
# Lawyering for LGBT Rights in Europe

## The Emancipatory Potential of Strategic Litigation at the CJEU and the ECtHR

Marion Guerrero

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 17 December 2018

European University Institute
**Department of Law**

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I , Marion Guerrero, certify that I am the author of the work "Lawyering for LGBT Rights in Europe. The Emancipatory Potential of Strategic Litigation at the CJEU and the ECtHR" I have presented for examination for the Ph.D. at the European University Institute. I also certify that this is solely my own original work, other than where I have clearly indicated, in this declaration and in the thesis, that it is the work of others.

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I confirm that chapters of my work draw upon two earlier articles I published:

"Activating the Courtroom for Same-Sex Family Rights: 'Windows of Opportunity' for Strategic Litigation before the European Court of Human Rights." In: Carlo Casonato, Alexander Schuster (eds) 'Rights on the Move - Rainbow Families in Europe (Università degli studi di Trento 2015), 53-72,

and

"Jenseits der Kernfamilie. 'Funktionale Elternschaft', eine progressive Alternative aus den USA." In: juridikum 2010, 143 (2010).

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number of other high-ranking LGBT rigths activists throughout the USA. A thank you also goes out to Marion Vannier, for encouragement and much-needed entertainment breaks.

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Thesis Summary

In Europe, the decisions of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) develop influence that transcends the particular case at hand. While this development has been criticised by progressive scholars, this thesis argues that it also enables civil society to participate in judicial decision making processes.

In the context of Lesbian, Gay, Bi and Transgender (LGBT) rights, this thesis investigates whether "strategic litigation" before the European High Courts can be a feasible and emancipatory endeavor. The concept of "strategic litigation" – developing long-term litigation strategies in order to induce legal, social and/or political reform – is based on the recognition that adjudication is, to a large extent, a political process.

To this end, strategic litigation as a (political) strategy is introduced and positioned within legal theory and the literature on "cause lawyering."

Within Europe, this thesis focuses on the ECtHR and the CJEU as potential fora for strategic litigation. In order to assess their case law from an activist point of view, a "strategic litigation opportunities" framework is designed. This framework both illuminates indicators for activist intervention, and highlights the agency of LGBT rights advocates in litigation. By doing so, it challenges the view of adjudication as a purely "top-down" process.

Lastly, a case study on the US LGBT rights movement, and the effective strategic litigation on (same-sex) marriage equality it has engaged in, serves as an example for the succsessful application of a long-term cause lawyering approach.

Ultimately, this thesis will conclude that strategic LGBT rights litigation at the European High Courts can, indeed, be a feasible and emancipatoy endeavour, by establishing:
1) European High Courts exert quasi-legislative power.
2) European High Courts provide procedural spaces for activist LGBT rights lawyers.
3) The European High Courts' case law can be analysed and utilised in a progressive LGBT-rights enhancing way.

# Table of Contents

# CHAPTER 0

# INTRODUCTION

This dissertation aims to examine the emancipatory potential of "strategic litigation" for the advancement of LGBT rights through the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). It also provides a case study of the US LGBT rights movement's struggle for marriage equality as a best practice example for an LGBT rights cause lawyering strategy.[1]

I will first introduce the concept of "lawyering for social change" and give an overview of relevant legal theory. Subsequently, I will provide an extensive analysis of the CJEU and the ECtHR in terms of their suitability for "strategic litigation," by first evaluating their procedural make-up, and then contributing extensive samples of their LGBT rights case law, using an "litigation opportunities framework" as an analytical tool. This inquiry allows for a systemic assessment of the Courts' case law for the purpose of long-term strategic litigation efforts. Lastly, I will provide a case study based in the US context, namely the strategic litigation around marriage equality.

## 0.1. Field of Research

My dissertation is rooted in legal theory, European Union law and European human rights law, with a special focus on gender and queer theory, and law and sociology. It also draws from other theoretical streams, such as language philosophy and hermeneutics, and comparative law. The premise of this work is the view of courts as political spaces, and the European Courts in

[1] In this dissertation, I will use the term "LGBT" as an umbrella term for any of the groups included in this expression, even though most of the cases I examine concern lesbian and gay rights. See also "Definition of Most Important Terms" later in this introduction *infra,* at 27.

particular as influencers and generators of policies.[2] I will argue that this fact cannot be dismissed on the outset based on democratic concerns,[3] but that it actually enables citizen participation. This is certainly true for LGBT rights, especially since activist lawyers and interest groups can use (and have used) the Courts to push their agenda by way of litigation. In this work, I advance a conception of long-term, systemic change, rather than focusing on the victory or defeat in single cases.

These premises will be developed gradually throughout the dissertation, drawing on the "lawyering for social change" approach as a theoretical anchor and finally, presenting a case study of the U.S. LGBT rights movement as a best-practice example.

The main objective of this thesis is to assess the emancipatory impetus and practicability of strategic LGBT rights litigation at the CJEU and the ECtHR; I will discuss particular findings throughout this work in various intermediary conclusions.

With this dissertation, I hope to contribute to European law debates regarding the role of litigants, as well as the CJEU and the ECtHR themselves, and also to the areas of gender law and law and sociology. Ultimately, I hope to challenge the view of judicial decision making (especially at the CJEU and the ECtHR) as a purely hierarchical process, *inter alia* by highlighting opportunities for strategic LGBT rights litigation and proposing an actor-centred reading of the respective case law.

I want to start out this thesis by briefly outlining my motivation for writing it.

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[2] That the European Courts influence policy has been argued, inter alia, by Alec Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance' (2010) 5 Living Reviews in European Governance 2; Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights. The Impact of the ECtHR on National Legal Systems* (Oxford University Press 2008); Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403.

[3] Such concerns have been advanced, e.g., by Richard Bellamy (ed), *Constitutionalism and Democracy* (Ashgate/Dartmouth 2006).

## 0.2. Motivation for the Thesis: Plea for the Political Activation of Law

Like many others, I started studying law because I was drawn to the idea of justice. The question that motivated my choice of discipline was: How can I use law to change the world?

During my studies in Austria, I quickly learned that this question was widely regarded as naive. The question we were taught to ask instead – which stands, in my opinion, almost in opposition to the first question – was: What is required by the law?
This question itself implies that the legal system provides a definite answer to any given problem. Are A and B allowed to marry in Poland, even though they are both women? The answer, if we take the *second* question as the main parameter for legal research, is: No.

However, if we take the *first* question as a starting point, the inquiry changes: How can we get to the point of A and B being able to marry? And how can we use the law to achieve this goal?
Three types of approaches are, from a legal point of view, particularly interesting in this context: 1) strategies that aim at *changing* the law; 2) strategies that aim at *reinterpreting* existing law; 3) a combination of the two.

These considerations stand at the beginning of this dissertation.

## 0.3. Background of the Thesis

In the past two decades, litigation before the Court of Justice of the European Union (CJEU), as well as before the European Court of Human Rights (ECtHR)[4] has increased considerably.[5] Certain areas – among them anti-discrimination and same-sex rights – have drawn a remarkable

[4] In the following article, I will sometimes refer to these two Courts as the "European High Courts." This is by no means a technical expression, but rather meant to provide better readability.

[5] For an account on this, see, e.g.: Alec Stone Sweet, 'The European Court of Justice' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2 edn, Oxford University Press 2011); Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance'; Mitchel Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe* (Oxford University Press 2009); Laurence R. Helfer and Erik Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe' (2014) 68 International Organization 77; and many others.

caseload.[6] Same-sex rights intersect with EU law and the European Convention of Human Rights alike. The ECtHR has been an important actor in improving the situation of LGBT minorities within Europe,[7] as has the CJEU (especially in the area of non-discrimination).[8]

An intriguing perspective on law as an instrument for change is advanced by the "lawyering for social change" movement.[9] It inquires whether interest groups and NGOs can use litigation (and other legal strategies) to promote social reform. This kind of activist strategy is also known, *inter alia*, as "cause lawyering," including approaches such as "strategic litigation."[10] Social movements in the USA have used cause lawyering since the beginning of the 20th century, particularly in (but not restricted to) the context of civil rights.[11] In the course of the last decades, the practice of using litigation to advance a political reform agenda has spread to a number of countries across the world.[12] In the area of LGBT rights, the "cause lawyering" movement has experienced a new renaissance, particularly regarding the advancement of LGBT minority

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[6] For a comprehensive compilation of literature on these issues regarding the CJEU, see Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance'. Muir has collected essays on how EU law provides mechanisms for collective action in the area of non-discrimination: Elise Muir, 'Anti-Discrimination Law as a Laboratory for EU Governance of Fundamental Rights at the Domestic Level: Collective Actors as Bridging Devices' in Elise Muir and others (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EU Working Paper LAW 2017/17). For the ECtHR, especially in the area of LGBT rights, see, e.g., *Kozak v Poland* App no 13102/02 (ECtHR, 2 March 2010); *PB & JS v Austria* App no 18984/02 (ECtHR, 22 July 2010); *Schalk & Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010); *EB v France* App no 43546/02 (ECtHR, 22 January 2008); *Gas & Dubois v France* App no 25951/07 (ECtHR, 15 March 2012); and many others.

[7] Many decisions by the ECtHR have improved the situation for lesbian, gay and transgender* people in Europe. See, e.g., *Schalk & Kopf* App no 30141/04; *Karner v Austria* App no 40016/98 (ECtHR, 24 July 2003); *EB* App no 43546/02; and many others.

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

[9] Famously: Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law and Society Review 95.

[10] See also the comprehensive discussion on cause lawyering and strategic litigation in Section 1.

[11] There is a large body of scholarship around civil rights activism and social change litigation in the U.S.; for an overview see, e.g., William N Eskridge, 'Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century' (2002) 100 Michigan Law Review 2062.

[12] For accounts on the use of lawyering in different local, national, and transnational legal environments, see, e.g., Austin Sarat and Stuart Scheingold (eds), *Cause Lawyering and the State in a Global Era* (Oxford University Press 2001); Austin Sarat and Stuart Scheingold (eds), *State Transformation, Globalization, and the Possibilities of Cause Lawyering* (Oxford University Press 2001).

rights.[13] Against this backdrop, this thesis examines the emancipatory potential of strategic LGBT rights litigation at the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). While cause lawyering has been developed and regularly applied in the USA and, to a certain degree, produced academic analytical tools and frameworks to analyse case law in a bottom-up way, this development is still in its infancy as a framework of analysis applied to European courts. My thesis uses the productive example of LGBT rights to contribute to developing such a framework, drawing on critical legal theory, which I will call "strategic litigation opportunities" framework. This is meant to illuminate instances of

Authorities such as Alec Stone Sweet[14] or Joseph Weiler[15] observe that courts within Europe (especially the CJEU and the ECtHR) are becoming more and more important in terms of giving impulses and forming or developing policies that ultimately shape national legal orders. However, this development has received extensive criticism, especially from progressive scholars, who fear that the Courts are overstepping their competences by exerting quasi-governance functions.[16] This can be termed the "separation of powers objection" to using courts for social change.

Nonetheless; the political potential of judgments provides considerable opportunities for advocacy groups. If the Courts' decisions can formulate policies that influence the whole

[13] For accounts on the U.S. LGBT movement and its litigation efforts, see, e.g., Scott L Cummings and Douglas NeJaime, 'Lawyering for marriage equality' (2010) 57 UCLA Law Review 1235; William N Eskridge Jr, 'Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States' (2013) 93 Boston University Law Review 275; Jane S. Schacter, 'The Other Same-Sex Marriage Debate' (2009) 84 Chicago-Kent Law Review 379; Ellen Andersen, 'Transformative Events in the LGBTQ Rights Movement' (2017) 5 Indiana Journal of Law and Social Equality 441. In Europe, a number of scholars have also examined the use of litigation strategies by the LGBT movement. See, e.g.: Helfer and Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe'; Paul Johnson, *Going to Strasbourg. An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights* (Oxford University Press 2016).

[14] Alec Stone Sweet, 'Why Europe Rejected American Judicial Review: And Why It May Not Matter' (2003) 101 Michigan Law Review 2744; Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000).

[15] Joseph Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and other Essays on European Integration* (Cambridge University Press 1999).

[16] For a collection on respective positions, see, e.g., Bellamy (ed), *Constitutionalism and Democracy*.

European region, it would make sense to include court-based strategies in LGBT rights advocacy efforts. By means of litigation, LGBT advocates could engage in the judicial discourse and thus participate in judicial policy forming and decision-making.[17] However, some schools of thought question of whether (minority) activists *can* and *should* use litigation in order to advance their agendas. Several schools of thought – among them feminist and queer theories – have brought up serious (empirical and normative) concerns on whether adjudication and law are adequate vehicles for the advancement of LGBT rights.[18] Apart from viewing adjudication as an intrinsically hierarchical and elitist process with little potential for activist intervention,[19] some scholars contend that such approaches might mainstream potentially subversive claims.[20] Hence, using law and litigation might be perceived as detrimental, even anti-progressive. These concerns have in common that they view law as a social change tool in a sceptical way, questioning (in one way or another) whether the legal arena is the right place to advance social change (especially in the area of sexual minority rights), and whether legal approaches can thus develop an emancipatory impetus. I will summarize these concerns under the term "law-sceptical objection" to using litigation for social change.

## 0.4. Research Question

The research question of this thesis is simple to ask, but rather difficult to answer:

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[17] Robert Cover, for instance, describes in his article 'Nomos and Narrative' how different interest groups within a society can negotiate their interests at court. Robert Cover, 'Nomos and Narrative. Foreword to the 1982 Term of the Supreme Court' (1983-1984) 97 Harvard Law Review 4. Reva Siegel describes how social movements have contributed to the development of law by means of litigation. Reva Siegel, 'The Jurisgenerative Role of Social Movements in United States Constitutional Law' (2015) <https://law.yale.edu/system/files/documents/pdf/Faculty/Siegel_Jurisgenerative_Role_of_Social_Movements.pdf> accessed 12 January 2018.

[18] See, e.g., Elisabeth Holzleithner, 'Emanzipatorisches Recht: Über Chancen und Grenzen rechtlicher Geschlechtergleichstellung' (2010) juridikum 6; Katherine M Franke, 'The Politics of Same-Sex Marriage Politics' (2006) 15 Columbia Journal of Gender and Law 236; Suzanne B. Goldberg, 'Sticky Intuitions and the Future of Sexual Orientation Discrimination' (2009) 57 UCLA Law Review 1375.

[19] See, e.g., Audre Lorde, *Sister Outsider* (Crossing Press 1984).

[20] See, e.g., Michael Warner, 'Normal and Normaller: Beyond Gay Marriage' (1999) 5 GLQ: A Journal of Lesbian and Gay Studies 119; Paula L Ettelbrick, 'Wedlock Alert: A Comment on Lesbian and Gay Family Recognition' (1996) 5 Journal of Law and Policy 107.

*Is strategic litigation at the CJEU and the ECtHR an **emancipatory** and **feasible** approach for the advancement of LGBT rights in Europe?*

This research question asks whether strategic litigation in the area of LGBT rights is a) a sustainable progressive endeavour in light of legal theoretical accounts – a question which is quite critically discussed especially in queer and feminist legal academia. On one hand, many scholars are sceptical towards courts exercising governance functions, claiming that this practice undermines the separation of powers; thus, using the courts to change law and policy raises the "separation of powers objection."[21] On the other hand, law and its application are often viewed with apprehension by critical legal theories, since they have traditionally been used to oppress and control minorities, rather than empowering them ("law-sceptical objection"). I will argue, however, that another view is possible, and that critical legal theories themselves (to which queer and feminist legal approaches usually pertain) contain promising insights in this regard. A study from the US LGBT rights context will furthermore show how LGBT movement activists have successfully employed strategic litigation to advance their social change agenda, thus positioning themselves as active agents within the judicial discourse.

Drawing on legal theory, this thesis b) evaluates whether (and how) strategic litigation is feasible before the European High Courts. In order to do so, I will attempt to develop an activism-centred reading of their respective case law that emphasises the agency of LGBT rights activists. To this end, I have devised a "strategic litigation opportunities framework" to analyse case law in a bottom-up, rather than top-down way. This cognitive inversion of a traditional case law analysis is meant to show how adjudication and case law can be understood as a field of opportunities for (future) activist interventions – an instrument of self-empowerment, rather than a power-structure that solely *exerts power on* its subjects.

In this way, I want to consolidate critical legal theory accounts with the more optimistic narrative of the "lawyering for social change" approach, answering the question of whether

[21] Richard Bellamy, *Political Constitutionalism* (Cambridge University Press 2007).

strategic litigation before the European High Courts in the area of LGBT rights would be, in principle, a progressive and useful form of activism.

**Preliminary considerations:** As a *preparatory investigation*, it is necessary to examine the existing European legal framework, both regarding the procedural make-up of the Courts, as well as the material (EU and ECHR) laws containing LGBT rights. In order for strategic litigation to work, activist litigants need to have access to the Courts. This is especially contentious regarding the CJEU, since individuals usually do not have *direct* access to this court.[22] In this sense, this investigation is not one of the *results* that my thesis aims to produce, but rather the *assumption* that this research is based on. Hence, it is the bedrock for the development of my research – should it be answered in the negative, the whole research project would be compromised. Thus – while it is not the main focus of my thesis – this investigation is an important precondition.

Furthermore, (minimum) legal standards, directly or indirectly protecting LBGT minorities (indirectly, for instance, via a general commitment to equality or anti-discrimination), are advantageous. These laws can be used as "anchor points" for strategic litigation, which can then attempt to expand their scope in an LGBT friendly way.

These preliminary considerations set the stage for the actual research question. They will not be presented in a closed segment, but rather touched upon in different chapters, especially in Chapters 2, 4 and 5 (see below, development of the thesis).

**Demarcating the research question:** Rather than assessing whether strategic litigation has taken place, or creating a handbook for activists interventions, this dissertation asks *whether law and adjudication are* per se *suitable fora to promote progressive change*, and *how case law could be read in order to develop comprehensive, long-term strategic LGBT rights litigation efforts*. Hence, it is important to distinguish the approach of this dissertation from both more descriptive, as well as more practice-oriented models. I do not mean to comprehensively portray

[22] Mariolina Eliantonio and others, *Standing Up for your Right(s) in Europe. A Comparative Study on Legal Standing (Locus Standi) Before the EU and Member States' Courts* (European Parliament 2012).

the European LGBT rights movement and its successes and setbacks, nor do I mean to present an exhaustive account of LGBT rights litigation in Europe. It is also not the task of this dissertation to evaluate past litigation and to discern whether it qualifies as "strategic." Likewise, I do not intend to suggest a *particular* litigation strategy for LGBT activists, or to create a list of "do's and "don'ts for LGBT rights litigation.

Three fundamental inquiries have to be carried out to answer the research question.

1) *Do the Courts exert sufficient influence to justify strategic LGBT rights litigation attempts?*

Strategic litigation, as any litigation, is resource intensive.[23] If the time and money spent on devising and executing a litigation strategy do not correlate with the *effects* of such an effort (if it is successful), then resources might be better spent elsewhere. If a (positive) decision by the CJEU or the ECtHR generates few to no effects (including side effects, such as raising awareness among the public for LGBT rights, influencing the policy development within Member States and/or at the European level, etc.) – then it makes no sense to address these Courts by way of strategic litigation. Moreover, this inquiry addresses the "separation of powers" objection, arguing that exercising judicial restraint is not necessarily the most "democratic" behaviour for a court. The fact that the European High Courts take on governance functions can indeed provide gateways for civil society to participate in policy making. This will be discussed in Chapter 1.

2) *Do European Courts provide procedural spaces for activist (LGBT rights) lawyers?*

This inquiry contains two subsets.

[23] In terms of budget, time, knowledge, and so on. Bellamy, *Political Constitutionalism*, 39.

2.1.) *Do the European Courts provide access to justice for activist (LGBT rights) litigants?*

As mentioned earlier, a precondition for the research question is to establish that the Courts do, indeed, provide access to justice for individuals. This is the focus of Chapter 2. If the procedural make-up of a court does not provide possibilities for activist lawyers to participate in a case and advance arguments – be it as (counsel to) applicants or third party interveners[24] – then strategic litigation will be futile. While it is usually undisputed that individuals have access to the ECtHR (under certain conditions, which will be discussed), this is not without contention regarding the CJEU. Therefore, the examination of the CJEU's available procedures will be more extensive.

2.2.) *Are the arguments of (LBGT rights) litigants adequately considered by the judges?*

If judges do not take the arguments of litigants *into adequate consideration*, then strategic litigation will not make a real difference. This point touches on theoretical deliberations on the *nature* of adjudication, particularly regarding the perception of adjudication as strictly hierarchical."[25] It also contains considerations regarding the agency of (activist) litigants. These issues address the "law-sceptical objection"[26] and will be discussed in the theoretical part of this dissertation (Chapter 1). The case study of the US context (Chapter 6) will provide an example of the successful interaction of (minority) actors with the judicial system.

*3) Can the case law of the European Courts be analysed and utilised in a progressive LGBT-rights enhancing way?*

This inquiry contains three subsets.

[24] For an account on the strategic use of amicus briefs, see: Paul M Collins Jr, 'Friends of the Court: Examining the Influence of Amicus Curiae Participation in US Supreme Court Litigation' (2004) 38 Law and Society Review 807.

[25] I will look extensively at respective theories in Chapter 1, Section 3.

[26] *Supra*, at 12.

3.1.) *Do European Union law and European human rights law protect LGBT rights?*

This subset examines material provisions containing LGBT rights in European Union law[27] and the European Convention of Human Rights (ECHR),[28] but also related laws and principles – such as the "equality principle"[29] in EU law, or the "margin of appreciation" as developed by the ECtHR.[30] The investigation of the material law on LGBT rights provides necessary background information for the analysis of the *application* of these rules by the Courts. This will be done in Chapters 4 and 5.

3.2.) *Can the respective case law of the Courts be analysed in an actor-centred way – and does it provide room for activist intervention?*

The second subset contains a two-fold query, which nonetheless cannot be hermeneutically separated. Drawing on legal theories, as well as on language philosophy, I will show that *interpretation* and *activism* are intrinsically connected. This is especially true in law – a discipline that operates with terms and concepts that have not only descriptive, but normative significance.[31] Hence, *reading*, *presenting* and *interpreting* law in an actor-centred way is already an activist intervention (I will refer to such activity as "interpretative intervention").

Hence, the foundation for a reading of the Courts' case law that reveals opportunities for activist intervention is the evaluation of whether law itself – and case law in particular – allows for a progressive, emancipatory discourse. In other words, is law necessarily the language of the elites, perpetuating existing power structures, or can activists participate in legal meaning

[27] See Chapter 4, Section 11.

[28] Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention on Human Rights, as amended) (ECHR), Rules of the European Court of Human Rights 2016 (as amended), Rule 25. See Chapter 5, Section 14.

[29] For an in-depth investigation of the "equality principle" as developed by the CJEU, see, e.g., Bruno De Witte, 'From a "Common Principle of Equality" to "European Antidiscrimination Law"' (2010) 53 American Behavioral Scientist 1715.

[30] For a comprehensive theoretical analysis of the margin of appreciation and the ECtHR's contributions see, e.g., Eva Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (1996) 56 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 230.

[31] I will discuss this at length in Chapter 1, especially in Sections 2.3.1, 3.2., and 4.1.

creation – and how? Moreover, is translating (political, societal) demands into legal language desirable and emancipatory, or does it rather affirm an unjust and elitist system, potentially de-radicalising the subversive character of the LGBT movement?

These issues deal with both the nature of law and adjudication, and the (theoretical) possibilities for activist litigants to actively influence legal categories. The discussion of these questions also means to credibly counter the "law-sceptical objection,"[32] by showing that law can be utilised in a bottom-up, empowering way.

These questions will be addressed in the theoretical part of this dissertation (Chapter 1), as well as in the US Case Study (Chapter 6).

3.3.) *How could an activist reading of the European Courts' LGBT rights case law look like?*
Conceptualising the case law of the European High Courts in an actor-centred way reveals opportunities for strategic LGBT rights litigation. In order to do so, it is expedient to apply an analysis that differs from traditional examinations. Finding an adequate "activist language" to describe the Courts' respective case law will uncover its emancipatory potential. To this end, I present a "strategic litigation opportunities" framework in Chapter 3 as a method to develop the Courts' LGBT rights case law (in Chapters 4 and 5), scrutinizing it for indicators for activist intervention opportunities. I believe that this approach allows a novel look at the case law of the CJEU and the ECtHR in the context of LGBT rights, re-conceptualising it as a "playing field" for activist intervention. Importantly, this kind of case law analysis challenges the view of courts as purely hierarchical institutions, and of adjudication as an exclusively top-down process, thus ultimately rebutting the "law-sceptical objection."[33]

By conducting these three inquiries and their subsets, and providing an example of a hugely successful, long-term litigation project (the US case study in Chapter 6), I hope to provide an

[32] *Supra,* at 12.

[33] *Supra,* at 12.

answer to the initial question: *Is strategic litigation at the CJEU and the ECtHR an **emancipatory** and **feasible** approach for the advancement of LGBT rights in Europe?*[34]

*Caveat*: As pointed out above, there are a number of different ways to analyse strategic LGBT rights litigation. For instance, one could attempt to delineate the development of particular cases from the outset (the national level) to the stage of the CJEU or the ECtHR,[35] or describe (in an empirical and descriptive manner) the impact of respective court decisions on national legal orders.[36] Another way to analyse relevant case law could be to trace and evaluate instances of present and past activist participation.[37] However, this is not the focus of this work (although it is still useful to point out that many, if not most, cases I will discuss in the area of same-sex rights contain activist participation, either in the form of third party interventions, or in the form of activist lawyers serving as counsel to the applicant(s).)[38]

By no means do I intend to suggest that this work can be understood as a ready-made practice guideline for strategic LGBT rights litigation on the European level. Especially with my analysis of the Courts' case law under a "strategic litigation opportunities" framework,[39] I mean to provide an example of what *an activist-centred reading* of legal texts and case law can look like.

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[34] For a summary of the research question, see Section 0.4.1.

[35] Paul Johnson provides such an account – based on oral history – in his highly remarkable work Johnson, *Going to Strasbourg. An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights*.

[36] This has been done in the context of the ECtHR, *inter alia*, by Keller and Stone Sweet (eds), *A Europe of Rights. The Impact of the ECtHR on National Legal Systems*. In the context of the CJEU, see, for instance, Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*; Weiler, 'The Transformation of Europe'.

[37] See, e.g., Johnson, *Going to Strasbourg. An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights*. Other such accounts – mostly in the realm of political science – include Anna van der Vleuten, 'Transnational LGBTI Activism and the European Courts: Constructing the Idea of Europe' in Phillip M. Ayoub and David Paternotte (eds), *LGBT Activism and the Making of Europe* (Springer 2014) (in the context of LGBT rights in Europe); Phillip M. Ayoub and David Paternotte, 'L'International Lesbian and Gay Association (ILGA) et l'expansion du militantisme LGBT dans une Europe unifiée' (2016) 70 Critique Internationale 55 (in the context of European LGBT activism under the umbrella of ILGA); Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders. Advocacy Networks in International Politics* (Cornell University Press 1998) (in the context of the participation potential – among other things at court – of transnational interest groups).

[38] See a (non-exhaustive) list of cases *infra,* at 55.

[39] I will introduce this framework in Chapter 3.

In this sense, I do hope to provide inspiration for LGBT rights activists – but this work *does not* contain a finished LGBT rights litigation strategy.

Summarising, the main point I aim to make is this: (at least) in the area of LGBT rights, it is both *possible* and *emancipatory* to activate law and case law (of the European High Courts) from the bottom up.

### 0.4.1. Summary of Research Question

The following table will summarise the research question, its three inquiries and respective subsets.

<table>
<tr><td colspan="2">Research Question: Is strategic litigation at the CJEU and the ECtHR an emancipatory and feasible approach for the advancement of LGBT rights in Europe?</td></tr>
<tr><td>1) Do the Courts exert sufficient influence to justify strategic LGBT rights litigation attempts?</td><td></td></tr>
<tr><td rowspan="2">2) Do European Courts provide procedural spaces for activist (LGBT rights) lawyers?</td><td>2.1.) Do the European Courts provide access to justice for activist (LGBT rights) litigants? (precondition)</td></tr>
<tr><td>2.2.) Are the arguments of (LBGT rights) litigants adequately considered by the judges?</td></tr>
<tr><td rowspan="3">3) Can the case law of the European Courts be analysed and utilised in a progressive LGBT-rights enhancing way?</td><td>3.1.) Do European Union law and European human rights law protect LGBT rights? (precondition)</td></tr>
<tr><td>3.2.) Can the respective case law of the Courts be analysed in an actor-centred way – and does it provide room for activist intervention?</td></tr>
<tr><td>3.3.) How could an activist reading of the European Courts’ LGBT rights case law look like? (“strategic opportunities framework”)</td></tr>
</table>

The subsets *in italics (2.1.* and *3.1.)* are preconditions for the research question; in other words, they are preliminary investigations that do not directly serve to answer the research question, but provide necessary background.

## 0.5. Structure of the Thesis

The organizing structure of the thesis consists of both chapters and sections. Chapters delineate the main research parts of this dissertation, while sections serve to create divisions and subdivisions of the text in order to increase readability. At the end of each chapter (with the exception of the introductory chapter), I will provide intermediary conclusions (which are a bit more comprehensive for Chapter 1), and general conclusions at the end of the thesis.

Overview of the chapters:

- CHAPTER 0 – INTRODUCTION
- CHAPTER 1 – THEORETICAL BACKGROUND: contains most important theoretical considerations; the entire work builds on the deliberations forwarded in this chapter
- CHAPTER 2 – PROCEDURAL CONSIDERATIONS: contains an analysis of the CJEU's and the ECtHR's procedural make-up as a pre-requisite for strategic litigation
- CHAPTER 3 – STRATEGIC LITIGATION OPPORTUNITIES FRAMEWORK: provides an activist-centred approach for the analysis of the CJEU's and the ECtHR's case law ("strategic litigation opportunities framework")
- CHAPTER 4 – THE CJEU AND SAME-SEX RIGHTS: introduces same-sex rights in EU law and contains an analysis of respective case law, using the "strategic litigation opportunities framework"
- CHAPTER 5 – THE ECtHR AND SAME-SEX RIGHTS: introduces same-sex rights in the ECHR and contains an analysis of respective case law, using the "strategic litigation opportunities framework"

- CHAPTER 6 – CASE STUDY: EXPERIENCE OF THE US LGBT RIGHTS MOVEMENT: contains a case study of the strategic litigation strategies carried out by the US LGBT rights movement
- CHAPTER 7 – CONCLUSIONS

### 0.5.1. Development of the Thesis

**Chapter 0** contains the introduction, including the research question and the development of the thesis, as well as an overview of the methodology used.

**Chapter 1** provides a theoretical discussion of law and adjudication, including the "lawyering for social change" approach. The US case study (Chapter 6) will later provide a practical example of many of the points discussed in Chapter 1.

I start the chapter by introducing the "lawyering for social change" approach, and discussing the concept of "strategic litigation" in Section (1). I will also briefly touch on the European LGBT rights movement as a possible agent of "strategic litigation."

In Sections (2) and (3), I provide fundamental theoretical considerations paramount to evaluating whether "strategic litigation" can be seen as an emancipatory endeavour. These considerations lie at the heart of the attempt to answer the research question. They lay the foundation for the re-conceptualisation of law as a tool for emancipation, but they also pose crucial challenges ("separation of powers objection" and "law-sceptical objection"). It is necessary to address these concerns in order to answer my research question: "*Is strategic litigation at the CJEU and the ECtHR an emancipatory and feasible approach for the advancement of LGBT rights in Europe?*[40]

[40] *Supra,* at 12.

Section (2) examines whether the CJEU and the ECtHR are *political spaces*. This correlates to the first inquiry of my research question (*Do the Courts exert sufficient influence to justify strategic LGBT rights litigation attempts?)*[41]

I will argue that these Courts act as "policy makers," and that their decisions develop impact beyond single cases. Critical voices challenge such quasi-legislative behaviour of the Courts as anti-democratic.[42] I will show, however, that "governing through the courts" is not a threat to the democratic separation of powers ("separation of powers objection"),[43] but that it can actually empower minority groups by providing them with an opportunity to participate in influential decision making processes.

Sections (2) and (3) will also argue that arguments brought forward by litigants in the courtroom *actually matter*, and that the arguments advanced by advocates are indeed considered and weighed by the court. This correlates with the second subset of my second inquiry (*Are the arguments of (LBGT rights) litigants adequately considered by the judges?)*[44]

This is paramount to evaluate whether there is a possibility for civil society to influence judicial decision-making. Therefore, I will examine in Section (3) what judicial-decision making actually *is*. In order to do so, I will first give an overview of different legal theories and their accounts on law application, focusing on positivism, realism, and critical legal approaches.[45] The latter recognise the interplay of law and society and the influence of hegemonic perceptions on law

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[41] *Supra,* at 15.

[42] Some scholars have advanced such criticisms. For an overview of these positions, see Bellamy, *Political Constitutionalism*.

[43] *Supra*, at 11.

[44] *Supra*, at 16.

[45] I use the term "critical legal approaches" or "critical theories" as umbrella terms for many different streams of thought, including, *inter alia*, poststructuralist and postmodern critiques, feminist and queer theories.

and adjudication, questioning the neutrality of law[46] and thus presenting a stark contrast to more formalist theories that consider it possible to separate law from politics.[47]

Closely connected to this is the argument that actors within a judicial system (particularly litigants) possess *agency*,[48] and that they can participate in legal meaning creation and thus, use law in an emancipatory way. This is closely connected to both the second subset of my second inquiry (see above), and to the second subset of the third inquiry of my research question (*Can the respective case law of the Courts be analysed in an actor-centred way – and does it provide room for activist intervention?)*[49]

I will attempt to show that a limited account of agency, which is common to critical theories, presents an incomplete picture of the inner workings of the legal system, overlooking instances where non-institutional actors intentionally and successfully contributed to the development of law.[50] Hence, I will argue that critical approaches would, in fact, allow for a more actor-centred view.

Leaning on philosophy of language and constructivism, critical legal theories tend to highlight the force of interpretation, convincingly demonstrating how interpretation not only influences,

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[46] Critical accounts tend to highlight the intersubjectivity of legal experience; in the context of gender law, see, e.g., Katharine T. Bartlett, 'Feminist Legal Methods' (1990) 103 Harvard Law Review 830; in the context of critical race studies, see, e.g.; Patricia J. Williams, *The Alchemy of Race and Rights* (Harvard University Press 1991).

[47] Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York University Press 1995), 224-226.

[48] Agency, here, means that individuals are not just subjected to the law, but can also take action to influence (in one way or another) the legal discourse. For a thorough discussion of this issue, see Section 3.2.4.

[49] *Supra,* at 17.

[50] Siegel gives an account of this: Siegel, 'The Jurisgenerative Role of Social Movements in United States Constitutional Law'.

but *creates* meaning; this implies that legal interpretation *creates* law.[51] This recognition is a pre-requisite for strategic litigation, since it means that activist lawyers could participate in judicial decision-making by advancing convincing interpretations.

However, critical theories also question the emancipatory potential of law on a number of levels. Most importantly, they are sceptical whether law can *ever* develop emancipatory impetus, given that it is usually an instrument for hegemonic domination. Critical approaches thus provide both the most interesting epistemological views regarding strategic litigation – and at the same time, the hardest challenges ("law-sceptical objection").[52] Therefore, I will use them as the theoretical foundation of my work.

In Section (4), I will assess the empowering potential of strategic litigation, especially for minority groups (such as the LGBT minority), based on the theoretical considerations in Sections (1), (2) and (3). I will present intermediary findings and conclude that based on the theory, strategic litigation *could* serve to advance a social change agenda. I will conclude that the theoretical deliberations introduced above can inform an academic analysis of case law, creating an "activist language" for understanding and talking about case law. To this end, I will introduce a "strategic litigation opportunities" framework, which serves to examine case law as a field of opportunities for activist intervention.

In **Chapter 2,** I will examine whether the formal make-up of both Courts would allow for strategic litigation approaches. I will argue that this is the case. Hence, this chapter answers the

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[51] Of course, this is not to say that interpretation re-writes legal texts; it rather means that a text ontologically cannot be separated from the communicative act of reading and interpreting it. This act is what gives it its meaning and brings it to live. A text outside of interpretation, therefore, is a mere hypothesis. See, *inter alia*, Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall 2 edn, New York: Crossroad 1989). For law, this means that black letter law starts its interaction with the world in the moment it is interpreted; before, it is a mere potentiality, containing a myriad of different meanings. It actualizes itself – for law, that means, begins to exert authoritative force – when being interpreted. Hans Kelsen, 'On the Theory of Interpretation' (1934/1990) 10 Legal Studies 127. Even without judicial interpretation, a legal text exercises force by being interpreted by different communities within the legal system – their own narratives shape the perception of law. Cover, 'Nomos and Narrative. Foreword to the 1982 Term of the Supreme Court', 25-40.

[52] *Supra*, at 12.

first subset of my second inquiry, namely the question of *whether Courts provide access for activist (LGBT rights) litigants*.[53] This is a precondition for the development of an answer to the research question.

**Chapter 3** introduces a "strategic litigation opportunities" framework, which can be used to examine the Courts' LGBT rights case law in order to reveal activist intervention possibilities. This framework is then applied to the Courts' respective case law in **Chapters 4 and 5.** Drawing on the theoretical considerations of Chapter 1, this part of the thesis aims to provide an answer to the third subset of my third inquiry: *How could an activist reading of the European Courts' LGBT rights case law look like?*[54]

**Chapter 6** contains a case study from the US context, relating the LGBT movement's struggle for marriage equality. In the course of this narrative, I will explore theoretical criticisms regarding their strategy, and cause lawyering in general, as touched upon in Chapter 1 ("law-sceptical objection")[55] – such as concerns that pushing for same-sex marriage might not address the heteronormative bias of the institution of marriage and instead normalise radical queer claims,[56] or create popular backlash.[57]

The strategy of the US LGBT movement was ultimately a success, culminating in a 2015 US Supreme Court decision that opened marriage for same-sex partners.[58] Hence, this case study is a "best practice" example, and as such, provides an ideal context to test some of the theoretical premises that this thesis advances, particularly the hypothesis that "lawyering for social change" can be an empowering strategy. Therefore, it contributes both to answering the second subset of my second inquiry (*are the arguments of activist (LGBT rights) litigants adequately considered*

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[53] *Supra*, at 16.

[54] *Supra*, at 18.

[55] *Supra*, at 12.

[56] This has been contended, *inter alia*, by Warner. Warner, 'Normal and Normaller: Beyond Gay Marriage'.

[57] For a famous account on this, see: Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2 edn, University of Chicago Press 2008).

[58] *Obergefell v Hodges,* 576 U.S. ___ (2015) (USA).

*by the judges?*)[59] and the second subset of my third inquiry (*can the respective case law of the Courts be analysed in an actor-centred way – and does it provide room for activist intervention?*)[60]

Importantly, Chapter 6 reveals both differences and similarities of the US experience in comparison with the European experience. After having regarded the European LGBT rights narratives, it is particularly interesting to gain insights from another context; as a best practice example, the US case study provides additional inspiration for future European LGBT rights litigation strategies.

Moreover, in Chapter 6 the dissertation comes full circle, closing the gap between theory and practice and ending with a positive outlook.

In the **Conclusions (Chapter 7),**[61] I will summarise and evaluate the findings of this thesis and answer the research question – *Is strategic litigation at the CJEU and the ECtHR an emancipatory and feasible approach for the advancement of LGBT rights in Europe?* – in the affirmative.

## 0.6. Definition of Most Important Terms

In this dissertation, I will use the term "**LGBT**" (an acronym referring to Lesbian, Gay, Bi, and Transgender people) as an umbrella term for any of the groups included in this expression, even though most of the cases I will examine lesbian and gay (same-sex) rights. Wherever a distinction is necessary (for instance, to distinguish same-sex rights in the area of marriage from transgender rights in the same area), I will make it. I consciously exclude the letters "I" or "Q" from the expression, even though within the community, "LGBTI" (to include intersex*people) or "LGBTQ" (to include queer people), or other combinations, have become equally common.

[59] *Supra,* at 16.

[60] *Supra,* at 17.

[61] *Infra,* at 417.

This is partly because I do not examine intersex*cases; and partly due to the fact that "LGBT" is still the most commonly used term in academic literature. By no means do I intend to belittle the significance of the claims and concerns of intersex* and queer people by this terminological reduction.

The definitions of "**social movement**" vary in academic literature. Tarrow's definition, for instance, refers to "collective challenges [to the status quo] by people with common purposes and solidarity in sustained interaction with elites, opponents and authorities ... ."[62] Tilly on the other hand describes social movements as a "sustained series of interactions between power holders and persons successfully claiming to speak on behalf of a constituency lacking formal representation, in the course of which those persons make publicly visible demands for changes in the distribution or exercise of power, and back those demands with public demonstrations of support."[63] McCann however criticises this definition by pointing out that it "does not clearly distinguish social movements from interest groups, minority political parties, protesting mobs, civil disobedience, terrorist violence, and other forms of collective action."[64]

For the purpose of this work, I will use Della Porta's and Diani's definition of social movements as *dense informal networks of actors who are engaged in political and / or cultural conflicts meant to promote or oppose social change, which share a distinct collective identity*.[65] Conflict in this sense is "an oppositional relationship between actors who seek control of the same stake ... ."[66] "Cause lawyering" hence can be understood as a form of conflict, the "stake" in this context being the definition power over legal meaning (which, as I will argue, carries social/political consequences).[67]

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[62] Sydney Tarrow, *Power in Movement* (Cambridge University Press 1994), 4, 5.

[63] Charles Tilly, 'Social Movements and National Politics' in Charles Bright and Susan Harding (eds), *Statemaking and Social Movements* (University of Michigan Press 1984), 306.

[64] Michael McCann, 'Law and Social Movements: Contemporary Perspectives' (2006) 2 Annual Review of Law and Social Science 17, 23.

[65] Donatella Della Porta and Mario Diani, *Social Movements. An Introduction* (2 edn, Blackwell 2006), 20, 21.

[66] Ibid, 21.

[67] See discussion in Chapter 1, Section 3.2.1.

It needs to be pointed out that a social movement – such as the "LGBT movement" – is not the same as an NGO, or a particular (LGBT rights) organisation; nonetheless, an NGO can, of course, identify with and be part of a social movement and work towards advancing its agenda, for instance, by cause lawyering. Edelman, Leachman and McAdam have examined the interplay between organisations, social movements and law, suggesting that these fields are overlapping and mutually influential.[68]

Moreover, while cause lawyers will more often than not be rooted in social movements, and while social movements are often the carriers of cause lawyering (and strategic litigation as a form of cause lawyering), there are also examples of strategic litigation carried out by non-movement lawyers.[69]

In the literature, "**cause lawyering**," "**public interest lawyering**" or "**lawyering for social change**" are terms for strategically using the law in order to create change. Sarat and Scheingold describe cause lawyering as "frequently [being] directed at altering some aspect of the social, economic, and political status quo." *(footnotes omitted)*[70] Historically, cause lawyering has been rooted in the progressive-left of the political spectrum.[71] However, cause lawyering has also been employed by the right, for instance to *oppose* progressive change, as it happened in the US as a reaction to the rise of LGBT rights.[72] Nonetheless, cause lawyering is defined by a desire to contribute to society by way of employing legal means. Sarat and Scheingold note that "cause

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[68] Lauren B. Edelman, Gwendolyn Leachman and Doug McAdam, 'On Law, Organizations, and Social Movements' (2010) 6 Annual Review of Law and Social Science 653.

[69] An example for this is the famous US LGBT rights case *Perry v Schwarzenegger*, argued by two corporate lawyers with scant connections to the LGBT movement. *Perry v Schwarzenegger,* 704 F. Supp. 2d 921 (N.D. Cal. 2010) (USA).

[70] Austin Sarat and Stuart Scheingold, 'Cause Lawyering and the Reproduction of Professional Authority. An Introduction' in Austin Sarat and Stuart Scheingold (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford University Press 1998), 4.

[71] Carrie Menkel-Meadow, 'The Causes of Cause Lawyering' in Austin Sarat and Stuart Scheingold (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford University Press 1998); 31-68.

[72] Keck traces both litigation and legislative counter-mobilization in this area. Thomas M. Keck, 'Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights' (2009) 43 Law and Society Review 151.

lawyers reconnect law and morality."[73] "Cause lawyering" and "strategic (or impact) litigation" will be discussed more in depth in Section (1) of the first Chapter.

"Cause lawyering" is not limited to "**strategic (or impact) litigation,**"[74] although this is one of its manifestations. There is no coherent definition the term "strategic (or impact) litigation;" whereas it is sometimes used interchangeably with "public interest lawyering" or "cause lawyering," there are important differences, since cause lawyering can also be used to describe non-litigation legal approaches,[75] such as legislative lobbying, public-private collaborations (e.g., supporting legislators as experts or consultants for law reform projects, etc.), data collection and analysis, and many more.[76] Moreover, cause lawyering is not restricted to activist lawyers, operating within or for a social movement; law school clinics, legal aid groups, or law firms with pro bono programs can offer possibilities for cause lawyering.[77]

This thesis will mostly be concerned with "strategic (or impact) litigation." For the purpose of this work, "strategic litigation" will be defined as:

- litigation which is carried out with the main purpose of effecting change that transcends the victory in a particular case
- litigation which prioritizes a specific (legal/social/political) agenda over the particular interests of a client (which does not always have to be a contradiction – however, contradictions can arise)[78]

A more thorough discussion of the concept of "strategic litigation" will be provided in Section (2) of the first chapter. Throughout this work, I will refer to "activist lawyers" as persons who

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[73] Sarat and Scheingold, 'Cause Lawyering and the Reproduction of Professional Authority. An Introduction', 3.

[74] Anna-Maria Marshall and Daniel Crocker Hale, 'Cause Lawyering' (2014) 10 Annual Review of Law and Social Science 301, 302-305.

[75] Ibid, 303.

[76] Louise G. Trubek, 'Crossing Boundaries: Legal Education and the Challenge of the New "Public Interest Law"' (2005) 455 Wisconsin Law Review 455, 460-466.

[77] Scott L. Cummings, 'The Pursuit of Legal Rights – and Beyond' (2012) 59 UCLA Law Review 506, 525-543.

[78] See also *infra*, at 41.

use litigation strategies primarily to advance an LGBT rights agenda, and who are often rooted in the LGBT movement

## 0.7. Methodology

For the purpose of this dissertation, I used a mix of methodologies.
I complemented traditional legal methods, such as research of primary and secondary sources of law (legislation, case law, legal scholarship) with sociological background research, particularly regarding the US and European LGBT rights movement. I also drew on language philosophy and hermeneutics in the theoretical part of this dissertation.

I conducted a series of qualitative interviews with 18 LGBT rights activists (5 from Europe and the 13 from the United States).[79] All of the interviewees had experience with "strategic litigation" in the area of LGBT rights.[80]

These interviews are meant to provide factual background and expert knowledge to my research topic. They can hence be classified as "epistemic group interviews" or "expert interviews."[81] In other words, I was not interested in the attitudes or behaviours of the interviewees, but in their *expertise* regarding "cause lawyering" and the strategies applied by the LGBT movement to further its agenda, particularly in the area of same-sex marriage and family rights. In preparing for the interviews, I conducted legal research into landmark cases (both US and European), and into the respective legal environments. Furthermore, I consulted secondary literature on these issues, as well as on the US and European LGBT movement and its organisations.

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[79] As background literature on interviews in legal research, I consulted the following sources: Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007); Dawn Watkins (ed), *Research Methods in Law* (Routledge 2013). The audio files rest with the author of this dissertation.

[80] For a definition of cause lawyering, see Chapter 1, Section 1.

[81] Alexander Bogner, Beate Littig and Wolfgang Menz, 'Introduction: Expert Interviews - An Introduction to a New Methodological Debate' in Alexander Bogner, Beate Littig and Wolfgang Menz (eds), *Interviewing Experts* (Palgrave Macmillan 2009), 1.

The interviews were qualitative and semi-structured.[82] Based on a set of standardized, open-ended questions prepared ahead of the interview, I let the interviewee develop the course of the interview. The interviewees were informed beforehand about the reasons for the interview in the context of my research, as well as of the fact that they were being recorded, and that I would use and cite the interviews in my dissertation.[83]

The areas I covered in the interviews were:

- **organisation and structure of the (US or European) LGBT movement**: main LGBT rights organisations; existence of (formal and informal) networks; cooperation among actors, cooperation with non-movement actors; etc.
- **strategic considerations of collective action**: strategy finding processes; determination of different approaches, campaigns (including media campaigns) and narratives; choice of forum (courts/legislature/others); etc.
- **legal action specifically:** legal narratives; monitoring of case law and legislation; use of *amicus briefs* and third party interventions; legal strategies based on factors within case law such as dissent/inconsistency/hesitation/European consensus; employment of non-legal expertise such as data/psychological research/others; etc.
- **particular case history:** genesis of landmark cases, both in the US and in Europe.

The interviews had an average length of approximately two hours each. The shortest interview took ca. 45 minutes,[84] the longest ca. 5 hours.[85] The interviews were conducted in 2014 during stays in the UK (London) and the US (San Francisco, Los Angeles, New York), and they took

[82] Ian Dobson and Francis Johns, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007), 32-40.

[83] All quotes of interviews in this thesis are verbatim quotes, as recorded on the audio files. If words or phrases were left out, this is indicated in the text. Colloquial interjections (um, er, etc.) were deleted due to readability. The respective interviewees were given the opportunity to check their quotes.

[84] Interview with Andy Izenson, Associate Attorney, Diana Adams Law and Mediation, New York, NY, USA (telephone call, 26 February 2014).

[85] Interview with Jennifer C. Pizer, Senior Counsel and Director of Law and Policy, Lambda Legal – Defense and Education Fund USA (Los Angeles, CA, USA, 21 March 2014).

place either in the offices of the LGBT activists or via telephone. One interview was conducted in a Café.[86] All interviews were taped (the audio files are in the author's possession).

I picked my interviewees based on a) their previous experience in the area of cause-lawyering, and b) their affiliation with LGBT rights groups and the LGBT movement in general. Most interviewees belonged to both categories a) and b), and three were from smaller LGBT groups who were critical towards the US "marriage equality" campaign.

I chose my sample based on the "snowball method,"[87] since it provided me with access to high-level LGBT rights experts. While this method has been criticised for producing homogenous samples, this is not of major concern for the purpose of this work, since I turned to the interviewees as an "epistemic group" (as mentioned previously), drawing on their knowledge rather than on their attitudes. One exception is the interviewees' stance on "marriage equality;" here, I counterbalanced the homogeneity bias of the "snowball method" by interviewing three activists with marriage-sceptical views.[88]

The sample of US activists consisted of:

- 7 activists from the US who were senior lawyers working for major LGBT organisations (including the LGBT rights chapter of the American Civil Liberties Union, ACLU), most of them in executive positions:
    - Kevin Cathcart, Executive Director, Lambda Legal – Defense and Education Fund USA
    - Jennifer C. Pizer, Senior Counsel and Director of Law and Policy, Lambda Legal – Defense and Education Fund USA

[86] Interview with Nigel Warner, Council of Europe Adviser, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (London, GB, 28 July 2014).

[87] Beate Littig, 'Interviewing the Elite - Interviewing Experts: Is There a Difference?' in Alexander Bogner, Beate Littig and Wolfgang Menz (eds), *Interviewing Experts* (Palgrave Macmillan 2009), 103.

[88] Andy Izenson, Diana Adams Law and Mediation, New York, NY, USA (2014); Interview with Ricci J. Levy, Co-Founder, President & CEO, Woodhull Freedom Foundation, Washington, DC, USA (telephone call, 19 May 2014); Interview with Lawrence G. Walters, General Counsel, Woodhull Freedom Foundation, Washington, DC, USA (telephone call, 28 April 2014).

    - Elizabeth Gill, Senior Staff Attorney, ACLU – American Civil Liberties Union for Northern California
    - Shannon Minter, Legal Director, NCLR – National Center for Lesbian Rights USA
    - Geoff Kors, Government Policy Director, NCLR – National Center for Lesbian Rights USA
    - Vickie Henry, Senior Staff Attorney, GLAD – Gay & Lesbian Advocates & Defenders, Boston, MA, USA[89]
    - Evan Wolfson, founder and Executive Director, Freedom to Marry, New York, NY, USA.
- One US activist who worked as a media specialist for the Gay and Lesbian Alliance Against Defamation (GLAAD):
    - Tiq Milan, Senior Media Strategist, GLAAD – Gay and Lesbian Alliance Against Defamation USA.
- One US activist who worked as a program and development director and community organizer for the LGBT rights organisation Equality California:
    - Jack Lorenz, Deputy Director – Programs and Development, Equality.

All of these activists, as well as the organisations they worked for, were importantly involved in the campaign for marriage equality in the US. However, since 2015 (the year marriage equality was achieved in the USA), some of them have left their respective organisations.

I also interviewed activists from within the US LGBT movement who were (to a certain extent) critical of or ambiguous towards the marriage-equality campaign:

- One interviewee was a senior lawyer with Diana Adams Law, working for the rights of (*inter alia*) polyamorous people:
    - Andy Izenson, Associate Attorney, Diana Adams Law and Mediation, New York, NY, USA.

[89] Since the interview, GLAD has changed its name into GLBTQ Legal Advocates & Defenders (GLAD).

- Two activists worked on a senior level for the Woodhull Freedom Foundation in Washington, promoting the rights of people non-traditional family forms, such as polyamorous relationships:
    - Ricci J. Levy, Co-Founder, President & CEO, Woodhull Freedom Foundation, Washington, DC, USA
    - Lawrence G. Walters, General Counsel, Woodhull Freedom Foundation, Washington, DC, USA.

The last interviewee from the US was a law professor who published extensively both on the LGBT movement and LGBT rights in general, and had an intimate knowledge of these issues.

- Douglas NeJaime, Professor of Law, University of California, Irvine School of Law, Irvine, CA, USA.

However, the last two interviews (with Walters and NeJaime) were solely led to gather background information, and will not be quoted in this thesis. Hence, there are no audio recordings available for these interviews.

All of the European activists I interviewed were extensively involved in European strategic litigation, most of them on LGBT rights:

- One was a lawyer and the director of the AIRE Centre in London:
    - Matthew Evans, Director, AIRE Centre, London, GB.
- One was a university professor who had litigated and intervened extensively before the ECtHR:
    - Professor Robert Wintemute, King's College London, GB.
- One was an Austrian lawyer and LGBT rights activist (founder of Rechtskomitee LAMBDA) who had litigated several cases both before the ECtHR and the CJEU:
    - Helmut Graupner, Founder and President, Rechtskomitee LAMBDA, Vienna, AUT.
- One was an adviser for the LGBT rights organisation ILGA-Europe on the Council of Europe:

    - Nigel Warner, Council of Europe Adviser, ILGA-Europe – European Region of the International Lesbian, Gay, Bisexual, Trans* and Intersex* Association.
- One was a lawyer and the managing director of the European Roma Rights Centre (ERRC) with extensive litigation experience on a European level:
    - Adam Weiss, Managing Director, European Roma Rights Centre (ERRC), Budapest, HU.

Rather than presenting these interviews in a separate section, I will use them as complementary input throughout this work. I will use citations were appropriate (respecting also the interviewees' confidentiality requests). I cite all interviewees with the position they held at the time of the interview.

# CHAPTER 1

# THEORETICAL FOUNDATIONS

In this chapter, I will outline the theoretical assumptions for cause lawyering. 1) I will introduce the most important concepts and debates regarding cause lawyering.[90] 2) Then, I will address the fact that the European High Courts exercise policy making powers, and the related concern that judicial policy making lacks democratic accountability.[91] I will 3) give an account of different legal theories on adjudication and law application.[92] Based on this, I will 4) conclude that "strategic litigation" indeed holds emancipatory potential, and propose an actor-centred way of analysing the case law of the European Court of Justice and the European Court of Human Rights.[93]

## 1. Lawyering for Social Change and Strategic Litigation – An Overview

Since judicial proceedings are costly and complicated, court proceedings tend to favour those who are already advantaged in terms of education, resources and hegemonic power.[94] Courts, thus, appear likely to perpetuate existing power structures instead of challenging them.[95] This assessment *prima facie* seems to further marginalize disadvantaged groups with limited (monetary, political, academic, technical and other) resources, since access to the courts is not egalitarian, but rather elitist.

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[90] See Section 1.

[91] See Section 2.

[92] See Section 3.

[93] See Section 4.

[94] Bellamy, *Political Constitutionalism*, 39.

[95] Ran Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004), 54. See also Audrey Lorde's famous saying that "the master's tools will never dismantle the master's house" Lorde, *Sister Outsider*, 112. For a collection of essays on this issue, see, e.g., David Kairys (ed), *The Politics of Law: A Progressive Critique* (Pantheon Books 1982).

However, it also poses the question of what the ones on the *wrong side* of the power scale can do not to be left out of influential judicial discourses.

A famous reply to this dilemma comes from the "lawyering for social change" movement, which originated in the USA. In his groundbreaking article *Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change,* published in 1974, Marc Galanter identified a core problem, which affects equality in litigation and frustrates the use of the social reform potential of law: certain "repeat players" in the legal system have considerable strategic advantages over people who only occasionally appear before courts.[96] "Repeat players" – such as transnational corporations with a legal department or access to high-profile law firms – "are engaged in many similar litigations over time,"[97] usually disposing of extensive resources, legal expertise and ample practical experience. Therefore, they are in a position to intentionally use litigation not only to succeed in a particular case, but to pursue long-term goals, as well; for instance, by aiming for decisions establishing a legal precedent.[98] Galanter's main argument was that the judicial system was not fairly balanced, being used disproportionally by one particular segment of society. He suggested that civil society should organize in agencies that could also afford to pursue long-term strategies by prioritizing general interests above the immediate interests of a single litigant.[99] Galanter did not, however, suggest that these organisations should step in the place of litigants. Rather, he proposed that they should offer legal counsel for selected cases, carefully chosen based on their potential to establish precedents.

The practice of promoting a specific reform agenda by way of litigation, as Galanter proposed, is most commonly called "strategic litigation" (or "impact litigation"). It consists in activist lawyers approaching a court on behalf of a litigant (e.g. as counsel) or in support of a litigant

[96] Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change', 9.

[97] Ibid.

[98] Tanja A Börzel, 'Participation Through Law Enforcement: The Case of the European Union' (2006) 39 Comparative Political Studies 128, 129.

[99] Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change', 44.

(e.g. as an *amicus*)[100] with the intention to effect social change.[101] Importantly, strategic litigation pursues social change, rather than an individual outcome; this means it tends to prioritize the given societal or political agenda over the immediate interests of the particular client.[102] Of course, this is a delicate situation that may – especially if the client is not an activist herself – significantly influence the lawyer-client relationship.[103] However, often times – especially in the area of LGBT rights – clients themselves are activists, or at least committed to the idea of not just gaining individual relief, but contributing to sustainable social change. Therefore, a perception of clients being the "puppets of NGOs" is usually not accurate, as Paul Johnson points out in his oral history account on LGBT rights litigation before the ECtHR, for which he interviewed a number of UK LGBT rights activists, as well as applicants in ECtHR cases. He writes,

> "although applicants to Strasbourg are clearly concerned to address their own personal suffering, they are also often motivated to take action for another key reason, which is to alleviate the suffering of others in a similar situation. ... There is no account by an applicant in this book that does not describe, to some extent, how a desire to help others was a motivation for them deciding to pursue litigation in Strasbourg. ... It is important to acknowledge the 'activism' of these applicants in order to rescue them from any idea that they were passive puppets of NGOs. These applicants were not the 'silent partners' of NGOs, and, although their degree of involvement in the legal process and any

[100] For an account on the strategic use of amicus briefs, see: Collins Jr, 'Friends of the Court: Examining the Influence of Amicus Curiae Participation in US Supreme Court Litigation'.

[101] Marshall and Hale, 'Cause Lawyering', 303. The term "social change" is borrowed from political theory and sociology. It means, in the larget sense, the alteration of the *status quo* of a given society. It can include change of social behaviours, interactions, institutions, rules governing and organising a society, and so on. There are a number of different theories of social change; for an overview, see Kevin T. Leicht, 'Social Change' (*Oxford Bibliographies Online,* 2 March 2018) <http://www.oxfordbibliographies.com/view/document/obo-9780199756384/obo-9780199756384-0047.xml> accessed 5 November 2018.

[102] Sarat and Scheingold, 'Cause Lawyering and the Reproduction of Professional Authority. An Introduction', 4.

[103] Derrick A. Bell has traced the, sometimes difficult, relationship between clients and lawyers in the litigation for school desegregation. Derrick A Bell, 'Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation' (1976) 85 Yale Law Journal 470. See also Sarat and Scheingold, 'Cause Lawyering and the Reproduction of Professional Authority. An Introduction', 4.

accompanying public campaign surrounding it is clearly variable, they played an important role in shaping litigation."[104]

Social movements often use litigation as one tactic among many, embedding in a comprehensive strategy to advance their particular agenda.[105] The most obvious outcome that strategic litigation strives for is legal change, for instance by winning a case and obtaining a positive precedent. However, strategic litigation can produce *additional effects* apart from winning a case, such as creating mobilization for a cause, generating sympathetic publicity, educating the public at large (including judges and lawmakers) about a certain topic, garnering media attention, exerting political pressure, among many others.[106] Some of these effects can also kick in when a case is lost, and sometimes with even more vigour – for instance, by fortifying a movement's identity due to outside resistance, by mobilizing constituents, or just by profiting from heightened media attention.[107] Cummings has accordingly observed that "contemporary public interest lawyering has moved beyond the founding conception and now can be understood as a diverse set of ideals and practices deeply engaged in the political fight to shape the very meaning of a just society."[108]

It is important to distinguish strategic litigation from (socially motivated) litigation without a primary social change impetus, such as legal aid litigation.[109] Legal aid lawyers may arguably classify as "cause lawyers" since the motivation underlying their occupation – supporting those in need – is essentially social. However, legal aid litigation aims to improve the particular situation of the assisted individual, rather than to create social change.

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[104] Johnson, *Going to Strasbourg. An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights*, 176-181.

[105] I will show this by the example of the U.S. LGBT rights movement's struggle for marriage equality, described in Chapter 6.

[106] Andersen shows this by tracing the impact of LGBT rights court decisions – positive and negative – in U.S. society. Andersen, 'Transformative Events in the LGBTQ Rights Movement'.

[107] Douglas NeJaime, 'Winning Through Losing' (2011) 96 Iowa Law Review 94, 969-1011.

[108] Cummings, 'The Pursuit of Legal Rights – and Beyond', 510.

[109] Richard L. Abel, 'Law without Politics: Legal Aid under Advanced Capitalism' (1985) 32 UCLA Law Review 474, 540-586.

Indeed, it has been argued that legal aid is almost *the opposite* of cause lawyering. Abel writes that legal aid programs in the US are actually a symptom of a fundamentally flawed justice system, which disadvantages the have-nots and restricts their access to justice. Therefore, the institution of legal aid itself, in Abel's view, "attempts to fulfil the promises of liberal legalism without first effecting any change in fundamental political relationships."[110] (This aligns with the CLS critique of (neo)liberal legalism discussed *infra*,[111] namely, the legalist illusion that law and its institutions were neutral and impartial.)[112] In this sense, legal aid reinforces an unjust system by "taking off the edge," instead of challenging it.

While this perception of legal aid might be a bit harsh, it nonetheless illustrates the important conceptual distinction between system-affirming and system-transforming litigation approaches. Strategic litigation, in the understanding of this dissertation, strives to *change* the system, not grant relief to single litigants *within* the system. Of course, any form of litigation still stays within the framework of law; this means that in order to mobilize the law, social movements need to translate their claims into legal language. This could have effects both on the movement itself (internal effects), and on society (external effects).[113] I will expand on this later.[114]

In the context of this thesis, I will use the term "strategic litigation" to mean:

- litigation which is carried out with the main purpose of effecting change that transcends the victory in a particular case
- litigation which prioritizes a specific (legal/social/political) agenda over the particular interests of a client (which does not always have to be a contradiction – however, contradictions can arise)

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[110] Ibid, 456.

[111] See *infra*, at 89.

[112] Alan Hunt, 'The Theory of Critical Legal Studies' (1986) 6 Oxford Journal of Legal Studies 1, 4.

[113] This typology of effects is advanced by Catherine Albiston. Catherine R. Albiston, 'The Dark Side of Litigation as a Social Movement Strategy' (2011) 96 Iowa Law Review Bulletin 61, 64.

[114] For a discussion on the problems arising when using the law to fight for disempowered groups, see *infra,* at 93. In the context of the US LGBT movement's struggle for marriage equality, there were related debates; for instance, regarding the issue of whether fighting for marriage might "heteronormatize" the movement. See discussion in Chapter 6, Section 17.4.

Strategic litigation, in this sense, is an activity *that goes beyond litigating a particular case*. It means devising and carrying out litigation *in order* to achieve a *particular social change goal*.[115] In the context of this thesis, this goal is usually the advancement of LGBT rights, in different manifestations: it can be specific (i.e., the inclusion of same-sex families under the term "family" in Article 8 of the European Convention of Human Rights),[116] or more generic (i.e., promoting awareness of LGBT issues[117] or promoting LGBT rights in general).

Importantly, however, strategic litigation needs to be distinguished from "aid" litigation as described above;[118] if an (activist) lawyer's main purpose is to assist LGBT individuals with legal advice and counsel, but *without* a larger political/legal/social goal in mind, this does *not* fall under strategic litigation in the definition of this thesis (even though the results of such litigation may well yield favourable results for the LGBT community at large). In this sense, the *intent of* and *motivation for* litigation plays a role when defining it as "strategic" or not. "Strategic litigation" in this meaning describes a political strategy, an attempt to shape the legal, political and/or social order.[119] Of course, it is sometimes difficult, if not impossible, to distinguish whether the main motivation for litigation is seeking redress for a personal injustice, or whether litigation is meant to propel social change.[120] Moreover, a non-strategic case can well take on a strategic agenda in the course of its progression.

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[115] The term "social change" here means an alteration to the *status quo* of a society in a broad sense. See *infra*, note 101.

[116] This was achieved by *Schalk & Kopf* App no 30141/04, a case with LGBT activist participation.

[117] This was an important aim of the US LGBT movement. See discussion in Chapter 6, Section 17.6.

[118] See *supra*, at 40.

[119] This coincides, to a certain degree, with Sarat's and Scheingold's definition of "cause lawyering" (understanding strategic litigation as a form of cause lawyering) that describes cause lawyers as role players in social movements, underscoring the "primacy of the political." While this thesis underscores the political impetus of cause lawyering and strategic litigation in particular, it does differ in as much as Sarat and Scheingold define "cause lawyering" as (necessarily) being carried out by social movements. Austin Sarat and Stuart A. Scheingold, *Cause Lawyers and Social Movements* (Stanford University Press 2006), 4. However, while Sarat and Scheingold define cause lawyers as social movement role players, my definition does not necessarily require the rootedness of a lawyer in a social movement (although this will often be the case).

[120] On the distinction of aid litigation and cause lawyering, see Abel, 'Law without Politics: Legal Aid under Advanced Capitalism', 540-586, or Cummings, 'The Pursuit of Legal Rights – and Beyond', 510.

Sometimes, strategic litigation efforts are embedded in a comprehensive long-term strategy, stretching over a period of several years (or decades).[121] An example is the fight for marriage equality in the US:[122] The US LGBT movement used *strategic litigation* (among other tactics, such as media and political lobbying, consciousness-raising, educative efforts, and others) in order to achieve the goal of same-sex marriage.[123] Strategic LGBT rights litigation thus is often carried out by activist lawyers rooted in an LGBT movement; however, this is not a necessary precondition for strategic litigation.[124] Nonetheless, given that strategic litigation is often most successful when embedded in a larger, long-term strategy,[125] social movements are often the most likely carriers of such a strategy; thus, strategic litigation is often carried out by actors rooted in a social movement.[126]

At this point, it might be worthwhile to stress the ontological distinction between the *effect of* and the *motivation for* litigation (as described above). It is indisputable that European LGBT rights activists (often rooted in the LGBT rights movement) have greatly contributed to the advancement of LGBT rights and have thus been major agents and drivers of social change in Europe[127] – this is the *effect* of their activity, regardless of whether this has been their primary motivation, or whether they prioritized a social change agenda over their clients' interests. This

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[121] This is especially true, as I will show, for US LGBT rights litigation. See Chapter 6.

[122] See Chapter 6.

[123] See Chapter 6, Section 17.3.

[124] Here, I differ slightly from Sarat's and Scheingold's definition. See *infra*, note 119.

[125] Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014).

[126] This was certainly the case for strategic litigation for marriage equality in the US. Cummings and NeJaime, 'Lawyering for marriage equality'. For Europe, see, e.g., Rachel A Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge University Press 2007).

However, there are counter-examples, such as the famous US case Perry v Schwarzenegger; it was pushed forward by two corporate lawyers, against initial warnings of LGBT groups. *Perry v Schwarzenegger,* 704 F. Supp. 2d 921 (N.D. Cal. 2010) (USA). Interview with Elizabeth Gill, Senior Staff Attorney, ACLU – American Civil Liberties Union for Northern California (San Francisco, CA, USA, 6 February 2014); Interview with Kevin Cathcart, Executive Director, Lambda Legal – Defense and Education Fund USA (New York, NY, USA, 21 April 2014); Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014).

[127] See, for instance, a list of cases before the European High Courts with activist participation, *infra,* at 55.

fact, however, needs to be distinguished from the question of whether they used litigation mainly *in order to achieve* social change.

While this distinction might seem purely academic, I believe that it has practical implications. If social change happens largely incidentally – as a pleasant and desired side-product of helping a client – this is commendable, but it makes it difficult to devise a comprehensive, long-term strategy to promote LGBT rights. As the example of the US marriage-equality context will show,[128] the success of the US LGBT movement rested on the creation of such a long-term strategy, which also means that some cases were hand-picked based on their potential to create change, and other cases discouraged because they were seen as detrimental to the larger social change goal – marriage equality.[129] Moreover, litigation was mostly not seen as an end in itself; it was merely *one* of the instruments the movement used in order to achieve marriage equality.[130] This kind of prioritization is unlikely if litigation focuses merely on one case at a time, trying to achieve the best outcome for one particular client. Without wanting to detract from the impressive accomplishments of European LGBT rights activists, the interviews point to the absence of a comprehensive strategy[131] – which of course does not automatically *exclude* the possibility that single cases were conducted with a strategic agenda in mind.[132]

[128] As presented in Chapter 6.

[129] This is discussed in Chapter 6, Section 17.5.

[130] This is discussed in Chapter 6, Section 17.3.

[131] Interview with Matthew Evans, Director, AIRE Centre, London, GB (London, GB, 25 July 2014); ibid; Interview with Adam Weiss, Managing Director, European Roma Rights Centre (ERRC) (telephone call, 11 August 2014).

[132] This was most probably the case in, *inter alia*, Case C-81/12, *Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării* ECLI:EU:C:2013:275 [2013] IRLR 660; *Schalk & Kopf* App no 30141/04; and others.

However, with the exception of Johnson's oral history account,[133] there is scant research into the *motivation* of parties and their counsel to approach the European High Courts in LGBT matters; nor is there much research that traces the development of the respective case law *in a bottom-up way*, based on particular social change agenda issues (such as marriage equality) and using both sociological and legal methods, as, for instance, NeJaime or Cumming have done in the US context.[134]

In any case, this thesis does not mean to establish whether European LGBT rights litigation that has taken place *in the past* can in fact qualify as such (which would be a worthwhile research topic for further sociological, historical or legal research). This work rather intends to evaluate the *potential* for strategic litigation before the European High Courts, asking whether strategic LGBT rights litigation in the meaning of this dissertation on the European level is, in principle, possible and expedient. In other words: Would it be a good idea for European LGBT activists and the LGBT movement at large to include (long-term) litigation strategies in their toolbox for advancing LGBT equality?[135] This question will be examined on a theoretical level (Chapter 1), on a procedural level (Chapter 2), and on a case law level (Chapters 3-5). Chapter 6 will provide a practical example from the US context as an outlook of how such a strategy might look like.

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[133] Johnson, *Going to Strasbourg. An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights*. In the USA, on the other hand, LGBT rights litigation is more comprehensively researched; see, e.g., Douglas NeJaime, 'Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage' (2014) 102 California Law Review 87; Cummings and NeJaime, 'Lawyering for marriage equality'; Scott Barclay, Mary Bernstein and Anna-Maria Marshall (eds), *Queer Mobilizations: LGBT Activists Confront the Law* (New York University Press 2009); Amanda K. Baumle, 'LGBT Family Lawyers and Same-Sex Marriage Recognition: How Legal Change Shapes Professional Identity and Practice' (2018) Journal of Homosexuality .

[134] NeJaime, 'Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage'; Cummings and NeJaime, 'Lawyering for marriage equality'.

[135] This mirrors my research question at the beginning of this thesis: "Is strategic litigation at the CJEU and the ECtHR an emancipatory and feasible approach for the advancement of LGBT rights in Europe?" See *supra*, at 12.

## 1.1. Origins

Especially in the USA, historical and political traditions have been tightly connected to law and its practice.[136] The judicial branch, epitomized by the Supreme Court, was fundamental for the young democracy of the early 1900s, with the courts as the primary agents to enforce public law.[137] The power of "judicial review" confirmed the Supreme Court as the ultimate interpreter of the Constitution, granting it a kind of "veto" power against administrative and legislative acts.[138]

In 1835, de Tocqueville expressed his admiration of the US judicial system, observing that

> "[w]hen we have successively examined in detail the organisation of the Supreme Court, and the entire prerogatives which it exercises, we shall readily admit that a more imposing judicial power was never constituted by any people. ... Its power extends to all cases arising under laws and treaties ... It may even be affirmed that, although its constitution is essentially judicial, its prerogatives are almost entirely political."[139]

If the process of adjudication is understood at political, then it is, of course, likely that courts will be involved in political campaigns. And indeed, litigation has traditionally been a powerful tool for social movements, especially (but not exclusively)[140] in the United States.[141]

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[136] Malcom M. Feeley, 'Foreword' in Stuart A. Scheingold (ed), *The Politics of Rights Lawyers, Public Policy, and Political Change* (2 edn, University of Michigan Press 2004), xii, xiii.

[137] Michael Les Benedict, 'Law and Regulation in the Gilded Age and Progressive Era' in Hendrik Hartok, William E. Nelson and Barbara Wilcie Kern (eds), *Law as Culture and Culture as Law: Essays in Honor of John Phillip Reid* (Madison House Publishers 2000), 240.

[138] The Supreme Court formulated this power in its landmark decision *Marbury v Madison,* 5 U.S. 137 (1803) (USA).

For a comprehensive discussion of the decision and its impact, see, e.g., William W. Alstyne, 'A Critical Guide to Marbury v. Madison' (1969) 1969 Duke Law Journal 1. For an account of judicial review before *Marbury*, see: William Michael Treanor, 'Judicial Review Before "Marbury"' (2005) 58 Stanford Law Review 455.

[139] Alexis De Tocqueville, *Democracy in America*, vol 10 (translated by Henry Reeve 2003 edn, Regnery Publishing 1835), 114, 115.

[140] For an overview of strategic litigation in other contexts than the US context, see, e.g., Sarat and Scheingold (eds), *State Transformation, Globalization, and the Possibilities of Cause Lawyering*.

Louis D. Brandeis, who would later go on to become one of the US Supreme Court's most accomplished Justices, noted already in 1905 that lawyers had a social responsibility towards civil society, and that they could – and should – use the law in order to achieve greater equality within society.

While he was a prominent lawyer in Boston, he focused on this issue during an address to the Harvard Ethical Society at Phillips Brooks House, Cambridge, Massachusetts:

> "Here, consequently, is the great opportunity of the bar. The next generation must witness a continuing and ever-increasing contest between those who have and those who have not. ... The people are ... beginning to doubt whether there is a justification for the great inequalities in the distribution of wealth, for the rapid creation of fortunes, more mysterious than the deeds of Aladdin's lamp. ...
>
> Nothing can better fit you for taking part in the solution of these problems, than the study and pre-eminently the practice of law. Those of you who feel drawn to that profession may rest assured that you will find in it an opportunity for usefulness which is probably

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[141] There is a large body of scholarship around civil rights activism and social change litigation in the U.S.; for an overview see, e.g., Eskridge, 'Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century'. Others include Louis D Brandeis, 'The Opportunity in the Law' (1905) 3 Commonwealth Law Review 22; Joel F Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (Academic Press 1978); Jerold S Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (Oxford University Press 1977); Mark V Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925-1950* (University of North Carolina Press 1987); Jack M Balkin, 'What" Brown" Teaches Us about Constitutional Theory' (2004) Virginia Law Review 1537; Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press 1998); Stuart Scheingold and Austin Sarat, *Something to Believe In: Politics, Professionalism and Cause Lawyering* (Stanford University Press 2004); Deborah L Rhode, 'Public Interest Law: The Movement at Midlife' (2008) Stanford Law Review 2027; Thomas M Hilbink, 'You Know the Type...: Categories of Cause Lawyering' (2004) 29 Law & Social Inquiry 657; Louise G Trubek, 'Public Interest Law: Facing the Problems of Maturity' (2010) 33 University of Arkansas Little Rock Law Review 417; Michael McCann, 'Law and Social Movements' in Austin Sarat (ed), *The Blackwell Companion to Law and Society* (Blackwell Publishing 2004); Stuart A. Scheingold, *The Politics of Rights. Lawyers, Public Policy, and Political Change* (2 edn, University of Michigan Press 2004); Michael W McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (University of Chicago Press 1994); Susan D Carle, 'Re-envisioning Models for Pro Bono Lawyering: Some Historical Reflections' (2001) 9 American University Journal of Gender, Social Policy and the Law 81; Bell, 'Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation'; and many others.

> unequalled. There is a call upon the legal profession to do a great work for this country."[142]

Brandeis, therefore, recognised the potential of law as an instrument to elicit social change. What is more, he underlined the position of a lawyer as an active and political member of society, her duty to engage with society and current social issues, and to use the legal profession in a socially conscious way.

Brandeis put his ideas into practice; he was actively involved in the "National Association for the Advancement of Colored People" (NAACP), promoting litigation as a way to achieve law reform.[143] Strategic litigation became one of the main avenues for the US Civil Rights Movement to fight racial discrimination in the early to mid 1900s.[144] However, after the US Supreme Court's landmark decision *Brown v. Board of Education*[145] in 1954, the enthusiasm for impact litigation somewhat declined, since the high hopes that Brown would swiftly end segregation did not manifest.[146] Since then, litigation as a social change project has faced increasing criticism from progressives,[147] but also renewed support (especially in the advent of successful LGBT rights strategies),[148] resulting in a lively academic debate.[149]

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[142] Brandeis, 'The Opportunity in the Law', 29-30.

[143] Christopher A. Bracey, 'Louis Brandeis and the Race Question' (2001) 52 Alabama Law Review 859, 878-905.

[144] See, e.g., Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925-1950* ; Patricia Sullivan, *Lift Every Voice: The NAACP and the Making of the Civil Rights Movement* (The New Press 2009); Stephen C Yeazell, 'Brown, the Civil Rights Movement, and the Silent Litigation Revolution' (2004) 57 Vanderbilt Law Review 12.

[145] *Brown v Board of Education,* 347 U.S. 483 (1954) (USA).

[146] For accounts on this, see Derrick A. Bell, 'Law, Litigation and the Search for the Promised Land' (1987) 760 Georgetown Law Journal 229, 229-231; Derrick A. Bell, *Silent Covenants: Brown V. Board of Education and the Unfulfilled Hopes for Racial Reform* (Oxford University Press 2004).

[147] See, e.g., Scheingold, *The Politics of Rights. Lawyers, Public Policy, and Political Change*, 95; Bell, *Silent Covenants: Brown V. Board of Education and the Unfulfilled Hopes for Racial Reform*, Gerald P Lopez, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (Westview Press 1992), and, of course, Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* .

[148] See, e.g., Cummings and NeJaime, 'Lawyering for marriage equality', NeJaime, 'Winning Through Losing'.

[149] See *supra* note 141.

The approach of using legal approaches to advance a political agenda has spread across the globe[150] – also to Europe. The European Court of Human Rights (ECtHR), as well as the Court of Justice of the European Union (CJEU), have been approached by activist advocacy groups.[151] Ronald Holzhacker writes, in the context of the CJEU:

> "The processes of Europeanization and transnationalization are highly linked and influence the strategies pursued by ... equality organizations. [Civil Society Organizations (CSOs)] may use European policies and institutions to assist their efforts in pressing for domestic change. For example, groups may remind governments of their obligation to transpose EU Directives in a timely and correct manner. CSOs may also point to resolutions of the European parliament, for example calls for the recognition of same-sex partnerships, to back their call for domestic change in family law. CSOs may also use arguments related to existing case law of the European Court of Justice or attempt to bring new cases before the court to argue for the protection of fundamental rights."[152]

Public interest groups and activists have used litigation before the CJEU to advance social change agendas. A famous example comes from the context of women's rights.[153] One of the earliest successful attempts of strategic litigation at the CJEU are the *Defrenne* decisions, which

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[150] For accounts on the use of lawyering in different local, national, and transnational legal environments, see, e.g., Sarat and Scheingold (eds), *Cause Lawyering and the State in a Global Era*; Sarat and Scheingold (eds), *State Transformation, Globalization, and the Possibilities of Cause Lawyering*.

[151] In the context of the CJEU, see, e.g., Ronald Holzhacker, 'Transnational Strategies of Civil Society Organizations Striving for Equality and Nondiscrimination: Exchanging Information on New EU Directives, Coalition Strategies and Strategic Litigation' in Laszlo Bruszt and Ronald Holzhacker (eds), *The Transnationalization of Economies, States, and Civil Societies New Challenges for Governance in Europe* (Springer 2009), 227.

[152] Ibid, 227.

[153] Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*; Dia Anagnostou and Susan Millns, 'Gender Equality, Legal Mobilization, and Feminism in a Multilevel European System' (2013) 28 Canadian Journal of Law and Society 115.

established equal pay between men and women throughout the European Union.[154] Elaine Vogel-Polsky argued the cases as counsel, guided by the motivation to achieve the direct applicability of the "equal pay" Treaty provision (then Article 119 EEC, now Article 157 TFEU).[155]

Other areas where litigation has been employed by activists include, *inter alia*, environmental rights[156] or social rights.[157] Börzel writes that the "EU's decentralized enforcement mechanism provides increased opportunities for individual participation through law enforcement."[158]

The European Court of Human Rights has also been a forum for activist interventions, for instance, in the area of Roma Rights,[159] women's rights,[160] asylum and refugee cases,[161] and in anti-discrimination contexts,[162] among others.

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[154] Case C-80/70, *Gabrielle Defrenne v Belgian State (Defrenne I)* ECLI:EU:C:1971:55 [1971] ECR 445; Case C-43/75, *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena (Defrenne II)* ECLI:EU:C:1976:56 [1976] ECR 455; Case C-149/77, *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena (Defrenne III)* ECLI:EU:C:1978:130 [1978] ECR 1365. I will discuss these decisions in more detail in Chapter 4, Section12.

[155] Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*, 173. Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

[156] Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*, 119-168, 207-241.

[157] For an account on this, see Lisa Conant, 'Individuals, Courts, and the Development of European Social Rights' (2006) 39 Comparative Political Studies 76.

[158] Börzel, 'Participation Through Law Enforcement: The Case of the European Union', 135.

[159] For an account on this, see Sophie Jacquot and Tommaso Vitale, 'Law as a Weapon of the Weak? A Comparative Analysis of Legal Mobilization by Roma and Women's Groups at the European Level' (2014) 21 Journal of European Public Policy 587.

[160] Ibid; Rachel Cichowski, 'Civil Society and the European Court of Human Rights' in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford University Press 2011).

[161] See, e.g., a list of cases in which the organisation "European Council on Refugees and Exiles" (ECRE) has participated in strategic litigation: 'List of ECRE publications' *(ECRE)* <https://www.ecre.org/ecre-publications/publications/#Litigation> (accessed 11 May 2018).

[162] Gesine Fuchs, 'Strategische Prozessführung als Partizipationskanal' in Dorothée de Nève and Tina Olteanu (eds), *Politische Partizipation jenseits der Konventionen* (Barbara Budrich Verlag 2013), 56.

## 1.2. The European LGBT Movement as an Agent of Social Change

Della Porta and Caiani observe that social movements increasingly extend their "collective action" repertoire to include the opportunities provided for by European institutions.[163] In the realm of LGBT rights, there are organisations that provide – or are in the process of constructing – an international framework for LGBT rights litigation, providing support and expertise to NGOs willing to engage in strategic litigation.[164] Paternotte has argued that organisations such as ILGA-Europe and the opportunities contained in EU law, such as the Treaty of Amsterdam, have contributed to the "NGOization" to the European LGBT movement, transforming it from a "fringe social movement" into a key player in European equality politics.[165] Ayoub also writes, in the context of European LGBT rights, that an "LGBT advocacy network composed of transnationally linked civil society groups, international human rights NGOs, and sympathetic political elites at the national and supranational levels has exacerbated the political opportunities for mobilization tremendously."[166] This has led to an expansion of LGBT activism on the European level, empowering LGBT groups and creating certain hierarchies among LGBT organisations, based on their capabilities and willingness to work transnationally.[167] ILGA-Europe has been especially important in this respect, contributing to the "NGOization" of European LGBT rights activism.[168]

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[163] Donatella Della Porta and Manuela Caiani, 'Europeanization from below? Social movements and Europe' (2007) 12 Mobilization: An International Quarterly 1, 15.

[164] Organisations such as ILGA, ECSOL or the Open Society Foundation. Interview with Helmut Graupner, Founder and President, Rechtskomitee LAMBDA, Vienna, Austria (Vienna, Austria, 2 September 2014); Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014); Adam Weiss, European Roma Rights Centre (ERRC) (2014); Interview with Robert Wintemute, Professor of Human Rights Law, King's College London (London, GB, 29 July 2014).

[165] David Paternotte, 'The NGOization of LGBT activism: ILGA-Europe and the Treaty of Amsterdam' (2016) 15 Social Movement Studies 388, 389.

[166] Phillip M. Ayoub, *When States Come Out. Europe's Sexual Minorities and the Politics of Visibility* (Cambridge University Press 2016), 59.

[167] Phillip M. Ayoub and David Paternotte, 'Introduction' in Phillip M. Ayoub and David Paternotte (eds), *LGBT Activism and the Making of Europe: A Rainbow Europe?* (Palgrave Macmillan 2014), 15.

[168] Paternotte, 'The NGOization of LGBT activism: ILGA-Europe and the Treaty of Amsterdam', 390.

Apart from NGOs such as ILGA Europe, Paternotte and Kollman show that a community of high-level activists, academics, and policy elites has contributed to the establishment of same-sex unions across Europe.[169] This network is only loosely institutionalized and significantly based on interpersonal contacts.[170] Especially legal academics pertaining to this community are well connected with one another, as van der Vleuten points out:

> "[A] key role is played by the European Commission on Sexual Orientation Law (ECSOL), a transnational network of legal experts that aims to promote equality and recognition for LGBTI persons within Europe. The network offers an impressive line-up of lawyers who play leading roles in national and international LGBTI movements, while being active in academia and the domestic lower and constitutional courts. They include "big names" such as Suzanne Baer (Germany), Helmut Graupner (Austria), Caroline Mécary (France), Kees Waaldijk (Netherlands), Robert Wintemute (UK), and Andres Ziegler (Switzerland). ECSOL is also member of the Fundamental Rights Platform of the EU Fundamental Rights Agency, linking the legal and political triangles. ECSOL members are highly active on the legal arena. They submit written observations on behalf of the litigants, setting out the opinion of the LGBTI community to the European judges. For instance, Graupner and Wintemute submitted observations in *Maruko* and *Römer*. Graupner, Wintemute, and Mécary all delivered or drafted oral arguments and third-party interventions in LGBTI cases before the ECtHR." (*citations omitted*)[171]

My interviews with LGBT rights experts also pointed to the fact that litigation was employed as a political means;[172] however, in most cases it was difficult to discern whether the main motivation for litigation was based on a social change agenda, or whether litigation was

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[169] Paternotte and Kollman call this the "velvet triangle." David Paternotte and Kelly Kollman, 'Regulating Intimate Relationships in the European Polity: Same-Sex Unions and Policy Convergence' (2013) 20 Social Politics 510, 518, 526-527.

[170] Formal networks include, notably, the European Group of Experts on Combating Sexual Orientation Discrimination, or the European Commission on Sexual Orientation Law (ECSOL).Ibid, 526; van der Vleuten, 'Transnational LGBTI Activism and the European Courts: Constructing the Idea of Europe', 127.

[171] van der Vleuten, 'Transnational LGBTI Activism and the European Courts: Constructing the Idea of Europe', 127.

[172] Adam Weiss, European Roma Rights Centre (ERRC) (2014); Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014).

primarily conducted as a form of "aid litigation," with the main purpose to offer assistance to a particular client and developing political effects "along the way."[173] While some of the cases I discussed with the interviewees certainly took on a strategic edge eventually (at the latest when reaching a European High Court),[174] these efforts were however not discernibly part of a coordinated, long-term and comprehensive social change project, such as the "marriage equality" campaign of the US LGBT movement.[175] The interviews in fact indicated that there was no precise official schedule or scheme for long-term litigation goals on the European level.[176]

Nonetheless, ILGA-Europe has undertaken efforts to evaluate national contexts in terms of presenting a suitable backdrop for CJEU/ECtHR litigation, identifying a range of gaps in LGBT rights protection – so called "gap issues" – that could be addressed by such litigation.[177] These issues have been communicated to ILGA-Europe member organisations and interested legal networks (including ECSOL). ILGA-Europe provides ample background information on respective case law and other informative resources. Moreover, ILGA-Europe is dedicated to identify and monitor respective cases, offering support by way of third party interventions, where such cases come forward.[178] In this sense, ILGA-Europe offers a *support system* for strategic litigation to NGOs and activist lawyers, based largely on sharing expert knowledge and information, as well as networking.[179]

The litigation itself usually hinged on a relatively small group of individuals, very well connected *with one another* (albeit rather informally), as well as deeply rooted in the LGBT

[173] Of course, I am aware that such distinctions are not without problems, particularly since different motivations for litigation often overlap. Regarding this distinction, see Abel, 'Law without Politics: Legal Aid under Advanced Capitalism', 540-586; or Cummings, 'The Pursuit of Legal Rights – and Beyond', 510.

[174] *Schalk & Kopf* App no 30141/04; Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014); Robert Wintemute, King's College London (2014).

[175] See case study in Chapter 6.

[176] Robert Wintemute, King's College London (2014); Matthew Evans, AIRE Centre, London, GB (2014).

[177] Email by Nigel Warner, 24 September 2018.

[178] Email by Nigel Warner, 24 September 2018.

[179] Email by Nigel Warner, 25 September 2018.

movement.[180] While litigation at the European level can thus be understood, at least to a certain degree, as a resource for collective action,[181] it is not clear whether the organisations and communities described above have the potential – i.e., the necessary resources (personal and financial), structure, networks, organisation and cohesion – to carry a comprehensive, issue-driven Europe-wide litigation project, as the US LGBT movement has done on the issue of marriage-equality (see case study in Chapter 6). Indeed, some of the European LGBT rights activists I interviewed have claimed that LGBT rights litigation before the European High Courts is not as common and structured a strategy for LGBT organisations in Europe as in the US. The activists (all of whom had participated, in one way or another, in LGBT rights litigation before the ECtHR, or the CJEU, or both) had a number of explanations, such as the high level of expertise and technical knowledge required to litigate before the European High Courts.[182]

Summarising, it is indisputable that European same-sex rights activists have participated in litigation on the European level, and that such cases have often times furthered the situation of LGBT minorities in Europe.[183] It is also clear that activists were well aware that their activity could (and should) lead to political and/or legal reform.[184] However, at this point, the LGBT movement has not adopted a common agreed upon agenda (such as the "marriage equality"

[180] Robert Wintemute, King's College London (2014); Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014).

[181] Jacquot and Vitale, 'Law as a Weapon of the Weak? A Comparative Analysis of Legal Mobilization by Roma and Women's Groups at the European Level', 592-593.

[182] Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014); Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014); Robert Wintemute, King's College London (2014); Adam Weiss, European Roma Rights Centre (ERRC) (2014).

[183] Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014); Robert Wintemute, King's College London (2014); Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014); Matthew Evans, AIRE Centre, London, GB (2014); Adam Weiss, European Roma Rights Centre (ERRC) (2014). See also (non-exhaustive) list of cases with LGBT rights activist-participation, *infra* at 55.

[184] This is confirmed by all of the interviews. Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014); Robert Wintemute, King's College London (2014); Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014); Matthew Evans, AIRE Centre, London, GB (2014); Adam Weiss, European Roma Rights Centre (ERRC) (2014).

agenda in the US).[185] This fact, together with the lower level of strategic coordination among movement actors, is the main difference of European LGBT rights litigation to US LGBT rights litigation, particularly regarding the issue of marriage-equality (outlined in Chapter 6), which became apparent in the interviews.

While the existence of a larger, long-term strategy and coordinated inter-movement cooperation, are not, of course, prerequisites for the existence of strategic litigation, the US case study nonetheless seems to provide a better framework to test the *theoretical premises* outlined in this Chapter. There can be no doubt that the US campaign for "marriage equality" is a prime example for strategic litigation, embedded in a larger social change project,[186] and carried out with the main purpose of eliciting social and legal reform.[187] Therefore, it is a better testing ground for the general hypothesis that "lawyering for social change" can be an emancipatory endeavour, particularly regarding the *theoretical soundness* of using law and litigation as a tool for empowerment.[188]

Nevertheless, it is worthwhile to point out that many of the European same-sex rights cases I will discuss contained activist participation. These include (but are not limited to):

CJEU

Case C-249/96 *Lisa Jacqueline Grant v South-West Trains Ltd.* ECLI:EU:C:1998:63, [1998] ECR I-621

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

Case C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg*, ECLI:EU:C:2011:286, [2011] ECR I-3591

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[185] Matthew Evans, AIRE Centre, London, GB (2014); Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014).

[186] See discussion in Chapter 6, Section 17.3.

[187] This has been studied, *inter alia*, by Cummings and NeJaime, 'Lawyering for marriage equality'.

[188] For reflections on law and society in general, see Section 3.2.

Case C-267/12 *Frédéric Hay v Crédit Agricole Mutuel de Charente-Maritime et des Deux-Sèvres* ECLI:EU:C:2013:823, [2013]

Case C-81/12 *Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării* ECLI:EU:C:2013:275, [2013] IRLR 660

Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* ECLI:EU:C:2018:385, [2018]

ECtHR

*Dudgeon v UK* App no 7525/76 (ECtHR, 22 October 1981)
*Smith & Grady v UK* App no 33985/96 and App no 33986/96 (ECtHR, 27 September 1999)
*Fretté v France* App no 36515/97 (ECtHR, 26 February 2002)
*Karner v Austria* App no 40016/98 (ECtHR, 24 July 2003)
*EB v France* App no 43546/02 (ECtHR, 22 January 2008)
*Frasik v Poland* App no 22933/02 (ECtHR, 5 January 2010)
*Kozak v Poland* App no 13102/02 (ECtHR, 2 March 2010)
*Schalk & Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010)
*Gas & Dubois v France* App no 25951/07 (ECtHR, 15 March 2012)
*X & Others v Austria* App no 19010/07 (ECtHR, 19 February 2013)
*Boeckel & Gessner-Boeckel v Germany* App no 8017/11 (ECtHR, 7 May 2013)
*Vallianatos & Others v Greece*, App nos. 29381/09 and 32684/09 (ECtHR, 7 November 2013)
*Oliari & Others v Italy* App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015)
*Pajić v Croatia* App no 47082/12 (ECtHR, 23 February 2016)
*Chapin & Charpentier v France* App no 39651/11 (ECtHR, 9 June 2016)
*Taddeucci & McCall v Italy* App no 51362/09 (ECtHR, 30 June 2016)
*Ratzenböck & Seydl v Austria* App no 28475/12 (ECtHR, 30 March 2017)
*Orlandi & Others v Italy* App nos 26431/12; 26742/12; 44057/12 and 60088/12 (ECtHR, 14 December 2017).

Regardless of its classification as "strategic" or not – once an LGBT rights case reaches a European High Court, it will most likely develop repercussions that transcend the particular

case, at the least because it will form part of the case law of the respective Court. Even if a particular case thus should not qualify as "strategic litigation" within the meaning of this dissertation,[189] it can have significance for future strategic litigation efforts.

## 1.3. Lawyering for Social Change – Fundamental Challenges

I will expand on the possibilities for strategic litigation at the ECtHR and the CJEU in the following chapters;[190] however, there are several questions to consider first when assessing the "emancipatory potential"[191] of law and litigation in general, particularly in the area of LGBT rights.

Two sets of questions regarding the theoretical underpinnings of the "lawyering for social change" approach need to be addressed before moving forward. These questions pose important theoretical challenges to the endeavour of using law – and litigation specifically – to elicit (legal, political and/or social) reform. I will discuss these questions in Sections (2)[192] and (3).[193]

*First* – can courts (specifically, the Court of Justice of the European Union and the European Court of Human Rights) be perceived as political spaces? Do their judgments develop influence beyond a particular case? And if that is so – is it justifiable to use the courts in a political way, given that judges usually lack the democratic legitimation of popular elections?

Extensive judicial review and policy-making at court has been subject to pervasive criticism from conservative and progressive scholars alike.[194] Governing from the courtroom has been called "judicial activism" and charged with endangering the separation of powers, since it would

[189] See *supra*, at 41.

[190] In Chapters 2, 3, 4, and 5.

[191] For an account of the emancipatory potential of law in the context of feminist and queer rights, see Holzleithner, 'Emanzipatorisches Recht: Über Chancen und Grenzen rechtlicher Geschlechtergleichstellung'.

[192] *Infra,* at 61.

[193] *Infra,* at 78.

[194] Bellamy provides an overview of present debates on the matter. Bellamy (ed), *Constitutionalism and Democracy*.

grant competences reserved for the legislator to elitist institutions that are not subject to electoral review.[195]

I hope to show, however, that a "passive" or "jurispathic"[196] court acts by no means "more" democratic than an active court. In fact, the courtroom provides a space to negotiate and re-negotiate the particular legal understandings (or narratives) of different groups (identity groups, interest groups, etc.) within a society.[197] After all, a court only becomes active when litigants approach it; it is "activated" by litigants. A general refusal to engage with their arguments is not a neutral, democratically sound position; rather, it deprives litigants (who are, after all, constituents) of an opportunity to defend their own interpretations of law and thus, participate in the process of the construction of legal meaning.[198] This discussion will be outlined in Section (2).

The *second* challenge, addressed in Section (3), regards the potential of law in general, and law application specifically, to generate progressive change. This challenge contains several levels. One level is loosely connected to the "democratic legitimacy" criticism mentioned above and concerns the *nature* of judging. Some legal theory schools of thought advance concepts of judicial decision-making that would leave little room for activist litigation. After all, strategic litigation will only work if litigants can, by way of argumentation, *participate* in the process of judicial decision-making.

Therefore, some legal theories will deny the possibility for – or at least, disapprove of – impact litigation. These are usually theories that see law as a closed system of knowledge, ontologically distinct from other knowledge-generating systems (such as, *inter alia*, positivism or

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[195] Bellamy, *Political Constitutionalism*, 32; John Hart Ely, 'Toward a Representation-Reinforcing Mode of Judicial Review' (1977) 37 Modern Law Review 451, 485-487.

[196] I borrow the term "jurispathic" from Robert Cover. Cover, 'Nomos and Narrative. Foreword to the 1982 Term of the Supreme Court', 53.

[197] Cover calls them "nomic" groups: A "nomos," in Cover's usage, is a system of norms, customs, traditions, experiences, historical beliefs and rituals, etc. which a certain group holds on to. Ibid, 9.

[198] Siegel, 'The Jurisgenerative Role of Social Movements in United States Constitutional Law', 10.

formalism).[199] Assuming that law is a self-referential system means, essentially, that judges would have every means at their disposal for sound judicial reasoning by merely consulting legal texts and case law. In fact, these theories over-emphasize both the role of the judge and black letter law in judicial processes, suggesting (with different impetus) that the law itself[200] holds the answer to every possible legal dilemma.

Such theoretical accounts[201] would indeed critically challenge the assumption that there is an opportunity for litigants to participate in judicial decision-making. If there is one right (or at least "righter") answer to any legal question, it is clearly the sole responsibility of the judge to find it. Litigants can, of course, assist in this exercise by pointing to particular provisions that they consider applicable; but strictly speaking, such assistance would not be *necessary*. Apart from that, litigants' role would be restricted to presenting the facts of the case. In other words, these theories construct a strict hierarchical architecture of adjudication, with the judge as the (ideally wise and just) potentate.

The ontological and epistemological premises of such theories have been questioned by critical legal theories, such as legal realism,[202] critical legal studies,[203] and others.[204] These approaches, while diverse in their manifestations, all criticise the view of law as a *neutral* system, value-free and independent from social and political realities.[205] While they tend to concede that courts are political spaces,[206] they however pose another challenge to impact litigation: Since courts are hegemonic institutions, it is likely that they will perpetuate existing dominance structures,

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[199] John Gardner, 'Legal Positivism: 5 1/2 Myths' (2001) 46 The American Journal of Jurisprudence 199, 202-203; Brian Leiter, 'Legal Formalism and Legal Realism: What Is the Issue?' (2010) 16 Legal Theory 111.

[200] Or, in the case of natural law theories, "universal norms" which stand above regular laws and should inform the judge when interpreting law. John Finnis, 'Natural Law Theories' Stanford Encyclopedia of Philosophy (2015) <https://plato.stanford.edu/archives/win2016/entries/natural-law-theories/> accessed 7 January 2018.

[201] Possibly including "natural law theories," see *supra,* note 200.

[202] Brian Leiter, 'Legal Realisms, Old and New' (2012) 47 Valparaiso University Law Review 949.

[203] See, e.g., Christopher Hutton, *Language, Meaning and the Law* (Edinburgh University Press 2009).

[204] See discussion in Section 3.

[205] Hunt, 'The Theory of Critical Legal Studies'.

[206] Hutton, *Language, Meaning and the Law*.

instead of breaking them up ("law-sceptical objection").[207] In this sense, critical approaches tend to disagree with positivist and formalist theories on their *concept of law as self-referential and neutral*, but not on their (sometimes implicit) *conception of adjudication as hierarchical*.

In this respect, I will argue, critical theories *also* have a tendency to over-state the role of the judge in adjudication. While they provide important insights into the social embeddedness of law and law application, they often underestimate the agency of other actors within the judicial system.[208]

Nonetheless, critical theories also contain the most promising arguments for cause lawyering. If it is true that legal rules are shaped by social realities, this also means that legal meaning is not fixed, but fluid.[209] Courts, consequently, are places where these meanings are negotiated and constructed. Thus, litigants could attempt to contribute to the development of legal meaning by suggesting progressive constructions via "interpretative interventions" in the courtroom.[210] These issues will be discussed in Section (3).

[207] Ibid, 15.

[208] Ibid, 18.

[209] Butler, for instance, holds that concepts are filled with meaning by way of communicative practice. This must certainly also be true for legal concepts. Judith Butler, *Gender Trouble* (1999 edn, Routledge 1993), 1073.

[210] Scheingold has made a similar point, writing "the soft hegemony of constitutional rights provides both cultural and institutional opportunities for social movements. … Institutionally, litigation offers direct and authoritative access to the agencies of state." Stuart Scheingold, 'Constitutional Rights and Social Change: Civil Rights in Perspective' in Stuart Scheingold (ed), *Legality and Democracy: Contested Affinities* (Taylor & Francis 2006), 86. Siegel shows that social movements in the U.S. have actually done exactly that: Siegel, 'The Jurisgenerative Role of Social Movements in United States Constitutional Law'.

## 2. The European High Courts as Political Spaces

The evolving jurisprudence of the CJEU and the ECtHR has, over the years, determined both Courts as important players in European policy development,[211] thus establishing their courtrooms as political spaces.

An important aspect of both Courts' case law in this regard is the practice of "judicial review." High courts review acts by executive and/or legislative organs by exercising "judicial review," based on values expressed in a higher-order text.[212] Both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) employ judicial review. The CJEU uses EU law to review national acts,[213] and the ECtHR checks national acts against the European Convention of Human Rights (ECHR).[214]

The practice of "judicial review" by the Court of Justice of the European Union (CJEU) has been the subject of lively scholarly debate; some commentators have accused the Court of practicing "judicial activism."[215] (The term "judicial activism" is commonly used – mostly in a derogatory

[211] See, e.g.: Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and other Essays on European Integration*; Weiler, 'The Transformation of Europe'; Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance'; Helen Keller and Alec Stone Sweet, 'Assessing the Impact of the ECHR on National Legal Systems' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008); Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*.

[212] For a more detailed account on judicial review, see, e.g., Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*.

[213] Martin Shapiro, 'The European Court of Justice' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (1 edn, Oxford University Press 1999), 326.

[214] Soledad Bertelsen, 'Consensus and the Intensity of Judicial Review in the European Court of Human Rights. Some Reflections from National and International Law' in Rainer Arnold and José Ignacio Martínez-Estay (eds), *Rule of Law, Human Rights and Judicial Control Power* (Springer 2017).

[215] See, for example, a collection of essays on this issue: Mark Dawson, Bruno de Witte and Elise Muir (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing 2013).

way – to label practices or situations where courts or judges are perceived to overstep their mandate by using the law to achieve a certain non-legal (usually political) end.)[216]

The European Court of Human Rights (ECtHR), on the other hand, has been charged with both "activism" and "passivism."[217] Nonetheless, the ECtHR has the power to review national legislation regarding its conformity with the European Convention on Human rights (ECHR), thus giving it, *de facto*, the power to review national laws and demand their modification.[218]

Be that as it may, the practice of "judicial review" gives the judiciary considerable power, since it allows the Courts to guard said texts even against acts of the legislature and the executive.[219] It also means that judgements of these Courts influence European policy.

## 2.1. The CJEU as Policy Maker

Neither the nature of the EU, nor, consequently, the role of the CJEU, is uncontested. Since the European Union displays elements of both a nation state and an international organisation, there is extensive academic discussion about the legal systematization of the EU. The classification of the CJEU is similarly complex; its competences are broader than that of a typical international court, but more narrow (especially in terms of citizen standing rights) than those of a national court. Hence, the history and development of the Court must be understood in the context of

[216] Arthur Schlesinger Jr. first used the term in a popular magazine in 1947, in order to criticise Justices Black, Douglas, Murphy and Rutledge of the US Supreme Court. He believed that the were exceeding their competences as judges by ruling with a political agenda in mind. Keenan D. Kmiec, 'The Origin and Current Meanings of Judicial Activism' (2004) 92 California Law Review 1441, 1446, 1447; John Hart Ely, *Democracy and Distrust. A Theory of Judicial Review* (Harvard University Press 1980).

[217] For an overview, see Adam Wiśniewski, *The European Court of Human Rights. Between Judicial Activism and Passivism* (Gdańsk University Press 2016).

[218] However, judicial review is exercised with different levels of intensity by the ECtHR; it uses the "margin of appreciation" doctrine to level its degree of judicial review (wide margin of appreciation = weak judicial review, narrow margin of appreciation = strong judicial review). Bertelsen, 'Consensus and the Intensity of Judicial Review in the European Court of Human Rights. Some Reflections from National and International Law', 298-300.

[219] Owen M. Fiss, *The Civil Rights Injunction* (Indiana University Press 1978).

complex political developments.[220] Much has been said about the importance of the Court of Justice of the European Union (CJEU) in terms of establishing a kind of European identity.[221] Some scholars have pointed out that the fragmentation of power within the EU has allowed institutions such as the CJEU to take over governance functions.[222] It plays a decisive role in advancing European integration,[223] guaranteeing the uniformity of EU law and its application,[224] and holding Member States to their obligations under the EU Treaties,[225] among other things.

Consequently, the CJEU has been called the "supreme court"[226] or "constitutional court"[227] of the European Union. Its case law has significantly contributed to the development of EU law.

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[220] See, e.g., Stefan Oeter, 'Federalism and Democracy' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing 2010), 59-60.

[221] See, e.g., Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A political Theory of Legal Integration' (1993) 47 International Organization 1, 42.

[222] Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance'; Fritz W. Scharpf, 'Notes Toward a Theory of Multilevel Governing in Europe' (2001) 24 Scandinavian Political Studies 1. Not surprisingly, this development has also drawn extensive normative criticism. In Europe, this has been discussed, for instance, in the wider realm of the democracy deficit debate; lately, the distinction between input and output legitimacy (terms coined by Fritz Scharpf) has become relevant in this regard. Fritz W Scharpf, *Governing in Europe: Effective and democratic?* (Oxford University Press 1999), 6. See also: Giandomenico Majone, 'Europe's "Democratic Deficit": The Question of Standards' (1998) 4 European Law Journal 5; Andrew Moravcsik, 'In Defense of the Democratic Deficit: Reassessing Legitimacy in the European Union' (2002) 40 Journal of European Market Studies 603.

[223] Lisa Conant, 'Europeanization and the Courts: Variable Patterns of Adaptation Among National Judiciaries' in Maria Green Cowles, James Caporaso and Thomas Risse (eds), *Transforming Europe: Europeanization and Domestic Change* (Cornell University Press 2001), 97.

[224] Burley and Mattli, 'Europe Before the Court: A political Theory of Legal Integration', 42.

[225] Ibid.

[226] Takis Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' (2003) 40 Common Market Law Review 9, 21.

[227] Schepel and Blankenburg point out that the CJEU tends to review national measures against community measures in a way that is reminiscent of constitutional judicial review. Harm Schepel and Erhard Blankenburg, 'Mobilizing the European Court of Justice' in Gráinne de Búrca and Joseph HH Weiler (eds), *The European Court of Justice* (2 edn, Oxford University Press 2001), 28.

Even though the CJEU hasn't formally adopted a doctrine of precedent, it usually follows its previous case law.[228]

Importantly, the CJEU has the interpretation monopole regarding EU law, which grant its judgments considerable leverage. Stone Sweet writes: "The Court is the authoritative interpreter of EU law, not the Member States. The Member States are principals when they are assembled as a constituent assembly. At most other times, each Member State is a subject of EU law on its own […]."[229] Moreover, the CJEU often applies a dynamic form of legal interpretation, which allows taking modern realities into account.[230]

The doctrine of "supremacy," developed by the CJEU, has significantly contributed to its role as "policy maker." It was established by the Court in its 1964 *Costa v ENEL* decision.[231] In this decision, the Court ascertained that (then) EC law was to be understood as "its own legal system" which had supremacy over national laws. While most European countries at the time

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[228] Alina Kaczorowska-Ireland, *European Union Law* (4 edn, Routledge 2016), 150. There is an academic debate on the difference between "persuasive" and "binding" CJEU precedent. For an overview of this discussion, see: John J. Barceló, 'Precedent in European Community Law' in D. Neil MacCormick, Robert S. Summers and Arthur L. Goodhart (eds), *Interpreting Precedents* (Ashgate 1997), 415-16.

However, there is general agreement that CJEU judgments are *de facto* an important source of European Union law. The subtleties of this distinction are thus of limited practical significance and beyond the scope of this work.

[229] Stone Sweet, 'The European Court of Justice', 128.

[230] Koen Lenaerts and Kathleen Gutman, 'The Comparative Law Method and the European Court of Justice: Echoes Across the Atlantic' (2016) 64 The American Journal of Comparative Law 841, 844, 845. On the CJEU's practice of using a dynamic interpretation in sex discrimination cases, see, e.g., Susanne D. Burri, 'Towards More Synergy in the Interpretation of the Prohibition of

Sex Discrimination in European Law? A Comparison of Legal Contexts and some Case Law of the EU and the ECHR' (2013) 9 Utrecht Law Review 80, 82. In the realm of LGBT rights, AG Wathelet claimed in his opinion in *Coman* that "EU law must be interpreted 'in the light of present day circumstances', that is to say, taking the 'modern reality' of the Union into account." (*citations omitted*) Case C-673/16, *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne,* Opinion of AG Wathelet ECLI:EU:C:2018:2 [2018] , para 56, citing Case C- 270/13, *Iraklis Haralambidis v Calogero Casilli,* Opinion of AG Wahl ECLI:EU:C:2014:1358 [2014] , para 52; and Case C-202/13, *The Queen, on the application of Sean Ambrose McCarthy and Others v Secretary of State for the Home Department,* Opinion of AG Szpunar ECLI:EU:C:2014:345 [2014] , para 63.

[231] Case C-6/64, *Costa v ENEL* ECLI:EU:C:1964:66 [1964] ECR 585.

knew some kind of judicial review,[232] the introduction of the judicial review *of legislative acts* was not generally recognised in all Member States.[233] Stone Sweet and Brunell note that "…supremacy required judges to abandon certain deeply entrenched, constitutive principles, such as the prohibition against judicial review of legislation."[234]

According to the doctrine of supremacy, national courts and other institutions are required to disapply national rules that contradict EU law.[235] And indeed, national authorities tend to accept the supremacy of EU law, complying with its requirements.[236] Taken together with the fact that the CJEU is the authoritative interpreter of EU law,[237] "supremacy" thus affords the Court with considerable "judicial review" powers of national legislations regarding their implementation of

[232] Dietze wrote in 1957 that "[t]o Europeans, judicial review has had a great variety of meanings. A distinction was made between the courts' right to test, in a federal state, acts of the authorities of the component member states for their compatibility with national law ('federal' judicial review), and their right to examine national acts for their constitutionality ('national' judicial review)." Gottfried Dietze, 'Judicial Review in Europe' (1957) 55 Michigan Law Review 539, 539. He goes on to state that while European courts did review administrative acts regarding their exercise of powers, the review of the constitutionality of laws was not generally recognised: "Over these administrative acts, a vigorous control is exercised either by special administrative courts, or by the ordinary courts. Whenever an administrative ordinance is considered to be in excess of the authority granted to the administration, it is annulled. Likewise, administrative acts may be condemned for being unfair or inexpedient. The review of the legality of administrative rules and ordinances has, during past generations, been a standing practice in European countries. Review of the constitutionality of laws, on the other hand, was not generally recognised." (*citations omitted*). Ibid, 540-541.

[233] Ibid, 540-41.

[234] Alec Stone Sweet and Thomas L. Brunell, 'The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961–95' (1998) 5 Journal of European Public Policy 66, 68.

[235] Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal [1978] ECR 629. Catherine Barnard, 'Introduction: The Constitutional Treaty, the Constitutional Debate and the Constitutional Process' in Catherine Barnard (ed), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (Oxford University Press 2007), 38.

[236] Karen Alter, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration' in Anne-Marie Slaughter and Joseph HH Weiler (eds), *The European Court and National Court - Doctrine and Jurisprudence Legal Change in its Social Context* (Hart 1998), 242; Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004), 21.

[237] Stone Sweet, 'The European Court of Justice', 128.

the EU acquis.[238]

This of course strengthened the judicial branch in an unprecedented manner. Courts were given an instrument to urge the CJEU to overturn national legislation, which in turn provided social change activists with a new route to induce legal change by challenging the compatibility of national rules and practices in light of the EU acquis.[239]

Summarizing, it is safe to say that judgments of the CJEU influence EU policy. The Court's judgments radiate beyond the single case and establish binding norms for the whole region in which EU law is applied. In other words, judicial debate before the CJEU is also *always* a political one. Consequently, a number of scholars have observed that within the EU, political discourses are often translated into legal terminology and solved on the judicial level.[240] Stone Sweet has noted the "capacity of the Court, through its rulings, to alter the underlying 'rules of the game' that govern policy making in any given field" in relation to the EU legislator.[241] While this development has been extensively criticised, the truth of the empirical observation *per se*

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[238] The scope of these "judicial review powers" has been an issue of lively debate, especially in the area of fundamental rights protection. The German *Bundesverfassungsgericht,* for instance, discussed this in the context of fundamental rights protection in its *Solange* decisions. BVerfGE 37, 271; 1974 2 CMLR 540 (Solange I) (GER); BvR 2, 197/83; 1987 3 CMLR 225 (Solange II) (GER). Generally, there is a climate of mutual cooperation between Member States institutions and the CJEU in this area; for an overview, see: Jürgen Schwarze, 'Judicial Review in EC Law - Some Reflections on the Origins and the Actual Legal Situation' (2002) 51 International and Comparative Law Quarterly 17.

[239] Stone Sweet and Brunell, 'The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961–95', 72.

[240] Shapiro, e.g., has noted: "Successful review courts turn constitutions into constitutional law. … [they] convert a text enacted at a given historical moment into a continuous, collective stream of case law. In this way, they turn a general political discourse into a specifically legal one in which judges and their fellow lawyers are the most authoritative speakers." Shapiro, 'The European Court of Justice', 326.

[241] He came to the conclusion that three types of decisions create situations which require EU bodies to follow the Court's case law, thus de facto transmitting quasi-legislative or policy powers to the CJEU (judicialization of law making): "First, when the Court choose to apply Treaty law to policy areas that were formerly assumed to be in the domain of national, not supranational, governance, it empowers the Commission and the courts, while undermining the authority of national officials. … Second, the CJEU may interpret EU statutes as if certain provisions express values of a higher, 'constitutional' status. In doing so, the Court carves out substantive legal positions, or guiding principles for law making, that lie outside the EC legislator's direct control. A third robust form of judicialization is triggered when the Court holds that Treaty law requires specific policy dispositions. These techniques typically lead to the 'constitutionalisation' of policy …" Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance', 25.

has seldom been challenged.[242]

## 2.2. The ECtHR as Human Rights Policy Maker

The European Court of Human Rights (ECtHR) differs importantly from the CJEU; while the supremacy of EU law and the compliance of EU Member States to its judgments are usually not questioned,[243] the ECtHR's authority might, at first glance, be more compromised.

The ECtHR walks a fine line between establishing itself as an effective human rights court, asserting its authority regarding the interpretation and enforcement of the European Convention of Human Rights (ECHR)[244] – and as an institution very well aware of the contingencies of international human rights law, namely, the fact that the ECHR is an multilateral treaty,[245] and that its authority is dependent, to a large degree, on the compliance of Member States with its judgments.[246] This also means that the Court has to harmonize a number of (sometimes greatly differing) constitutional and human rights traditions.[247]

Nonetheless, since the adoption of the ECHR, the High Contracting Parties have regularly expanded and improved the scope and capabilities of the ECHR regime.[248] In fact, as scholars

[242] Although it has generated criticism. See discussion in Section 2.3., *infra* at 69.

[243] See discussion in Section 2.1.

[244] Alastair Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5 Human Rights Law Review 57, 58; Luzius Wildhaber, 'Rethinking the European Court of Human Rights' in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights Between Law and Politics* (Oxford University Press 2011), 212.

[245] Mowbray, 'The Creativity of the European Court of Human Rights', 58.

[246] Wildhaber, 'Rethinking the European Court of Human Rights', 212.

[247] Ibid, 212.

[248] Alec Stone Sweet and Helen Keller, 'The Reception of the ECHR in National Legal Orders' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008), 3, 6.

have pointed out, Member States' compliance with ECtHR judgments is remarkably high[249] – both the regarding the compliance of Member States with a decision *they have been the specific addressees of*,[250] as well as regarding the reception of ECtHR decisions in *other* Member States.[251]

Keller and Stone Sweet have argued that the Convention's application actually supersedes the "traditional view" of establishing only a minimum standard of human rights protection, a "floor below which national legal protection may not fall."[252] Instead, the Court's understanding of the ECHR as a "living instrument" has established the Court as an autonomous developer of Convention rights, providing a level of human rights protection which often surmounts the protections afforded by Member States. In this sense, "one important meta-narrative of reception is that States are always playing catch-up to the Court, if some more than others."[253]

The "dynamic and evolutive" interpretation approach the Court takes when determining the rights the Convention affords enables to Court to steadily update the interpretation of Convention Articles to correspond to present-day needs.[254] The ECtHR itself explicitly endorses

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[249] This has led Keller and Stone Sweet to calling the ECHR "the most effective human rights regime in the world." Ibid, 3. There are two forms of compliance with ECtHR judgments – compliance of a State with a judgment rendered specifically against it, and compliance of Member States with the jurisprudence of the ECtHR more generally – i.e., by way of reception (even if they have not been the concrete addressee of a decision). Scholars contend that both forms of compliance are usually kept with (although, of course, with different degrees).

[250] Regarding compliance of Member States against whom a judgment has been rendered with said judgment: Laurence R Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 Yale Law Journal 273, 276, 296; Richard S. Kay, 'The European Convention on Human Rights and the Authority of Law' (1993) 8 Connecticut Journal of International Law 217. For an overview, see: John Cary Simst, 'Compliance Without Remands: The Experience Under the European Convention on Human Rights' (2004) 36 Arizona State Law Journal 639.

[251] For a comprehensive overview of Member State's reception of ECtHR decisions (even if these decisions are not directed against them), see, e.g., Keller and Stone Sweet (eds), *A Europe of Rights. The Impact of the ECtHR on National Legal Systems*; Stone Sweet and Keller, 'The Reception of the ECHR in National Legal Orders'; Helfer and Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe'.

[252] Keller and Stone Sweet, 'Assessing the Impact of the ECHR on National Legal Systems', 702.

[253] Ibid, 702.

[254] Mowbray, 'The Creativity of the European Court of Human Rights', 69.

this conception:

> "The Court has repeatedly stated that its 'judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties' … Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States."[255] (*citations omitted*)

This means that the Court's rulings establish principles that transcend one particular case and thus, can shape the legal order. This *erga omnes* effect of ECtHR judgments has been the issue of broad discussion.[256] Helfer and Voeten have collected data to show that in the context of LGBT rights, there is in fact evidence that ECtHR judgments develop considerable effects:

> "In particular, ECtHR judgments increase the likelihood that all European nations – *even countries whose laws and policies the court has not explicitly found to violate the European Convention* – will adopt pro-LGBT reforms. The effect is strongest in countries where public support for homosexuals is lowest."[257] (*emphasis added*)

## 2.3. Democratic Concerns Regarding Courts as Policy Makers – the "Separation of Powers Objection"

The phenomenon that (constitutional or quasi-constitutional) judges act as policymakers[258] is not without contention. It has been broadly debated under the label "new constitutionalism."[259]

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[255] *Karner* App no 40016/98, para 26.

[256] For an overview, see: Samantha Besson, 'The Erga Omnes Effect of Judgments of the European Court of Human Rights - What's in a Name?' in Samantha Besson (ed), *The European Court of Human Rights After Protocol 14: First Assessment and Perspectives* (Schulthess 2011).

[257] Helfer and Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe', 29.

[258] Hans L.M. Gribnau, 'Legitimacy of the Judiciary' 2002 <https://www.ejcl.org//64/art64-3.html> accessed 11 May 2018.

A concern that is often advanced in this context regards the lack of democratic legitimation of practices such as (extensive) judicial review ("separation of powers objection").[260] Such practices are frequently condemned as a threat to democracy, since they would re-distribute quasi-legislative powers to judges, thus compromising the "separation of powers."[261] After all, judges are usually not subjected to electoral monitoring, and thus, do not have to answer for their decisions to the people they affect. Some argue that judges should not be allowed to circumvent traditional political discourse mechanisms by autocratically deciding contentious issues,[262] such as, for instance, same-sex marriage.

Moreover, bringing a case before a court often involves high costs and requires extensive knowledge of the legal system. Therefore, "judicial law making" would favour the elite and potentially disadvantage the lower classes.[263] Ran Hirschl, for instance, contends that the origins of judicial empowerment are connected to hegemonic processes, and that thus, political power-holders are the ones that most likely will benefit from expansive juridical powers.[264]

For these and other reasons, critics have dubbed "governing through the courts" a deeply anti-democratic process. Since these criticisms are chiefly concerned with the democratic legitimacy of "judicial decision making" (this also underlies the claim that minorities are shut out by such a practice, in favour of elites), I will summarise them under the term "separations of power objection" to using the courts for social change.

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[259] For an overview of the most relevant positions, see: Bellamy (ed), *Constitutionalism and Democracy*.

[260] For a more detailed account on judicial review, see, e.g., Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*.

[261] Miguel Schor, 'Mapping Comparative Judicial Review' (2008) 7 Washington University Global Studies Law Review 257, 270.

[262] Bellamy, *Political Constitutionalism*, 32; Ely, 'Toward a Representation-Reinforcing Mode of Judicial Review', 485-487.

[263] Bellamy, *Political Constitutionalism*,18, 54.

[264] Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*, 39.

Defenders of (constitutional) judicial review however have pointed out, among other things, that even non-majoritarian institutions such as courts can legitimize their exercise of quasi-legislative power by achieving good results: this means that they should not be judged regarding whether they enable egalitarian access, but rather, according to whether they actually manage to produce just and egalitarian outcomes.[265] In other words, if a court, albeit an elitist institution, affects the legal order in a positive way – for instance, by promoting policies that lead to a higher level of equality – then, the lack democratic legitimation could be regarded as "healed." And since high courts often operated on the basis of constitutional principles such as fairness, equality or dignity, chances were high that they actually might reach better results than legislatures, which are much more dependent on majoritarian and populist biases.[266] Such a consideration is of course especially relevant for minorities who need to be able to defend certain fundamental rights and values even against the majority.[267]

Critical voices again contend that there was no guarantee that courts were better suited to define and protect these rights than democratic legislatures.[268]

A powerful account of the positive role that courts could play comes from scholars such as Susan Sturm: while she refutes formalistic approaches which view the courts as mere enforcers of the law, she is also critical of the notion that judges are capable of functioning as an "oracle"

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[265] Scharpf, for instance, draws a distinction between input legitimacy and output legitimacy: the arguments here would be an example of output legitimacy. Scharpf, *Governing in Europe: Effective and democratic?*, 6. Majone and Moravcsik also argue (in the context of the debate around the democratic deficit of the EU) that substantive criteria should be taken into account when assessing the legitimacy of institutions. Majone, 'Europe's "Democratic Deficit": The Question of Standards'; Moravcsik, 'In Defense of the Democratic Deficit: Reassessing Legitimacy in the European Union'. See also: Stefano Bartolini, 'Should the Union Be 'Politicised'? Prospects and Risks' (2006) Notre Europe Paris 1, 18.

[266] See, e.g., Fiss, *The Civil Rights Injunction*, 7.

[267] Dworkin is a famous defender of the view that certain rights have to trump majority rule; see, e.g., Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977); as is Rawls, e.g., John Rawls, 'The Idea of Public Reason Revisited' (1997) 64 The University of Chicago Law Review 765.

[268] Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale Law Journal 1346, 1369, 1395; Bellamy, *Political Constitutionalism*, 21; Ely, 'Toward a Representation-Reinforcing Mode of Judicial Review', 485.

of the real meaning of fundamental conceptions of justice.[269] Instead, she promotes an understanding of courts as mediators and catalysts for reform; since the necessary measures in a given case are contingent on a multitude of factors which often transcend the assessment capabilities of a court, a judgment can serve to destabilise the status quo[270] and demand creative problem solving of other stake-holders.[271] Thus, a court decision often functions not as a replacement of a legislative or executive act, but rather, as a kind of evaluative veto and call to action: Not like this, try again.

### 2.3.1. Legal Interpretation as Democratic Participatory Exercise

In 1983, Robert Cover published his article "Nomos and Narrative,"[272] arguing in favour of an adjudication that engages deeply with the arguments brought before the court by the parties, as a form of legitimation of their exercise of judicial power.[273] Cover describes how different groups within society have their own narratives of what law is (or should be).[274] This leads to a

[269] Here, Sturm critically refers to Owen Fiss' scholarship. Susan Sturm, 'Equality and the Forms of Justice' (2003) 58 University of Miami Law Review 51, 58.

[270] James S Liebman and Charles F Sabel, 'Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform' (2003) 28 New York University Review Law & Social Change 183, 214. Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change'.

[271] Sturm, 'Equality and the Forms of Justice', 66. Basically, this approach is related to the "experimentalist governance" movement, which recognises the emergence of new institutional frameworks and seeks to apply creative methods for involving civil society in decision-making processes, e.g., by finding ways to engage NGOs, experts, and other stake-holders. According to this approach, the courts (among other things) exert a destabilising effect on the status quo that makes room for reform. Charles Sabel is a prominent proponent of this approach; see, e.g., Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism* (Harvard University Press 2006). For the European context, scholars such as Joanne Scott and Gráinne de Búrca have partly dealt with this approach: Joanne Scott and Susan Sturm, 'Courts as Catalysts: Re-thinking the Judicial Role in New Governance' (2006) 13 Columbia Journal of European Law 565; Gráinne de Búrca, 'New Governance and Experimentalism: An Introduction' (2010) 2010 Wisconsin Law Review 227. See also: Charles F. Sabel and Jonathan Zeitlin, *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford University Press 2010).

[272] Cover, 'Nomos and Narrative. Foreword to the 1982 Term of the Supreme Court'.

[273] Ibid, 57.

[274] Ibid, 26.

multiplicity of legal meanings within a society bound by the same legal system.[275] The court is a place where these meanings can be negotiated.

Seyla Benhabib has addressed the way in which citizens can make use of the law and the courts for political debate by challenging and re-negotiating legal meaning. In the context of international law, she shows how international treaties can in fact empower citizens by "creating new vocabularies for claim making, as well as by opening new channels of mobilization for civil society actors who become part of … hegemonic resistance."[276] She calls process of appropriating legal texts and utilising them in the course of local struggles "democratic iterations:"

> "By democratic iterations, I mean complex processes of public argument, deliberation, and exchange through which universalist rights claims are contested and contextualized, invoked and revoked, posited and positioned throughout legal and political institutions as well as the associations of civil society. In the process of repeating a term or a concept, we never simply produce a replica of the first intended usage or its original meaning; rather, every repetition is a form of variation."[277]

While Benhabib refers to the use of international legal instruments by local actors, her assessment contains insights that are also useful in a more general sense. Her statements hold true for law in general; law receives its democratic legitimacy by being debated, used, adapted and accepted by the public. Without these processes of appropriation, law is reduced to violence.[278] This also requires the existence of spaces for carrying out such discussions. Spaces that also grant respective debates a degree of authority and influence, since otherwise, such discussions would remain purely academic and could not provide democratic legitimacy to the

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[275] Ibid, 25.

[276] Seyla Benhabib, 'Claiming Rights across Borders: International Human Rights and Democratic Sovereignty' (2009) 103 American Political Science Review 691, 696.

[277] Ibid, 698.

[278] In the sense of Cover, see below.

texts in question.[279] Thus, the courtroom is a site of political dialogue where different groups can defend their particular legal understandings. In this sense, law has an integrative function, and courts have the task to accommodate different perspectives and needs by taking the distinct interpretations of law (narratives) of a given societal group into account. These narratives can exercise a "jurisgenerative" force, creating legal meaning.[280]

Cover therefore criticises a court that does not engage in the hermeneutic process, but simply rests its decision on the authoritative force of the state, as "jurispathic."[281] A court's silence is a form of violence that is destructive:

> "If we think of [legal] interpretation [during adjudication], unrealistically, as the mere offering of disembodied doctrine, the coercion of silence … would rest on a claim that courts ought to possess the unique and exclusive power to offer interpretations. This is the 'argument of force in its worst form,' illegitimate as interpretative method."[282]

Here, Cover turns the normative assumption that judicial restraint is the *least intrusive* and *most democratically legitimate* interpretative mechanism (which underlies the "separation of powers objection") on its head. Judicial deference is revealed as recourse to pure and unreasoned power (or violence).[283]

Cover recognises the "countermajoritarian difficulty" – the democratic dilemma posed by judicial review: By abolishing a legal rule imposed by the legislator, a (supreme) court exercises control not on behalf, but against the prevailing majority. [284] He concedes that it is a complicated conundrum. However, he holds that

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[279] The function of "democratic iterations" to provide democratic legitimacy is also discussed by Seyla Benhabib. Benhabib, 'Claiming Rights across Borders: International Human Rights and Democratic Sovereignty'.

[280] Cover, 'Nomos and Narrative. Foreword to the 1982 Term of the Supreme Court', 11.

[281] Ibid, 53.

[282] Ibid, 48.

[283] Ibid, 57.

[284] Alexander Bickel, *The Least Dangerous Branch* (Bobbs-Merrill 1962), 16-18.

> "it is difficult to ignore the fact that the tie between administration and coercive violence is always present, while the relation between administration and popular politics may vary between close identity and the most attenuated of delegations. The jurisdictional principles of deference are problematic precisely because … they align the interpretive acts of judges with the acts and interests of those who control the means of violence. The more that judges use their interpretive acts to oppose the violence of the governors, the more nearly do they approximate a 'least dangerous branch' with neither sword nor purse, and the less clearly are they bound up in the violent suppression of law. Indeed, the quality of their interpretive acts and the justifications for their special role – that is, the hermeneutics of jurisdiction – are all that judges have to play against the violence of administration."[285]

A refusal to consider the narratives advanced by the parties and thus to engage, together with them, in a hermeneutic discussion means asserting power by violence as the only justification for a verdict. Cover makes it evident that alleged abstention from judging is an illusion;[286] it means automatically choosing the "official" (hegemonic) narrative over other narratives, without reasoning or other forms of legitimizing justification. Law is infused with ideology;[287] exercising restraint therefore cannot possibly be equalled with refraining to act ideologically. Rather, it is the ultimate ideological act: the enforcement of existing power structures without justification.

Indeed, to assert that this was the type of judging which most respects "the will of the people"[288] seems almost ironic when considering that the parties in a court case are, after all, part of the *polis* which the state (and judges as part of the state) aim to represent. As Siegel writes, "[m]obilized citizens understand themselves as authorized to speak to constitutional questions

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[285] Cover, 'Nomos and Narrative. Foreword to the 1982 Term of the Supreme Court', 57.

[286] Here, he is in line with constructivist accounts related earlier. See, e.g., Anthony Giddens, *Central Problems in Social Theory: Action, Struggle, and Contradictions in Social Analysis* (University of California Press 1979), 88-9.

[287] See discussion in Section 2.2., *infra* at 86.

[288] As has been asserted not only by legal positivists and formalists, but also by other scholars, e.g., by Bellamy, *Political Constitutionalism* or Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*.

and employ a diverse array of techniques to contest the actions of government officials and other citizens with whom they disagree."[289] The participation of civil society in the meaning creating interpretation of legal rules is not only desirable – it is a prerequisite for democracy. Otherwise, institutions such as constitutional courts would lose their significance, being reduced to executive organs of the administration and thus, undermining the fundamental democratic idea of checks and balances.[290]

There is a point to be made that judges are aware of the responsibility they carry. In his book "The Judge as a Political Theorist," David Robertson gives an intriguing account on the role and activity of judges,[291] rejecting explanations that look into the personal sphere of the judge to find reasons for the political element in (constitutional) interpretation and judging, such as, for instance, notions of behavioural analysis or agenda-driven motivations[292] – without, however, collapsing into the antiquated formalism of theories that assume a "neutral" constitutional interpretation is actually possible. Since decisions on constitutional issues more often than not require the evaluation of values (this is especially true in the area of anti-discrimination),[293] value judgements, which transcend the pure letter of the law, are inevitable.[294] However, this doesn't mean that judges act arbitrarily, without legal constraints whatsoever, or resort to legal doctrine after already having made up their mind, in order to retroactively justify their personal opinions. According to Robertson, judges act like appliers of political theory (rather than, for instance, like politicians).[295] In other words, judges – who, after all, are usually experienced legal thinkers – are guided by a complicated apparatus of doctrine, precedent and legal

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[289] Siegel, 'The Jurisgenerative Role of Social Movements in United States Constitutional Law', 10.

[290] Cover, 'Nomos and Narrative. Foreword to the 1982 Term of the Supreme Court', 57.

[291] David Robertson, *The Judge as Political Theorist. Contemporary Constitutional Review* (Princeton University Press 2010).

[292] Ibid, 24.

[293] Mark Bell, 'The Principle of Equal Treatment: Widening and Deepening' in Paul Craig and Gráinne de Burca (eds), *The Evolution of EU Law* (2 edn, Oxford University Press 2011), 638: „Given the expanding remit of EU anti-discrimination legislation, it seems inevitable that the [ECJ] will be confronted with topical controversies, such as … conflicts between discrimination grounds."

[294] See also: Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005), 176.

[295] "[I] take judicial argument seriously as one of the major, if not the sole, determinant of decisions courts make." Robertson, *The Judge as Political Theorist. Contemporary Constitutional Review*, 21.

methodology,[296] within which they navigate when looking for direction and which they respect when making decisions. The parameters by which they operationalize this body of legal thought are legal reasoning and argumentation. As Robertson puts it: "Politicians negotiate; judges argue."[297]

There are certainly a number of critiques that can be brought forward here, especially regarding the fact that Robertson's account might be a little too oblivious to personal elements which influence judging, such as (unconscious) biases or personal interests;[298] however, it can nonetheless provide useful perspectives for analysing jurisprudence. After all, there *is* a doctrinal methodology of working with precedent and jurisprudence that cannot easily be ignored by judges; even if they chose to do so, they would have to provide convincing arguments for this. This is especially true because inconsistency in decision-making will usually draw extensive criticism by scholars, practitioners and fellow judges, whether on the appellate level or in personal interactions; especially if inconsistency occurs in areas which are under the heavy scrutiny of the public eye. The more "political" a subject area is – in terms of being ambiguous and hotly debated – the more judges might have to argue thoroughly and convincingly in order to shield themselves from accusations of bias, political agendas or plain inaptitude.

This is not to say that non-legal factors have no influence whatsoever on judges' reasoning (they surely do to a certain degree) – but judges in any case will usually not simply ignore convincing legal arguments; they have to at least address and refute them.

[296] Ibid, 282.

[297] Ibid, 36; see also the notion of the "thoughtful judge," as advanced by Aharon Barak in his seminal work Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2006).

[298] This was a point made especially by the legal realist movement. Leiter, 'Legal Realisms, Old and New'.

## 3. Theoretical Foundations of Law Interpretation and Application – A Comparison of Theories

If judges rely on legal arguments when deciding a case, and actually take this discourse seriously – perhaps unlike politicians who might be driven by more mundane interests, such as maximizing popular support for a need of votes (something which judges, due to their particular position, need not engage in)[299] – then, this would support a range of legal argumentation possibilities for advocates.

In this section, I will expand on these issues by looking at different theories on the nature of adjudication, and subsequently evaluate the possibility of *agency* for litigants within the courtroom.

### 3.1. Positivism, Formalism and Natural Law Theories

In the early 20th century, Austrian scholar Hans Kelsen – nowadays known as one of the fathers of legal positivism – wrote: "[E]very legal act implementing a norm – be it an act of law creation or an act of pure implementation – is determined only in part by this norm and remains indeterminate for the rest."[300] Here, Kelsen recognises the (partial) indeterminacy of legal rules, meaning that their content is, to a considerable degree, not defined by the rules themselves. He goes on to state:

> "the norm to be implemented is simply a frame within which several possibilities of implementation are given, and every act that stays within this frame, filling it out in some possible sense, is in conformity with the norm. … Interpreting a statute, then, leads not necessarily to a single decision as the only correct decision but possibly to several decisions, all of them of equal standing measured solely against the norm to be applied, even if only a single one of them becomes, in the act of the judicial decision, positive law. That a judicial decision is based on a statute means in truth only that the decision stays within the frame the

[299] Robertson, *The Judge as Political Theorist. Contemporary Constitutional Review*, 36.

[300] Kelsen, 'On the Theory of Interpretation', 128.

statute represents, means only that the decision is one of the individual norms possible within the frame of the general norm, not that it is the only individual norm possible."[301]

With this analysis, Kelsen steers away from formalistic explanations of law application; indeed, he expressly rejects the view that "interpretation is cognition of the positive law."[302] Kelsen constructs this view as an antithesis to the so-called "Begriffsjurisprudenz" (jurisprudence of concepts), a theory that understands law as a closed system of concepts that is logically coherent to the degree that new normative claims can be inductively found by the *correct* interpretation of higher-order norms. In other words: this theory assumes that there is but one correct interpretative solution for any norm that has to be drawn from the legal order itself.[303]

Kelsen recognises that legal interpretation does *not* mean detecting the (unique) meaning of a norm within the legal text itself.[304] Interpretation, then, is a) inherently necessary to make sense of a rule, and b) not just a method to *correctly understand* the legal text.

Kelsen also asserts that each norm holds a multitude of possible interpretations that cannot be ranked according to their accuracy. *How* a norm is interpreted is not so much a question of law, says Kelsen, as a question of legal policy ("Rechtspolitik").[305] This is not, according to Kelsen,

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[301] Ibid, 129.

[302] Ibid, 132.

[303] However, the term "Begriffsjurisprudenz" was mostly used in a polemic or derogatory way to point out the cognitive naïveté of extreme formalism. Enzyklopädie zur Rechtsphilosophie *Begriffsjurisprudenz* IVR (Deutsche Sektion) und Deutsche Gesellschaft für Philosophie, .

[304] "By applying a statute, a judge will possibly turn to "other norms that can now make their way into the law-creating process, the norms, namely, of morality, of justice – social value judgments customarily characterized with the catch-phrases 'welfare of the people', 'public interest', 'progress', and the like." Kelsen, 'On the Theory of Interpretation', 132. Niklas Luhmann writes that each legal text requires interpretation to the extent that it only comes to life in the light of interpretation. (Niklas Luhmann, *Das Recht der Gesellschaft* (suhrkamp 1993), 256.

[305] Kelsen, 'On the Theory of Interpretation', 131-132.

the hallmark of bad judging or judicial activism – it is rather a necessity, an inherent characteristic of law application. Judges therefore always create law.[306]

Nowadays, this particular view of Kelsen is still not without contention. Interestingly, modern legal positivism[307] – the theoretical movement that Kelsen is most often associated with – seems somewhat uneasy with the concept of indeterminacy of legal rules. However, legal positivism – like most legal theories – can be understood as a spectrum rather than a clear-cut framework, allowing for a number of different constructions and overlapping, on many sides, with other legal theories, as I will illustrate.

In his 1958 article "Positivism and the Separation of Law and Morals,"[308] HLA Hart discusses the common theories on legal positivism as well as its basic premises and criticisms. Among these premises are the separation of law and morals, the "contention that laws are commands of human beings," and the contention that moral judgements are noncognitive.[309] Furthermore, Hart writes that the analysis or study of law needs to be distinguished from non-legal inquiries, such as the examination of the origins of law, sociological analysis or other social phenomena. Law, according to Hart, is a "'closed logical system' in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies, moral standards, ..."[310]

These last two contentions are especially interesting, because they illuminate the positivist view that law is a closed discourse, ontologically distinct from other knowledge-generating systems.

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[306] Although they can only exert this power within the framework of the particular legal norm. Ibid, 131. David Robertson seems to make a similar point when he claims that judges act in a similar way to Appliers of political theory. Robertson, *The Judge as Political Theorist. Contemporary Constitutional Review*, 21.

[307] Famous representatives of this theory are, among others, Thomas Hobbes, Jeremy Bentham, Adolf Merkl, HLA Hart, Georg Jellinek, John Austin, or Joseph Raz. Sociologists, such as Niklas Luhmann, have also drawn on legal positivism in his "system theory," describing law as a social system which is

[308] HLA Hart, 'Positivism and the Separation of Law and Morals' (1986) 71 Harvard Law Review 593.

[309] Ibid, footnote 25, 601.

[310] Ibid.

Moral or ethical assessments particularly are "outside" of law.[311] Consequently, law and legal determination are, can – or should be – shielded from outside influences. It is important to note that positivism usually does not dispute that law is the manifestation of dominant ideology or culture – but while this impacts the formation of a legal norm, it does not inform the normativity of a legal norm once "law" is established, nor the workings of the legal system.[312] Therefore, this kind of information is relevant only to the degree that they can be translated into legal language, since legal activity has its own intrinsic logic and methodology. Niklas Luhmann, for instance, describes law as a social system, claiming that "outside" influences – such as morality, ideology, etc. – cannot create normative legal significance *per se*; a legal system is "self-referential" in that its normativity can only be drawn from within the legal system itself. In order to define this normativity (which is essentially the exercise of law application), it is only permissible to draw on sources from within the legal system. This is how the system perpetuates itself ("autopoiesis").[313]

While judicial discretion is generally recognised as a fact of law application, positivists believe that this discretion mostly plays a role when subsuming the facts of a particular case to fit the legal rule. In this vein, HLA Hart distinguishes between the "core" and the "penumbra" of laws.[314] Simply put, the "core" of a legal rule contains the cases which a certain statute was intended to cover; its "penumbra" transcends the core, including cases which are not explicitly covered by its text, but encompassed by the rule, nonetheless.

For example, a case that touches the "core" of a legal rule might be quite straightforward – in this sense, a rule prescribing "no smoking inside" obviously applies if someone wants to smoke cigarettes in a room. Penumbra cases are not as clear: For example, is it ok to smoke in a covered patio?

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311 Gardner, 'Legal Positivism: 5 1/2 Myths', 202-203.

312 Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (Springer 1986), 4.

313 Niklas Luhmann, *Die Soziologische Beobachtung des Rechts* (Metzner 1986), 20.

314 Hart, 'Positivism and the Separation of Law and Morals', 12.

Here, according to Hart, the judge influences the existing rule by using her discretion and thus specifying the rule's scope.[315] It is not clear, however, what this means for law in general – particularly, whether (and to which degree) judicial interpretation changes the meaning of the law itself.[316] Moreover, it is arguable that legal positivism would call on judges to exert their judicial discretion as cautiously as possible, careful not to introduce extra-legal values into their assessment.[317] This of course presupposes that there is the possibility of "more" and "less" interpretation, or in other words: one interpretation that is closer to the *correct understanding* of the legal rule, and one that moves away from it. However, the belief that a "core" of a rule exists which can be extracted from the legal system itself already seems to limit Kelsen's view on law application which, after all, assumes that *every* legal rule *always* enables a multitude of different, *equally valid*, interpretations.[318]

Formalist theories, such as textualism, originalism or historical interpretation accounts, display certain similarities to positivism in their main (or sole) focus on legal sources as knowledge generators in law. Strict formalists assume that the correct legal interpretation can be derived either from the meaning of the words (textualism) or from the will of the legislator (originalism or historical interpretation), therefore largely denying or ignoring the questions posed by

[315] Ibid, 122, 134. Hart holds that the "open texture" of language basically makes interpretation necessary; every rule contains the "duality" of a core and a penumbra.

[316] Positivists themselves disagree on this issue. Leslie Green, 'Legal Positivism' Stanford Encyclopedia of Philosophy <http://plato.stanford.edu/entries/legal-positivism> accessed 2 February 2015.

[317] Ibid.

[318] "From the standpoint of the positive law, however, there is no criterion on the basis of which one of the possibilities given within the frame of the norm to be Applied could be favoured over the other possibilities… Every method of interpretation developed thus far invariably leads merely to a possible result, never to a single correct result. … Even the principle of the so-called balancing of interests is merely a formulation of the problem here and not a solution." Kelsen, 'On the Theory of Interpretation', 130. "The notion underlying the traditional theory of interpretation is that in so far as the prescribed legal act is indeterminate, the determination not provided by the applicable higher-level norm can be arrived at through some sort of cognition of existing law. This self-contradictory notion flies in the face of the very assumption that interpretation is possible. For if a norm can be interpreted, then the question as to which is the 'correct' choice from among the possibilities given within the frame of the norm is hardly a question of cognition directed to the positive law; it is a problem not of legal theory but rather of legal policy." Ibid, 131.

indeterminacy.[319] Christopher C. Langdell, dean of Harvard Law School in the late 19th century, famously compared law libraries to laboratories, and law as an academic discipline to the natural sciences.[320] In essence, formalists believe that the "law is rationally determinate" in that there is "one and only" correct outcome in every jurisprudential decision, and that this outcome can be derived from the law itself; and second, that adjudication is "autonomous from other kinds of reasoning" in that it excludes extra-legal considerations and only moves within the law.[321]

Formalism overlaps with positivism in certain ways, but it also importantly differs from it. One commonality is the belief that law, in essence, is (or should be) a closed system, in the sense that adjudication is reasoning rooted in the law, and the law alone. However, while positivism is somewhat opposed to value judgements about the law, formalism suggests that there is a "correct" or "better" answer to a legal dilemma.[322] This also means that the legitimate discretion of judges is necessarily limited (or even disappears); there is only one correct answer, and it is the judge's duty to find it. Moreover, formalists contend that it is actually possible to deduce the normatively "right" answer from the law itself.[323]

Some scholars suggest that if the legal rules themselves don't determine the right choice of answer, a judge might refer to core principles of the legal order, "universal norms" which stand

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[319] For an overview, see, e.g.: Frederick Schauer, 'Formalism' (1988) 97 Yale Law Journal 509; Daniel A. Farber, 'The Originalism Debate: A Guide for the Perplexed' (1989) 49 Ohio State Law Journal 1058, 1086; Antonin Scalia, 'Common-Law Courts in a Civil-Law System: The Role of United Stats Federal Courts in Interpreting the Constitution and Laws' in Antonin Scalia Amy Guttmann (ed), *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press 1997).

[320] Richard A. Danner, 'Law Libraries and Laboratories: The Legacies of Langdell and His Metaphor' (2015) 107 Law Library Journal 7. Contemporary legal formalists include Frederick Schauer, the late U.S. Supreme Court Justice Antonin Scalia, and, to some degree, Ronald Dworkin, although he has more often been labelled an interpretivist.

[321] Leiter, 'Legal Formalism and Legal Realism: What Is the Issue?', 111.

[322] In his earlier work, Dworkin contends that the law, if it is interpreted correctly, actually holds an answer for every legal dilemma – not in a "moral" sense, but in a sense that is most in line with the law itself. Dworkin, *Taking Rights Seriously*, 210.

[323] Richard A. Posner, 'Legal Formalism, Legal Realism and the Interpretation of Statutes and the Constitution' (1986) 37 Case Western Reserve Law Review 179, 181.

above regular laws.[324] This particular vision of formalism overlaps with natural law theories, which also build on the idea that there are general principles, which transcend the legal norms themselves.[325]

Natural law concepts date back to antiquity. Thomas Aquinas used religiously infused natural law ideas in his works, and Hugo Grotius applied natural law as a basis for his theories of international law. Scholars such as John Locke reinterpreted these concepts in line with ideas akin to the enlightenment. [326] They hold that there is a set of ethical rules existing outside of human made law ("natural law"), which law should try to embody. Judges, when interpreting law, should take into account the values saturating these absolute principles. Consequently, natural law theories problematize legal positivism's absence (or even rejection) of moral considerations in law.[327]

Both of these views (formalism and natural law theory) relegates interpretation to a mere attempt to decipher a legal will that is greater than the judge's own perception, a kind of pre-existing "essence" or "spirit" of the law. In a way, the judge becomes a mere instrument, the prophet of this "spirit" of the law. Her task is the proclamation of this spirit; the method to get there is

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[324] Alexy, for instance, distinguishes – in the context of constitutional rights – between rules and principles, claiming that they are qualitatively different; principles are "optimization requirements," whereas rules (which may satisfy, to a certain degree, these requirements) are straight-forward norms that are either fulfilled, or not. Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002), 47, 48. However, Alexy contends that there may be more than just one right answer. Mattias Kumm and Victor Ferreres Comella, 'The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union' (2005) 3 International Journal of Constitutional Law 473, 210.

[325] This is one of the main points of contention legal positivists hold against both some accounts of formalism, as well as natural law theories.

[326] Modern representatives of natural law theories are, e.g., John Finnis, Brian Bix or Lon Fuller. To some degree, Gustav Radbruch and Robert Alexy can also be seen as representatives of natural law theories, although some would call Radbruch a positivist, and Alexy a formalist. Some would argue that Ronald Dworkin's work also belongs to this category, although he has also been labelled a formalist, and most often an interpretivist. Nowadays, natural law accounts play a role in human rights theory and international law, as well in the context of the debate around "unjust law." Finnis, 'Natural Law Theories'.

[327] As mentioned, natural law concepts overlap to a certain degree with some formalist accounts: "The first 'formalist' view – call it 'Natural Law Formalism' – is an instance of a standard 'natural-law' canard according to which there is always a pre-existing answer to every legal question, usually one that requires moral reflection (or, in earlier forms, insight into the divine will) to discover." Leiter, 'Legal Formalism and Legal Realism: What Is the Issue?', 115.

interpreting the law correctly.[328] The spirit itself is presupposed, like an almost metaphysical, unfailing fact; the judge, however, might make mistakes while trying to decipher it.[329]

Neither formalism, natural law theory, or positivism seem to engage significantly with the intersubjectivity of law – namely the fact that law is not neutral, but rather, affects different groups differently.[330] Nor do they account for the role of litigants and/or third parties in judicial proceedings. The focus lies on the judge and her cognitive labour when determining the content of a rule. According to these views, social change advocates might have very limited possibilities to convince by argumentation, since the answer to a legal problem would ostensibly be found in (or near) black-letter law – supplemented by the exertion of judicial discretion – and judges would reach their verdict by meditating over what the law actually is, rather than taking into account novel approaches or persuasive arguments.

The cognitive premises of positivism and formalism (as well as natural law theory, to some degree) are critically challenged by a number of other theoretical streams, such as legal realist and critical law movements.

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[328] However, most (modern) formalist accounts would shy away from seeing the judge as a mere mechanical appliers of laws – they agree that applying the law "correctly" is a difficult and complex undertaking. Ibid, 111-112.

[329] Interestingly enough, this account about the law seems to be the one that resonates most with the greater public. Ibid.

[330] This has been one of the main critiques of critical legal approaches, as I will explain in the following part. See also in the context of gender law, Bartlett, 'Feminist Legal Methods'; in the context of critical race studies, see, e.g.; Williams, *The Alchemy of Race and Rights*.

[330] Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End Postmodern Legal Movements: Law and Jurisprudence at Century's End* , 224-226.

## 3.2. Law as Language and Social Interaction: Legal Realism and Critical Legal Approaches

Legal Realism challenges the epistemological premises of theories such as legal positivism or formalism as being fundamentally flawed.[331] Thus, it can be seen as the basis for the so-called "law and" movements, most famously "law and sociology," but also "law and literature," "law and economics," "law and psychology" and others. Realism also importantly influenced modern critical approaches to law, such as Marxist theories, Critical Legal Studies (CLS) or critical feminist or race studies.

The emergence of "legal realism" correlates with the "linguistic turn" in many academic disciplines around 1940.[332] Ludwig Wittgenstein can be particularly credited for this development; he thoroughly challenged the idea that texts (and consequently, legal texts) could be understood separately from the communicative act (for instance, the act of judging) as epistemologically false.[333]

Even earlier, philosophy of science had also started to attack the assumption that "truth" exists irrespective of social interaction. Its constructivist epistemology and ontology resonated with language philosophy, enriching the debate with a scientific perspective. Ludwig Fleck, an avantgardist of philosophy of science, makes a point as to the constructedness of what we perceive as true: A fact, he contends, is created rather than "found." The act of human perception changes it – or, put in other words: It is not possible to perceive a scientific fact *purely and objectively*, because it does not exist in a *pure state* – the concept of a *pure state* is in itself a construction. Thus, his findings reflect the basic assumptions of critical legal theories:

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[331] There are two main streams in legal realism, one stemming from the USA and represented by Jerome Frank, Roscoe Pound, Karl Llewellyn, among others; the other one comes from Scandinavia and is based on ideas by Axel Hägerström and developed by Karl Olivecrona, Alf Ross, Anders Vilhelm Lundsted, and others. Whereas the American variant of legal realism was mostly developed by legal scholars, the Scandinavian one is rooted in philosophy rather than law. Leiter, 'Legal Realisms, Old and New'. For an overview of old and new legal realisms, including, e.g., the Italian school of new legal realism, see ibid.

[332] Hutton, *Language, Meaning and the Law*, 54. Hutton argues that Wittgensteinian ideas had been especially influential in philosophy of law, ibid, 55.

[333] Ludwig Wittgenstein, *On Certainty* (GEM Anscombe 1969 edn, Blackwell 1951), para 501.

> "Disregarding the question of whether cognitions are, from an individual standpoint, truth or error, of whether they seem to be understood or misunderstood – they are rambling within society, are polished, formed, strengthened or weakened, and influence other cognitions, terminologies, perceptions and modes of thinking. After a journey within society, a cognition often returns remarkably changed to its issuer – and even *he* sees it differently now, does not recognise it as his own or (as it often happens) believes to have seen it *originally* in its present form."[334] ***(emphasis added)***

Consistent with this view is language philosopher JL Austin's ground breaking work on speech acts.[335] Austin initially distinguished "constatives" from "performatives" – constatives being declarations of fact, whereas performatives constitute facts (e.g., "You are not allowed to smoke!" creates a fact, namely a prohibition). Eventually, he gave up on this distinction, recognising that every kind of communication shapes meaning.[336] Translated to law, this means that courts never just *apply* law; they always also *produce* law.[337] Consequently, there cannot be such a thing as judicial restraint, since every judgment is necessarily an act of law making. This, of course, seems to resonate (to a certain degree) with Kelsen's assessment of adjudication:

> "Interpreting a statute, then, leads not necessarily to a single decision as the only correct decision but possibly to several decisions, all of them of equal standing measured solely against the norm to be applied, even if only a single one of them becomes, in the act of the judicial decision, positive law. That a judicial decision is based on a statute means in truth only that the decision stays within the frame the statute represents, means only that the decision is one of the individual norms possible within the frame of the general norm, not that it is the only individual norm possible."[338]

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[334] Ludwig Fleck, *Entstehung und Entwicklung einer wissenschaftlichen Tatsache* (suhrkamp 1980), 58-59, in my own translation. Thomas Kuhn, often named as one of the most significant philosophers of science of the 20th century, actually based a lot of his theories on Fleck's work. Wojciech Sady, 'Ludwig Fleck' Stanford Encyclopedia of Philosophy (2012) <http://plato.stanford.edu/entries/fleck/#9> accessed 2 February 2015.

[335] JL Austin, *How To Do Things With Words* (Clarendon Press 1962).

[336] Ibid, 138.

[337] On this issue see, e.g., Ingo Venzke, 'The Role of International Courts as Interpreters and Developers of the Law: Working out the Jurisgenerative Practice of Interpretation' (2011) 34 Loyola International and Comparative Law Review 99, 116.

[338] Kelsen, 'On the Theory of Interpretation', 129.

Legal realism can be understood as embracing the indeterminacy of language and thus, law;[339] in this sense, it draws from language philosophy, semiotics, hermeneutics, or philosophy of science, among others.[340] It recognises that law is a social phenomenon, and holds that its creators and appliers are as influenced by current trends, beliefs and personal opinions as anyone else. Neither do they stand outside of history, nor outside of society. According to realist scholars, the judges' own views and political convictions, many of them subconscious, will invariably inform their decisions.[341] Similarly, Jerome Frank, a famous American realist of the early 20th century, took issue with the concept of legal certainty as one requiring judges to merely "execute" the law – not from a normative standpoint, but on cognitive grounds:

> "If … one has a powerful need to believe in the possibility of anything like exact legal predictability, he will find judicial law making intolerable and seek to deny its existence. Hence the myth that the judges have no power to change existing law or make new law: it is a direct outgrowth of a subjective need for believing in a stable, approximately unalterable legal world – in effect, a child's world."[342]

The movement of "Critical Legal Studies" (CLS) emerged in the 1970s, growing out of American Legal Realism and serving as an umbrella term for a colourful mix of different approaches – such as, *inter alia*, post-colonialist theories, Marxist and Marxist-inspired theories, critical race, feminist and queer studies, or cultural relativist or constructivist accounts. The common denominator of these approaches might be the view that law, as part of our social system, is context-dependent and ideological.[343]

Critical Legal Studies emphasized the radical indeterminacy of legal rules, a view it shares with legal realism. Notably, CLS' assessment of law being incapable of predicting the outcome of a

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[339] Hutton, *Language, Meaning and the Law*, 12.

[340] See, e.g., Gadamer, *Truth and Method*; Roland Barthes, *Mythologies, translated by Anette Lavers* (Paladin 1957/1972); and others.

[341] Benjamin N. Cardozo, *The Nature of the Judicial Process* (2009 Classics edn, Cosimo 1921), 12.

[342] Jerome Frank, *Law and the Modern Mind* (2009 edn, Transaction Publishers 1930), 38.

[343] Hutton, *Language, Meaning and the Law*, 17.

specific legal problem led to the "indeterminacy debate" of the 1980s. According to CLS, political, social and cultural power structures have a much higher and influential stake in legal and judicial conflicts than black letter law or doctrine. Mark Tushnet, for instance, concludes his seminal work on Constitutional Analysis by remarking "[c]ritique is all there is."[344]

Importantly, critical theories show how social realities factor into both law making and application; structural inequalities therefore tend to be reflected in law and adjudication.[345] Alan Hunt writes that the CLS movement directs its "critical energies" against (neo)liberal assumptions about the workings of law, namely

> "the philosophy of legalism and the associated jurisprudence of legal positivism that has so decisively implanted itself in both the academic, the political and the popular discourse of contemporary capitalist democracies. The central features of this powerful doctrine of legalism are: (a) the separation of law from other varieties of social control, (b) the existence of law in the form of rules which both define the proper sphere of their own application and (c) which are presented as the objective and legitimate normative mechanism whilst other normative types are partial or subjective, and (d) yield determinant and predictable results in their application in the juridical process."[346]

Thus, CLS challenge positivist and formalist accounts of law and adjudication on many levels, including the cognitive, the normative and the political level; they tend to underline the social embeddedness of individuals (including judges), meaning that we all are encapsulated in a

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[344] Mark V. Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (Harvard University Press 1988), 318. Indeed, the roots of this view are much older: See, for instance, Frank, *Law and the Modern Mind*. See also: Peter Goodrich and David Gray Carlson (eds), *Law and the Postmodern Mind: Essays on Psychoanalysis and Jurisprudence* (University of Michigan Press 1998); Roberto M. Unger, *What Should Legal Analysis Become?* (Verso 1996); Peter Gabel, 'The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves'' (1984) 62 Texas Law Review 1563; among others.

[345] Hunt, 'The Theory of Critical Legal Studies'.

[346] Ibid, 4.

particular societal climate which impacts or even constructs our opinions, desires and identities, and structures our (inter)actions.[347]

In other words: Neither law nor its processes (including adjudication) are value-free or neutral. Indeed, legal activity is guided by and perpetuates existing societal hierarchical structures; therefore, conflicts are solved not according to black letter law, but according to prevalent dominance structures.[348] Since lawmakers, judges and lawyers are part of the elite, legal interpretation will be informed by the interests of the ruling class.[349] Courts, thus, appear likely to perpetuate existing power structures instead of challenging them.[350]

If it is true that law is a mere reflection and perpetuation of hegemonic ideology, this might preclude the possibility of wilful power shifts by legal means, specifically by litigation. In this vein, Audrey Lorde has famously postulated that "the master's tools will never dismantle the master's house,"[351] thus fundamentally questioning the mere endeavour of engaging hegemonic institutions in the achievement of social justice.

Critical Legal Studies still exert influence on a number of legal schools of thought. Marxist feminist scholars such as Catherine MacKinnon use similar analysis with regards to the law's perpetuation of patriarchy; law and its application as tools of the patriarchal elite would necessarily contribute to, rather than reduce, gender inequality.[352] More postmodern-inspired

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[347] For instance, feminist legal scholars show how patriarchy promotes male and hetero-normativity, meaning that allegedly "neutral" standards actually construct "normality" as a male and heterosexual reality. For example, the prototypical employee is seen as male, without childcare obligations, and married (to a woman). Since we are embedded in a society that accepts these standards as the norm, we often fail to grasp the underlying inequalities hidden within such concepts. As law is part of our social reality, legal rules tend to build on such concepts. Therefore, law sustains or even furthers inequality.

[348] This account is, of course, oversimplified. See, e.g., Mark Tushnet, 'Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles' (1983) 96 Harvard Law Review 781, 794-804, 809-15.

[349] Hutton, *Language, Meaning and the Law*, 15.

[350] Bellamy, *Political Constitutionalism*, 54. For a collection of essays on this issue, see, e.g., Kairys (ed), *The Politics of Law: A Progressive Critique*.

[351] Lorde, *Sister Outsider*, 112.

[352] Catherine A. MacKinnon, 'Feminism, Marxism, Method, and the State: An Agenda for Theory' (1982) 7 Signs 515.

approaches, such as critical race studies, postcolonial legal studies or postmodern feminist theories further infused the debate with discussions from their specific disciplines: They introduced concepts such as culture,[353] heteronormativity[354] or intersectionality,[355] employing approaches from discourse analysis,[356] psychoanalysis,[357] poststructuralism[358] and deconstruction.[359] However, these approaches usually discard the idea of an intentional, single hegemony of one "ruling class" as the basic motor for political interaction as too simplistic a depiction of the social order, while nonetheless accepting a reality of (a multitude of) hegemonic power struggles.[360]

In the following subsections, I will use the term "critical legal approaches" and "critical theories" as an umbrella term for these different schools of thought.

### 3.2.1. The Interplay Between Law and Social Reality

While critical theories show how social reality affects law, they also hold that the opposite is true: law shapes social reality. It alters the consciousness of its subjects by pretending that legal norms are *depicting* reality, instead of *contributing* to it – this process of "inversion" guarantees the perpetuation of unequal societal structures.[361]

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353 For an overview, see: Naomi Mezey, 'Law as Culture ' (2001) 13 Yale Journal of Law & the Humanities 35.

354 Importantly, Catherine A. MacKinnon analysed law as being intrinsically heteronormative. Catherine A. MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989).

355 For an overview, see: Emily Grabham and others (eds), *Intersectionality and Beyond. Law, power and the politics of location* (Routledge.Cavendish 2009).

356 For instance, the works of Michel Foucault.

357 See, e.g., Joseph Goldstein, 'Psychoanalysis and Jurisprudence' (1968) 77 Yale Law Journal 1053; Goodrich and Gray Carlson (eds), *Law and the Postmodern Mind: Essays on Psychoanalysis and Jurisprudence*.

358 Hutton, *Language, Meaning and the Law*, 17.

359 Ibid, 17.

360 Jon Beasly-Murray, 'On Posthegemony' (2010) 22 Bulletin of Latin American Research 117, 119.

361 Hutton, *Language, Meaning and the Law*, 16.

The relationship between law and (social) reality can be best understood as synergetic, characterized by reciprocity; our legal system is shaped and guided by cultural, societal, gender and other conventions, but legal concepts in turn also forge our understandings of culture, society, gender, etc. This might become especially salient in Judith Butler's concept of performativity in the realm of gender, even though she does not particularly focus on law.[362] Her considerations are nonetheless useful in a legal context, because they examine the interactions of social practice – which obviously includes law and judicial activity – and the construction of reality, especially regarding LGBT contexts.

Butler argues that concepts such as "gender" or "sexuality" are created by being repeatedly performed in a certain way.[363] For instance, womanhood, or heterosexuality, are defined by the social practice of performing femaleness, or straightness, rather than by some metaphysical female or heterosexual essence;[364] consequently, these concepts are historical and culturally contingent. Dominant conceptions assert themselves (and thus, create reality) by being constantly replicated in all kinds of contexts.

This is of course also true for law. Law, according to critical scholars, operates with categories that are (a) necessarily a simplification of the diverse reality of human experience,[365] and (b) informed by imperialist, heterosexist, racist, etc. connotations.[366] Thus, the mere fact that law operates with categories can contribute to "reify gender" and other concepts by reflecting stereotypical notions of what it means to be a woman, or what marriage consists of, etc. Adjudication, according to CLS, tends to replicate these notions – for instance, when courts

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362 Which, in turn, was heavily influenced by JL Austin's views on language, as well as by Foucauldian discourse analysis, among others. Butler, *Gender Trouble*.

363 Ibid.

364 Ibid, 33-44, 185.

365 Regarding the reductiveness of categories, in the context of legal gender theory, see, e.g.: Robin West, 'Jurisprudence and Gender' (1988) 55 University of Chicago Law Review 1; Martha Minow, 'Justice Engendered. Foreword to the Supreme Court 1986 Term' (1987) 101 Harvard Law Review 10; Mary Joe Frug, 'A Postmodern Legal Manifesto (An Unfinished Draft)' (1991-1992) 105 Harvard Law Review 1045.

366 In the context of heterosexism, see, e.g., Catherine A. MacKinnon, 'Reflections on Sex Equality Under Law' (1990-1991) 100 Yale Law Journal 1285, as well as Frug, 'A Postmodern Legal Manifesto (An Unfinished Draft)'; Minow, 'Justice Engendered. Foreword to the Supreme Court 1986 Term'.

hold, over and over again, that marriage is a union of a man and a woman, marriage *is established as* a union between a man and a woman.

But if categories are the problem – how to mobilize for a disempowered group without perpetuating misconceptions and thus, essentializing the group in the process? Indeed, the analysis of CLS leads to a practical problem of representation, especially in the legal arena. Law change would become difficult or even obsolete, since the new categories that would be erected in place of the old ones would again oversimplify a complex social reality. Can law contribute to social change, or is the question alone a contradiction in terms?[367]

Mary Joe Frug addresses this conundrum in the context of feminism. Her brilliant article "A Postmodern Feminist Legal Manifesto" describes the way in which allegedly neutral law transports essentializing assumptions about women.[368] However, in her introduction, she warns against "eliminating 'women' as identifiable subjects who are affected by law reform projects"[369] – in other words, she criticises the notion that getting rid of the category "woman" would solve problems of female discrimination and essentialization within the law. She writes:

> "If, or when, the social construction thesis seems about to deconstruct the basic category of woman, its usefulness to feminism is problematized. How can we build a political coalition to advance the position of women in law if the subject that drives our efforts is 'indeterminate,' 'incoherent,' or 'contingent?'
>
> I think this concern is based upon a misperception of where we are in the legal struggle against sexism. I think we are in danger of being politically immobilized by a system for the production of what sex means that makes particular sex differences seem 'natural.' If my assessment is right, then describing the mechanics of this system is potentially enabling rather than disempowering; it may reveal opportunities for resisting the legal role in producing the radical asymmetry between the sexes."[370]

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[367] Elisabeth Holzleithner addresses the emancipatory potential of law (or absence thereof) in Holzleithner, 'Emanzipatorisches Recht: Über Chancen und Grenzen rechtlicher Geschlechtergleichstellung'.

[368] Frug, 'A Postmodern Legal Manifesto (An Unfinished Draft)'.

[369] Ibid,1052.

[370] Ibid,1051.

Frug exemplifies one of the core dilemmas of critical theories, which has subjected them to ardent critique. They have been accused for not sufficiently addressing the question of agency, and particularly political action.[371]

It has been pointed out that there is an intrinsic tension between critical theories' exploration of "subjectivity" which focuses mostly on phenomenological issues such as creation of consciousness and identity, and "structuralist" considerations that aim to explain systemic patterns.[372] While unveiling the naiveté of views that uncompromisingly believe in individual choice and thus downplay or ignore the constraints of social structures,[373] critical theories – particularly those committed to the exploration of questions of identity – often place emphasis on the personal experiences of individuals in the legal system, and their portrayal as subjects upon which the law is exercised. The question of agency thus remains in the dark – such as the question of an individual's (or a group's) possibility of political self-assertion.

A short anecdote might help to illustrate this point: A colleague of mine (back then, a law student inspired by Marxist and structuralist theories) approached his professor at Harvard – a brilliant scholar known for her outstanding critical legal track record – and asked her a simple question on a political issue (the specific topic is not important): "Which one do you think is the right approach, A or B?"

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[371] Hutton, *Language, Meaning and the Law*, 18. A similar point has been made by Nancy Fraser, writing that "[c]laims for the recognition of difference … have … become predominant within social movements such as feminism, which had previously foregrounded the redistribution of resources. … Why do so many movements couch their claims in the idiom of recognition? To pose this question is also to note the relative decline in claims for egalitarian redistribution. Once the hegemonic grammar of political contestation, the language of distribution is less salient today." Nancy Fraser, 'Rethinking Recognition' (2000) 3 New Left Review 107, 107. While this does not necessarily mean a decline in social activism, it certainly seems to signal a retreat from traditional political discourses of equality that usually contained a redistributive edge. This assessment is mostly geared towards postmodern theories.

[372] James Boyle, 'The Politics of Reason: Critical Legal Studies Theory and Local Social Thought' (1985) 133 University of Pennsylvania Law Review 685, 688-689. Partly critical: Rosemary J. Coombe, 'Room for Manoeuver: Toward a Theory of Practice in Critical Legal Studies' (1989) 14 Law and Social Inquiry 69, 69-71.

[373] Coombe, 'Room for Manoeuver: Toward a Theory of Practice in Critical Legal Studies', 77; Thomas Heller, 'Structuralism and Critique' (1984) 36 Stanford Law Review 173.

She replied: “Each approach has its merits and its faults.”
He asked: “But which one do *you* think is better, for society?”
She replied: “I can’t give you an answer to that; there is no right or wrong approach.”
He asked, again: “Yes, but in your opinion – what would be the right choice?”
She replied: “This question makes no sense.”
My friend told me he felt frustrated.[374]

This little episode seems very revealing to me. My friend wanted to hear the professor’s opinion on a normative issue (admittedly, he may have put her on the spot), but she refused to give a value assessment. This, of course, makes sense if one thinks of critical legal concepts as mainly analytical, descriptive theory, a tool of critique rather than a doctrine or a political ideology. Furthermore, to suggest a course of action also means to commit to a certain kind of tangibility – to a strategy or a distinct plan. And, as described above, every category, term or thing can be deconstructed, which automatically invites, if not necessitates, criticism in the critical legal universe.

I believe that both my friend and his professor were correct. Every strategy is necessarily imperfect and can (and should!) thus be criticised. Critical legal theory has done an amazing job in creating a toolbox for well-grounded, enlightened critique, exposing subconscious biases and delineating hidden power structures.[375] However, I also understand my friend’s frustration. What good is a toolbox if it is safely stored away in the legal ivory tower, never used in the real world, for fear that the stink of intellectual compromise might rub off?[376]

Indeed, stressing only the invasiveness of law, but denying empowering elements, contributes to an overly institutional understanding of law, disregarding the inherent fluidity of categories. If we agree that law imposes certain expectations and roles on individuals, this is not only a

[374] I use this anecdote with my colleague’s permission.

[375] See discussion in Section 2.2.1.

[376] Some scholars have made similar points; Nancy Fraser, for instance, wrote that the politics of redistribution had been replaced by the politics of recognition, and that this led to a regrettable lack of political impetus. Fraser, 'Rethinking Recognition'.

problem, but also an opportunity. Underlying assumptions inform law and its categories, but these assumptions can be addressed – and they can also be challenged, and possibly replaced. In fact, as society changes, assumptions also change; this is an on-going process, testimony to the flexibility of law. A critique of law which entirely focuses on the present – on the assumptions of a given point in time, without taking into consideration the processuality of the creation of meaning – limits itself to pointing out the flaws of the moment, without the possibility of developing a strategy of change.

However, Mary Joe Frug does subtly point us into a promising direction for activist endeavours. Even though she calls for caution when formulating advocacy campaigns[377] – also or mostly because of the gendered nature of many campaigns which tend to replicate typical male-dominated hierarchies[378] – she does not entirely disregard activist approaches, nor the law as an arena for such approaches. She rather suggests "deconstruction" as an activist tool (in this particular example, regarding pornography):

> "If women's oppression occurs through sex, then in order to end women's oppressions in its many manifestations the way people think and talk and act about sex must be changed."[379]

When seen in this light, critical approaches can actually *reveal opportunities* for activism.

Concepts are filled with meaning by way of communicative practice.[380] Judith Butler, for instance, holds that the creation of meaning is an on-going process, a practice rather than a one-time declaration. Importantly, this practice never comes to a halt.[381] Since this process is embedded in hegemonic power relations, mainstream ideology informs the content of these

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[377] Frug, 'A Postmodern Legal Manifesto (An Unfinished Draft)', 1074.

[378] Ibid, 1074.

[379] Ibid, 1073.

[380] Communication in the broadest possible sense, referring to all kinds of manifestations occurring in social interactions, and including, of course, law.

[381] Butler, *Gender Trouble*, 33-44.

concepts; however, there is space for reform. Changing the practice means changing the concepts. Butler invites us to

> "think through the possibility of subverting and displacing those naturalized and reified notions of gender that support masculine hegemony and heterosexist power, to make gender trouble … through the mobilization, subversive confusion, and proliferation of precisely those constitutive categories that seek to keep gender in its place by posturing as the foundational illusions of identity."[382]

As mentioned above, law operates with categories and thus can contribute to "reify gender" and other concepts by reflecting notions of what it means to be a woman, or what marriage consists of. However, law is also practice – especially law application and legal interpretation can be seen as acts of performance according to Butler's analysis. Courts are thus places where social reality is shaped and constructed. Each time a judge interprets a legal rule, she can either repeat the prejudiced underlying assumptions that inform the content of such rule – or challenge them. In this sense, law application *can* be subversive, re-constituting reality in a more progressive way.

While Butler has been reprimanded for being too apolitical and overly focusing on the individual,[383] her theory no doubt opens way for strategic considerations, similar to the ones Mary Joe Frug has pointed to.[384] If Butler is right, changes in legal interpretation will have an impact on categories of law and on reality. After all, law is part of our social environment and as such, affects our views, self-perceptions and actions. Following these thoughts, this means that reality can be altered by altering law and its exercise. A short case study from the US context will illustrate this point, by showing how the concept of "parenthood" has been successfully de-constructed – and then re-constructed in a more inclusive way, allowing for the incorporation of same-sex parents.

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[382] Ibid, 44.

[383] Martha Nussbaum, 'The Professor of Parody' *The New Republic* (22 February 1999).

[384] See *infra*: "If women's oppression occurs through sex, then in order to end women's oppressions in its many manifestations the way people think and talk and act about sex must be changed." Frug, 'A Postmodern Legal Manifesto (An Unfinished Draft)', 1073.

### 3.2.2. Case Study: Changing Concepts in Court – The Example of "Functional Parenthood"[385]

As established above, the way in which a concept is interpreted shapes law.[386] The degree to which law application is influenced by (often unconscious) assumptions and societal notions becomes especially clear in the context of parenthood. However, these notions and assumptions can be challenged.

First, there is the common assumption that every child has *one* mother and *one* father.[387] This view is influenced by an essentialist father-mother-dichotomy. It assumes that *parentage* is synonymous with *parenthood*, thus implying that the process of reproduction determines who the parents of a child will be. Social realities that point in a different direction are understood as exceptions at best. Father/father or mother/mother constructions thus are often seen as aberrations, which cannot, in principle, be included in the understanding of "parenthood."[388]

Another assumption rests on the belief that a child cannot have more than two primary care givers,[389] based on the notion of the "nuclear family" as the most common lifestyle. Not only same-sex partnerships question the validity of the father-mother-child-model; patch-work-families or grandparents who take over child-rearing tasks equally shake this traditional family

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385 This part is based in part on a 2010 article of mine: Marion Guerrero, 'Jenseits der Kernfamilie. "Funktionale Elternschaft", eine Progressive Alternative aus den USA' ' (2010) juridikum 143.

386 Aulis Aarnio, *Reason and Authority. A Treatise on the Dynamic Paradigm of Legal Dogmatics* (Dartmouth 1997), 123-125.

387 Nancy D. Polikoff, 'This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families' (1989-1990) 78 Georgetown Law Journal 459, 468-71.

388 Ruthann Robson, 'Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory' (1993-1994) 26 Connecticut Law Review 1377, 1385; See also: Kimberly Richman, 'Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law' (2002) 36 Law and Society Review 285, 286.

389 Richman, 'Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law', 286.

concept.[390] Scientific achievements, for instance in-vitro-fertilization, have also contributed to unsettling the *status quo*.[391] In line with Butler's analysis, these phenomena can be seen as subversive acts, challenging mainstream ideas about what it means to be a "family."

In their highly regarded essay "Revisioning the Family: Relational Rights and Responsibilities," Martha Minow and Mary Lyndon Shanley argue in favour of an approach which respects the complexity of individual relations by taking into account both the freedom of (lifestyle) choice of the parents as well as the interest of the child:

> "First, the individual must be seen simultaneously as a distinct individual and as a person fundamentally involved in relationships of dependence, care, and responsibility. [...] The law must allow parents to resume their independence and to remarry or form new relationships if they wish, but the law must also enforce the continuing obligations each has to their children. … [T]he biological tie between an adult and his or her offspring has been taken to establish *prima facie* parental rights and obligations; few have proposed that children, at birth, be assigned to the best possible caretaker, rather than to their biological parents."[392]

The authors claim that acts of caregiving and affection, and not formalistic criteria, should be at the core of a legal or judicial examination.[393] Thus, Minow and Shanley deconstruct the traditional meaning of "parenthood" and liberate it from essentialist elements by focusing on factual actions and the relationship that flows from these actions. This analytical approach suggests a parenthood that is defined by a certain behaviour and its respective consequences, without having to be justified by a (legally relevant) origination ritual, such as, for instance, conception, pregnancy or adoption. While there may be certain overlaps with formal parenthood,

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[390] The U.S. Supreme Court has reacted to this in a number of decisions, e.g. in *Moore v City of East Cleveland,* 431 U.S. 494 (1977) (USA); (the nuclear family is extended to include the grandparents for tenancy purposes); *U.S.D.A. v Moreno,* 413 U.S. 528 (1973) (USA) (here, the Supreme Court accounts for social reality by including roommates in the realm of "family" in a case dealing with food stamps).

[391] John Hill Kay, 'What Does It Mean to Be a Parent? The Claims of Biology as the Basis for Parental Rights' (1991) 66 New York University Law Review 353, 358-59.

[392] Martha Minow and Mary Lyndon Shanley, 'Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law' (1996) 11 Hypatia 4, 22.

[393] Ibid, 20-26.

the main difference consists in the fact that formal parenthood is mostly established by one act – either biological (birth) or legal (acknowledgement of paternity, adoption). This act usually *precedes de facto* parenting. Functional parenthood, on the other hand, inquires whether *de facto* parenting is happening – and draws legal conclusions from this examination. Of course, overlaps between formal and functional parenthood can happen, i.e. when foster parents want to adopt their foster child. In such cases, the quality of the *de facto* parenting that happened during the foster relationship will figure into the adoption decision. [394]

In 1995, the Wisconsin Supreme Court engaged in such deliberations when it devised a test to determine whether a person who is not legally related to a child has taken over parental functions.[395] It consists in evaluating features such as consent of the legal parents, living in the same household, carrying out parental obligations and the *de facto* establishment of a parental role.[396] Consequently, Wisconsin was the first US State in which a Supreme Court held that a lesbian co-parent should be permitted to maintain a relationship with a child that she jointly parented.[397] Other courts across the US have used a number of different models to do justice to the interests of children and their caretakers in cases that reflect a changed social reality. For instance, doctrines such as "in loco parentis," "de facto parenthood," "psychological parenthood," "equitable parenthood" or "equitable estoppel" are either based on common law theories or so-called equitable principles – principles that are applied by the court to avoid

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[394] *Foster parents considering adoption*, Child Welfare Information Gateway, Official Information by the U.S. Department of Health and Human Services, Children's Bureau (2012), <https://www.childwelfare.gov/pubPDFs/f_fospar.pdf> (accessed 10 May 2018).

[395] *In re the Custody of H.S.H.-K.,* 533 N.W.2d 419 (Wis. 1995) (USA).

[396] Justice Abrahamson wrote for the majority: "To demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature." (*citations omitted*). Ibid, para 658.

[397] Courtney G. Joslin, 'The Legal Parentage of Children Born to Same Sex Couples: Developments in the Law' (2005-06) 39 Family Law Quarterly 683, 693.

unreasonable hardship in particular cases.[398] However, while these theories recognise in principle that a person who is not related to a child can take over parental functions and can provide relief in single cases, some of these approaches are not particularly suited to serve as a model for the treatment of similarly situated cases.[399]

The influential "American Law Institute" (ALI) recommended that "functional parenthood" should be taken into account by courts, since an overly formalistic approach would be detrimental for the interest of a child.[400] The doctrine of "functional families" also found support in legal academia; in an amicus brief submitted in support of petitioner Debra H. during the 2010 New York Court of Appeals case "Debra H. v. Janice R.,"[401] forty-five law professors across New York State supported the "functional family" doctrine.[402] Of course, the approach is not without critique, also from the left – Baker, for instance, argues that the doctrine might actually *harm* non-traditional family forms by taking the autonomy to define "family member" away from the family unit and transferring it to the judges, therefore necessarily limiting the autonomy of the "legal" parent(s).[403] She warns that allowing the judiciary to make the decision of who is family member is dangerous, for a number of reasons; for instance, judges would often hold

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398 Adjudication which has applied one or more of these doctrines: *In re the Custody of H.S.H.-K.,* 533 N.W.2d 419 (Wis. 1995) (USA); *Jean Maby H. v Joseph H.,* 676 N.Y.S.2d 677 (App. Div. 1998) (USA); *In re Marriage of Sleeper,* 929 P.2d 1028 (Or. Ct. App. 1996) (USA); *Bupp v Bupp,* 718 A.2d 1278 (Pa. Super. Ct. 1998) (USA); *Rubano v DiCenzo,* 759 A.2d 959 (R.I. 2000) (USA); *Quinn v Mouw-Quinn,* 552 N.W.2d 843 (S. D. 1996) (USA); *V.C. v M.J.B.,* 748 A.2d 539 (N.J. 2000) (USA); *Elisa B. v Sup. Ct.,* 33 Cal. Rptr. 3D 46 (Cal. 2005) (USA); *In re Parentage of A.B.,* 818 N.E.2d 126 (Ind. Ct. App. 2004) (USA); *In re Parentage of L.B.,* 122 P.3d 161 (Wash. 2005) (USA); *Mason v Dwinnell,* 660 S.E.2d 58 (N.C. Ct. App. 2008) (USA); etc.

399 This topic is discussed at length in (among others) the following publications: Polikoff, 'This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families'; Joslin, 'The Legal Parentage of Children Born to Same Sex Couples: Developments in the Law'; Deborah L. Foreman, 'Same Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle for Parental Equality' (2006) 40 Family Law Quarterly 23; and many more.

400 American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations 1, 1(d) (2002).

401 *Debra H. v Janice R.,* 930 N.E.2d 184 (N.Y. 2010) (USA).

402 Suzanne B. Goldberg, Harriet Antzack and Mark Musico, 'Family Law Scholarship Goes to Court: Functional Family and the Case of Debra H. v. Janice R.' (2011) 20 Columbia Journal of Gender and Law 348, 350.

403 See, e.g., Katherine B. Baker, 'Quacking Like a Duck? Functional Parenthood Doctrine and Same-Sex Parents' (2017) 92 Chicago-Kent Law Review 135.

applicants to "traditional" expectations of what it means to be a parent and thus disadvantage those who don't fit this description.

Laufer-Ukeles and Blecher-Prigat, while being less critical and recognising the positive impact of the development of "functional parenthood," make a point for not equating functional parenthood with legal parenthood. They argue that these differences include "(1) the diversity and flexibility of functional relationships; (2) the point at which such relationships begin and end; (3) the invasion of privacy from the state into children's lives; and (4) the stability, predictability, and assignability of these relationships."[404] However, it needs to be noted that the "functional family" doctrine was adopted by many LGBT activists also because it constituted, for many years, the only way for same-sex partners to get legally recognised as the co-parent of their partner's child.[405] Today, formal parenthood is available to most lesbian and gay parents in the US.[406] Arguably, the legally sanctioned and thus increasingly common performance of LGBT parenthood is starting to challenge traditional conceptions of family; and indeed, with the recognition of same-sex marriage by the US Supreme Court in 2015[407] and its follow-up decision on the right of married same-sex parents in 2017 to be listed as parents on birth certificates,[408] LGBT parenthood has seemingly arrived in the legal (and possibly societal) mainstream.[409]

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[404] Ayelet Blecher-Prigat Pamela Laufer-Ukeles, 'Between Function and Form: Towards a Differentiated Model of Functional Parenthood' (2013) 20 George Mason Law Review 419, 427.

[405] Baker, 'Quacking Like a Duck? Functional Parenthood Doctrine and Same-Sex Parents', 136.

[406] Ibid.

[407] *Obergefell v Hodges,* 576 U.S. ___ (2015) (USA), para 17. The decision lists, among other things, birth certificates and an array of parental rights.

[408] *Pavan v Smith,* 582 U. S. ___ (2017) (USA). Two married women from Arkansas wanted to be listed as mothers in their child's birth certificate; the child had been conceived by anonymous sperm donation. State officials refused, denying them the "presumption of paternity" which a heterosexual married couple would have fallen under. After a decision by the Supreme Court of Arkansas, which confirmed the officials' decision, the U.S. Supreme Court reiterated its *Obergefell v. Hodges* opinion (see id.), repeating that "birth certificates" fell among the rights that come with the status of marriage.

[409] The continued acceptance of LGBT parenthood can be witnessed by the growing engagement of pop-culture with the phenomenon of LGBT parenthood. See, e.g., modern TV shows like Modern Family, How I Met Your Mother, Glee, The New Normal, Girls, 13 Reasons Why, etc. Arguably, the degree to which the sexual orientation of the parents is not picked as a central theme or problematized, but merely portrayed, is related to how "normal" LGBT parenthood probably has become.

The concept of "functional parenthood" and the recent acceptance of formal LGBT parenthood show how the epistemological deconstruction of a (social) term – parenthood – can enable the judicial re-conceptualisation of the legal meaning of this term. This, in turn, increases the visibility of LGBT families, effectively constructing a new, more inclusive reality. By dismantling the underlying connotations that a term like parenthood carries, these connotations can then be exposed as biased and as such, challenged.

### 3.2.3. Law is Imperfect – Why Not to Avoid It, Anyway

Emphasizing the fluidity and constructedness of categories such as culture or gender lies at the heart of many postmodern legal theories.[410] As the case study above points out, legal categories, such as "parenthood," are also contingent on social practice; their meaning is not carved in stone, but flexible and ever changing. Indeed, this is a logical inference from the characterization of law as indeterminate. By strategically contributing to more favourable constructions of legal concepts, agents of social change could theoretically shape law into more satisfying manifestations. In this sense, legal activism can immensely profit from critical legal theories' insights by applying some of its methods in a strategic, goal-oriented way.

Another important issue I will raise relates to the fact that adjudication involves more than just one actor. The traditional scepticism of critical theories towards the suitability of law as an emancipatory tool all too often leads to a disregard or even denial of the contribution that non-institutional actors have made to the development of law and public opinion. In other words, a sole focus on the institutional level (the judges / courts) when analysing adjudication results in a skewed and simplistic view of law.[411] It creates an inflexible and almost unbreakable ruler-ruled narrative.

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[410] Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York University Press 1996), 225.

[411] Reva Siegel points out that social movements have considerably contributed to the development of U.S. constitutional law. Siegel, 'The Jurisgenerative Role of Social Movements in United States Constitutional Law'.

As political scientists and sociologists have pointed out, law and constitutional governance cannot be understood merely as hegemonic top-down processes; indeed, the legal arena rather seems to present itself as a complicated net of cross-influences and interactions between a number of different players, such as courts, legislators, lawyers, social movements, activists and institutions, as well as media and other civil society actors, among others.[412] To recognise that adjudication is a multi-player-process (albeit with admittedly different degrees of influence) can be empowering and destabilise the idea of simple vertical hierarchies. In the following chapters, I will try to show that non-institutional activists can – and have indeed – strategically contributed to the development of law and legal norms, and thus, promoted change by using (among others) legal tools.

It also deserves to be mentioned that the elitism, which some critical approaches detect in law and adjudication, might well be, to a certain degree, a projection. Sneering at legal means is ultimately an elitist approach, the prerogative of a relatively privileged class that does not need to turn to the law in order to have a voice. Indeed, sometimes, legal approaches seem to be preferred by those in need over complex, but theoretically sound social activism.

This is beautifully exemplified by Liora Israël's account of the Marxist law shops in Paris, in the early 1970s.[413] A number of idealistic, Marxist-inspired lawyers created open door, self-help law firms, meant to support the local population in their legal struggles. The idea was to break the traditional lawyer-client relationship and to extend social activism beyond the realm of law; individuals seeking for legal help were expected to become part of the political community of

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In the context of Europe, this has been shown by: Della Porta and Caiani, 'Europeanization from below? Social movements and Europe', 10; Sabrina Tesoka, *Judicial Politics in the European Union: Its Impact on National Opportunity Structures for Gender Equality* (MPIfG Discussion Paper 1999); Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*; Conant, 'Individuals, Courts, and the Development of European Social Rights'; Anagnostou and Millns, 'Gender Equality, Legal Mobilization, and Feminism in a Multilevel European System'; etc. Benford and Snow show how social movements can contribute to the construction of meaning by framing. Robert D Benford and David A Snow, 'Framing Processes and Social Movements: An Overview and Assessment' (2000) 26 Annual review of sociology 611.

412 Della Porta and Caiani, 'Europeanization from below? Social movements and Europe'.

413 Liora Israël, 'Rights on the Left? Social Movements, Law and Lawyers after 1968 in France' in Dia Anagnostou (ed), *Rights and Courts in Pursuit of Social Change* (Hart 2014).

the law shops, participate in discussions, etc. In turn, they were presented with strategies to "help themselves" – rather than providing them with lawyers and straightforward legal expertise, the aim was to provide do-it-yourself solutions. However, the experiment failed, because it neglected to take into account the social reality of the prospective clients; many of them were full-time workers with no time to spare, hoping to find some (at times urgently needed) free legal advice, but unwilling to partake in a revolutionary social project. This eventually led to some law shops, which stuck to their initial premises, becoming more of a pastime for idealistic intellectuals than a real social help project.[414]

As a legal scholar, it might be especially tempting to maintain a sophisticated distance to the (intellectually imperfect) compromises required by legal practice and litigation. It is a safe way to avoid being complicit with the hegemon. However, law and law application are part of our social world, and it is doubtful whether there even is such a thing as noble restraint. As Giddens points out, the exercise of power does not require intentionality. Even the most casual social encounters will have some kind of structural effect.[415] Abstention is not necessarily without influence; if nothing else, it might perpetuate existing dynamics. This might be particularly true for opinion leaders such as law professors, lawyers and judges. By refusing to actively engage in institutional power struggles over legal meaning, they arguably might leave the field to be ploughed by non-progressive forces.

Moreover, members of disempowered groups might not even enjoy the luxury of *choosing* to abstain from approaches such as litigation; to them, litigation might be a last resort, the only chance to exercise some kind of power over otherwise much more powerful opponents.[416] Employing legal means and thus, using the system in a proactive way, might even be an empowering experience.[417]

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[414] Ibid.

[415] Giddens, *Central Problems in Social Theory: Action, Struggle, and Contradictions in Social Analysis* , 88-95.

[416] Moreover, sometimes there is not even a choice whether to engage in litigation or not – in cases where litigation has already been started by non-progressive actors against members of a disempowered group.

[417] William L.F. Felstiner, Richard L. Abel and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming…' (1980-1981) 15 Law and Society Review 631.

Precisely because of the liberalist and legalist assumptions Alan Hunt had determined as CLS' main point of attack,[418] a grievance will often be understood *prima facie* as purely personal misfortune, rather than a wrong caused by systemic injustice.[419] This can produce a sense of powerlessness and abandon. Therefore, translating the issue into legal language can sometimes provide relief by creating a certain structure and calculability of the steps ahead. The grievance transcends from the realm of the personal into the legal/political sphere by re-defining the claimant as the sufferer of a slight, naming a perpetrator, and formulating a claim.[420] This can contribute to building consciousness, regaining control and restoring agency. This is not to say that there are no other ways to achieve similar results, for instance, by political struggle. However, political action and litigation are not a natural dichotomy; indeed, movements often engage in litigation as a form of political activism. Moreover, political action is not as immediate as litigation, and might not be available to everybody (for instance, unionization requires the possibility to form a union in the first place).

Addressing a problem in legal terms is, to a certain degree, an appropriation of the legal system for one's own cause. At least symbolically, it can be a way to "level the playing field" – a plea becomes a (legal) demand, and the perpetrator has to defend himself not only against the slighted individual, but against the law itself. Especially for groups who cannot count on a strong political lobby to further their interests, and thus might distrust classic traditional representative

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[418] Recall that Alan Hunt wrote that the CLS movement directs its "critical energies" against liberalist assumptions about the workings of law, namely "the philosophy of legalism and the associated jurisprudence of legal positivism that has so decisively implanted itself in both the academic, the political and the popular discourse of contemporary capitalist democracies. The central features of this powerful doctrine of legalism are: (a) the separation of law from other varieties of social control, (b) the existence of law in the form of rules which both define the proper sphere of their own application and (c) which are presented as the objective and legitimate normative mechanism whilst other normative types are partial or subjective, and (d) yield determinant and predictable results in their application in the juridical process." Hunt, 'The Theory of Critical Legal Studies', 4.

[419] Felstiner, Abel and Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming…', 633.

[420] Ibid. The authors have shown how the process of "naming, blaming, claiming" can provide disadvantaged persons or groups with remedies to re-define what happened to them in a more proactive, empowering way, and show them "a way out" of their situation.

channels, going to court might present an attractive alternative.[421] For the politically marginalized therefore the law, with all its theoretical imperfections, might be the only card up their sleeves – even if it is a jack of clubs rather than an ace of hearts.

### 3.2.4. Finding Agency in Critical Legal Theories

"*The uncontrolled character of meaning exercises a destabilizing influence upon power.*"[422]

However, while critical theories have sometimes been reprimanded for not accounting for agency,[423] an actor-oriented reading is possible.[424] Indeed, critical analysis itself provides helpful cues as to spaces of possible activist intervention. Especially the accounts on the synergies between language and meaning formation open up opportunities for interpretative activism; if it is true that language and other social practice influence, even create, reality, this must logically mean that a) law and jurisprudence (as a form of language) create reality, and b) different interpretations of law via judicial decisions will have an impact on both law and society.

For example, Michel Foucault's famous discourse analysis – analysing the interrelationship between authority and truth/knowledge – contains insightful clues. According to Foucault, the social world as we experience it is constituted by an all-encompassing power discourse.[425] The way that power expresses itself is by way of language (and behaviour); language, thus, both shapes power and is shaped by it.

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[421] Nan Hunter, 'Lawyering for Social Justice' (1997) 72 New York University Law Review 1009, 1017; See also: Bruce A. Ackerman, 'Beyond Carolene Products' (1985) 98 Harvard Law Review 713, 732 (describing how some minority groups are so stigmatized or overlooked that they are unlikely to generate the necessary political sympathy for pushing for their claims on the legislative level).

[422] Cover, 'Nomos and Narrative. Foreword to the 1982 Term of the Supreme Court',18

[423] See discussion *supra,* at 94.

[424] Giddens shows this in the context of social theory. Giddens, *Central Problems in Social Theory: Action, Struggle, and Contradictions in Social Analysis* .

[425] Michel Foucault is one of the important philosophical reference figures of the CLS movement, together with Jacques Derrida, and others, depending on the particular current. For the area of law, this work by Foucault is particularly interesting: Michel Foucault, *Discipline and Punish* (1977 edn, Pantheon 1975).

Knowledge or information, therefore, is never value free and neutral; it creates truth and therefore, authority. Authority, on the other hand, determines what counts as "true." For instance, in his trilogy "The History of Sexuality," Foucault traces "sexuality" as a discursive object, describing its emergence, its different connotations, and its discursive usage to express and exert power.[426] For instance, defining sex between men not as a mere action (such as eating peanuts), but by labelling it a behaviour (sodomy) and a defining trait (homosexuality), was a way to exert control over people's sexuality by laying down rules of "accepted" or "sane" sexuality. In this sense, language exerts and creates power, and is also influenced by power.

Whereas Foucault's approach has been criticised for disregarding agency,[427] some scholars, such as Raymond Caldwell, also contend that his discourse analysis does not necessarily impede it.[428] While Caldwell does contend that that Foucault overemphasizes agency *as acts of resistance*,[429] he recognises that "even Foucault … realized in his later work that you cannot really subvert subjectivity, rationality and individualist notions of choice, unless you redefine a viable counter-concept of autonomous agency."[430]

Foucault, however, can also be read as claiming that in an all-encompassing power discourse, everybody is at the same time object *and subject* of the discourse.[431] Language and power are inextricably linked; while language is a product of power, it can also both enforce and destabilise

[426] Michel Foucault, *Histoire de la sexualité: La volonté de savoir* (Gallimard 1976).

[427] Amy Allen, 'The Anti-Subjective Hypothesis: Michel Foucault and the Death of the Subject'(2000) 31The Philosophical Forum 113.

[428] See, e.g., Raymond Caldwell, 'Agency and Change: Re-evaluating Foucault's Legacy' (2007) 14 Organization 769.

[429] Caldwell critically observes Foucault questioning the possibility of intentionality and creating impossibly high standards for wilful action, such as extreme self-reflexivity as a precondition for agency and change. This creates false dichotomies, e.g., between "faced and de-faced power, stasis and change, a fixed universal self of rationalism and the forever changing and indeterminate subject of a postmodern polyvocal self." Ibid, 779.

[430] Ibid, 788-789.

[431] Raymond Caldwell, 'Agency and Change: Re-evaluating Foucault's Legacy' (2007) 14 Organization 769.

power.[432] By participating (which we all necessarily do by engaging with the world), we either sustain or shift the power structures, depending on our particular position of power and influence. In other words: The discourse works *on* us, but it also works *through* us. Language – legal language as well – is not only influenced by, but *also influences* reality.

Judith Butler also addresses the question of agency:

> "If repetition is bound to persist as the mechanism of the cultural reproduction of identities, then the crucial question emerges: What kind of subversive repetition might call into question the regulatory practice of identity itself? If there is no recourse to a 'person,' a 'sex,' or a 'sexuality' that escapes the matrix of power and discursive relations that effectively produce and regulate the intelligibility of those concepts for us, what constitutes the possibility of effective inversion, subversion, or displacement within the terms of a constructed identity? What possibilities exist *by virtue* of the constructed character of sex and gender? … If there is something right in Beauvoir's claim that one is not born, but rather *becomes* a woman, it follows that *woman* itself is a term in process, a becoming, a constructing that cannot rightfully be said to originate or end. As an on-going discursive practice, it is open to intervention and resignification."[433]

In other words: categories are never fixed, but fluid. Logically, this should also be true for legal categories. As Wittgenstein has shown, there is no pre-interpretive understanding of a text; it always needs contextualization. Similarly, JL Austin has contended that communication not only expresses, but *creates* meaning.[434] This is in line with both Foucault's view that language is power, as well as with Butler's view that categories such as "woman" are constantly negotiated,

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[432] Foucault, *Histoire de la sexualité: La volonté de savoir*, 133. Foucault writes: "Les discours, pas plus que les silences, ne sont une fois pour toutes soumis au pouvoir ou dressés contre lui. Il faut admettre un jeu complexe et instable où le discours peut être à la fois instrument et effet de pouvoir, mais aussi obstacle, butée, point de résistance et départ pour une stratégie opposée. Le discours véhicule et produit du pouvoir; il le renforce mais aussi le mine, l'expose, le rend fragile et permet de le barrer." ("Discourses, just like silences, aren't automatically subjected to power or geared against it. Rather, it is a complex and instable interplay in which the discourse can be, at the same time, an instrument or the effect of power; but also obstacle, attack, point of resistance for a counterstrategy. The discourse is vehicle and product of power; it reinforces it, but also undermines it, exposes it and makes it fragile and allows to block it." (*in my own translation)*).

[433] Butler, *Gender Trouble*, 43, citing Simone de Beauvoir, *Le deuxième sexe, 2 vols* (Gallimard 1949).

[434] See debate *infra*, at 86.

that there is no essential core to it, but that they only come to life by being constantly "performed." Categories, consequently, gain their content by "on-going practice."

If we take legal categories to fall into this pattern, this means that their interpretation constructs them. Legal texts, just like any other texts, require interpretation to *exist*, to come into life – a fact that Hans Kelsen already observed in the 1920s.[435] Rather than constraining the diversity of social phenomena, the social practice of law application allows for *their consideration*, at least theoretically. And not just on a case-by-case basis – interpretation inherently *changes the legal rule itself*. There is no reason why interpretation, then, shouldn't be used as a form of "subversive practice" within Butler's meaning.

Rosemary Coombes points out that the indeterminacy of legal rules implies that even within "a restricted domain, numerous possibilities for the creation of meaning are available. … Only if we deny the creative activity of the interpreting social actor and insist on seeing structure as a static, monolithic straitjacket that, so to speak, descends from above is it necessary to see constraint as determinacy."[436] In other words: the critical legal studies (CLS) view of radical indeterminacy itself logically infers the existence of a flexible legal structure. Coombes questions the dichotomy between structure and subjectivity;[437] she suggests, "we would have much to gain by extending the range of our scrutiny beyond the domains occupied by legal decision-makers."[438] She concludes that

> "[a]ll human practices, then, are the creation of people who are themselves shaped by historically specific structures of meaning that both constrain and enable practice. Abandonment of sterile dichotomies that posit structural constraint and subjective experience as mutually exclusive or analytically separable concerns is clearly only a small step towards the construction of a comprehensive critical theory of legal practices. It is, however, an absolute crucial one if we are to give ourselves the theoretical room for

[435] Kelsen, 'On the Theory of Interpretation'.

[436] Coombe, 'Room for Manoeuver: Toward a Theory of Practice in Critical Legal Studies', 92.

[437] Ibid, 111.

[438] Ibid, 115.

> manoeuver necessary to develop a politically progressive and socially sensitive critical legal scholarship."[439]

Robert Cover skilfully combined a hegemonic critique of law and legal practice with theories of interpretation inspired by hermeneutic deconstructivism.[440] Law, according to Cover, can be seen as "a system of tension or a bridge linking a concept of reality to an imagined reality"[441] – meaning that it contains both an account of what reality is, and the possibility of constituting an alternative reality, by being interpreted in a different way. Such alternative interpretation happens by way of "legal narratives". Cover defines "narratives" as alternative interpretations of law, based in the particular experiences and stories of different identity groups within a society ("nomoi").[442]

A "nomos," in Cover's usage, is a system of norms, customs, traditions, experiences, historical beliefs and rituals, etc. which a certain group holds on to.[443] Cover gives the examples of religious groups, ethnic groups and groups tied together by a common belief system; as such, they present "alternities," or "others" (when compared to an imagined norm group) within society.[444] In relation to the law, the "nomos" is an "interpretive community," because its distinctive narratives lead to a particular understanding of what the law is and should be.[445]

When a nomic group applies their beliefs of what law is or should be, it applies a "legal narrative". For instance, the narratives advanced by the LGBT community (as nomos) in the US have proposed and alternate reading of US laws (including the constitution) regarding marriage,

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[439] Ibid, 121.

[440] Cover, 'Nomos and Narrative. Foreword to the 1982 Term of the Supreme Court'.

[441] Ibid, 9.

[442] "Interpretation" indeed might be a bit of a simplification of the term; narratives are also "signs by which each of us communicates with others," and they have the potential to not only explain and adapt law to a certain context, but indeed to create the internal regulatory principles of a certain "nomos" and therefore, transcend legal interpretation in the strict sense. Ibid, 8-31.

[443] Ibid, 9.

[444] Ibid, 9.

[445] Ibid, 26.

family and so on.[446] In this sense, law has an integrative function, and courts would have the power to accommodate different perspectives and needs by taking the interpretative creations of a nomos into account – which indeed happened in the US, for instance when the US Supreme Court opened up marriage to same-sex couples.[447] Therefore, these narratives can exercise a "jurisgenerative" force, the creation of legal meaning.[448]

Cover distinguishes between two kinds of "interpretive communities" – the ones aiming for "insular autonomy,"[449] and the ones seeking for a "transformation of the surrounding social world."[450] The former group mostly tries to carve out spaces within the existing legal system that allow them to live their lives according to their own customs, rituals and ideas; they do not in principle question the legitimacy of the *law as it is*, but rather ask for accommodation of their particular nomos.[451] This means that they will challenge legal practices and laws that are in conflict with their autonomy.

The latter group aim at a more comprehensive transformation of the "social world in which they live,"[452] because they doubt, for instance, whether merely selective changes to the existing system would enable their full and equal participation in society. Cover calls the method of change that these groups employ "redemptive constitutionalism,"[453] because it challenges the constitutional understanding of a legal system by trying to redeem the positions of the group

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[446] For an account on how 50 years of LGBT legal activism has renegotiated certain terms in the realm of family law, see, e.g., Richman, 'Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law'.

[447] *Obergefell v. Hodges*, 576 U.S. ___ (2015) (USA).

[448] Cover, 'Nomos and Narrative. Foreword to the 1982 Term of the Supreme Court', 11. Cover understands the jurisgenesis to take place not only once a court, the legislator or an administrative agency recognises these narratives as legitimate – rather, they exert force already without any form of official sanctus, for within the nomos, these narratives are binding. This leads to the "problem of the multiplicity of meaning – the fact that never only one but always many worlds are created by the too fertile forces of jurisgenesis…", even within a single nomos. Ibid, 15-16, 25.

[449] Ibid, 26.

[450] Ibid, 33-34.

[451] Ibid, 26-33.

[452] Ibid, 33.

[453] Ibid, 34.

within the foundational premises of the law. He defines three postulations of "redemptive constitutionalism:" "(1) the unredeemed character of reality as we know it, (2) the fundamentally different reality that should take its place, and (3) the replacement of the one with the other."[454] Most identity-based movements will probably display elements of both approaches.[455]

In the early 2000s, Nancy Fraser made a somewhat related distinction by (critically) pointing out the difference between a politics of recognition and a politics of redistribution.[456] She claimed that with the growing relevance of identity debates, the politics of recognition had replaced the politics of redistribution.[457] She wrote that proponents of an identity model believe that the discrimination of a particular group is rooted in the lack of respect of the dominant culture towards that group, and that the answer to this problem would be their full recognition.[458] This is a similar mechanism as calling for an accommodation of the insular needs of a group into mainstream society. Fraser points out that such efforts do not take into full account the economic dimension of discrimination – in other words, the state logic of distributing such resources one way or another to begin with.[459] She writes

> "To be misrecognized, accordingly, is not simply to be thought ill of, looked down upon or devalued in others' attitudes, beliefs or representations. It is rather to be denied the status of a full partner in social interaction, as a consequence of institutionalized patterns of cultural value that constitute one as comparatively unworthy of respect or esteem."[460]

Whereas recognition requires mostly respect, it does not necessarily challenge the distributive logic behind allocation of goods and services. Leading a redistributive debate, on the other hand, means not only asking for "likewise consideration" – it questions the underlying justification of

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[454] Ibid, 34.

[455] This is, for instance, certainly true of the LGBT rights movement, which tends to claim both recognition and access to resources. See the example of the U.S. LGBT movement's struggle for marriage equality, discussed in Chapter 6.

[456] Fraser, 'Rethinking Recognition'.

[457] Ibid.

[458] Ibid,109-110.

[459] Ibid, 113.

[460] Ibid, 113-114.

allotting certain resources to the privileged group from the outset. Therefore, such examination is in line with a *societal transformation*, rather than an *insular accommodation*.

In fact, the epistemological value of Cover's differentiation of these two distinct forms of intentionality behind law change attempts might be illuminating in the context of a dilemma that many critical legal accounts have formulated: Namely, the concern that legal social change attempts – especially litigation – might come at the cost of significantly reducing the radicalness of one's claims in order to fit the rigid matrix of judicial language and maximize their mainstream appeal.

In the realm of LGBT rights, the debate of "marriage equality" might fall into this pattern. In the US, the adoption of "marriage equality" as an activist goal was quite controversial within the movement; some saw it as ridding queerness of its radical potential by "heteronormativizing" the LGBT movement, whereas others saw it as a step to change the meaning of marriage well beyond the realm of LGBT rights.[461]
Cover's distinction gives an answer to those who see law-based approaches such as litigation as *necessarily* non-radical, as system affirming rather than system-transforming.[462] This criticism loses much of its impetus when the goal of a law change attempt is not exhausted by achieving the adaption of one legal rule (i.e., by merely accommodating the *insular needs* of a particular

[461] Warner, 'Normal and Normaller: Beyond Gay Marriage'; Franke, 'The Politics of Same-Sex Marriage Politics'; Nancy D. Polikoff, 'We Will Get What We Ask For: Why Legalizing Gay And Lesbian Marriage Will Not Dismantle The Legal Structure Of Gender In Every Marriage' 79 Virginia Law Review 1535; William N Eskridge Jr, 'Channeling Identity-Based Social Movements and Public Law' (2001-2002) 150 University of Pennsylvania Law Review 419.

[462] Lorde, *Sister Outsider*.

group). Rather, a legal strategy can aim much higher, for example, at the transformation of a rule *for everybody* ("redemptive constitutionalism").[463]

A practical example of this might be the struggle for "marriage equality. While a number of scholars have worried that pushing for marriage for gays and lesbians might actually de-radicalise the LGBT movement, stripping it of its potential to question heterosexist assumptions which underlying this institution,[464] a more optimistic construction is possible. Apart from simply seeking to grant access to the institution of marriage for same-sex couples, the legal re-negotiation of "marriage" might indeed serve to destabilise the (traditional) content of this institution,[465] posing the larger question of what "marriage" actually means. The effect of this destabilisation would radiate beyond the LGBT movement, transforming the meaning of "marriage" for mainstream culture at large. Mary Bernstein, for instance, describes how identity can be "deployed strategically" to contest stigmatized social identities in order to elicit institutional change, but also to transform mainstream culture: "The goal of identity deployment can be to transform mainstream culture, its categories and values (and perhaps by extension its policies and structures), by providing alternative organizational forms. Identity deployment can also transform participants or simply educate legislators or the public."[466]

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[463] Cover concedes, however, that different nomic groups have varying degrees of hegemonic power when pushing for their particular narratives. As he points out, "[i]nterpretation always takes place in the shadow of coercion." In other words: Cover recognises that the state, and particularly the courts who hold a special position in the realm of law interpretation, have an advantage over other nomic groups, since they can resort to authority (which Cover translates as "violence") to enforce a particular reading of the law. He writes: "In an imaginary world in which violence played no part in life, law would indeed grow exclusively from the hermeneutic impulse – the human need to create and interpret texts. Law would develop within small communities of mutually committed individuals who cared about the text, about what each made of the text, and about one another and the common life they shared. Such communities might split over major issues of interpretation, but the bonds of social life and mutual concern would permit some interpretive divergence." (*citations omitted*) Cover, 'Nomos and Narrative. Foreword to the 1982 Term of the Supreme Court', 40.

[464] Ettelbrick, 'Wedlock Alert: A Comment on Lesbian and Gay Family Recognition'; Polikoff, 'We Will Get What We Ask For: Why Legalizing Gay And Lesbian Marriage Will Not Dismantle The Legal Structure Of Gender In Every Marriage'; Warner, 'Normal and Normaller: Beyond Gay Marriage'.

[465] By presenting an overview of 50 years of adjudication, Kimberly Richman discusses how the law creates and shapes meanings, definitions and identities in the context of LGBT family rights adjudication, thus de-constructing and re-constructing concepts such as "parent," "family," etc. Richman, 'Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law', 286-290.

[466] Mary Bernstein, 'Celebration and Suppression: The Strategic Uses of Identity by the Lesbian and Gay Movement' (1997) 103 The American Journal of Sociology 531, 538.

Both the realist legal movement and critical legal accounts have shown that law is more than black letter law;[467] law is a cultural and social phenomenon, the meanings of which are constantly negotiated. If it is true that law contains a multitude of different meanings, it also means that it holds progressive potential that can be explored by activists.

In this sense, law is not merely an instrument of hegemonic domination, but also potentially a tool for liberation.[468] And indeed, social movements have significantly contributed to the development of (constitutional) law by way of interpretative intervention.[469] Scholars like Stuart Scheingold also advertise the opportunities provided by this particular form of resistance, writing, "the soft hegemony of constitutional rights provides both cultural and institutional opportunities for social movements. … Institutionally, litigation offers direct and authoritative access to the agencies of state."[470]

However, the theoretical considerations discussed above also raise some concerns regarding the emancipatory potential of strategic litigation. For one, framing demands as legal claims that are "winnable" at court could de-radicalise a movement's impetus and suppress other emancipatory strategies.[471] Lawyers are influenced in their thinking by their legal education and by their role as a lawyer, and this will probably have an effect on how they conceptualise both the cause and the system.[472] Scheingold, for instance, warns against idealizing the promise of law – and rights in particular:

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[467] Austin Sarat, 'Vitality Amidst Fragmentation: On the Emergence of Postrealist Law and Society Scholarship' in Austin Sarat (ed), *The Blackwell Companion to Law and Society* (Blackwell Publishing 2004), 2.

[468] Benhabib, 'Claiming Rights across Borders: International Human Rights and Democratic Sovereignty', 696.

[469] Siegel shows this in the context of the U.S: Siegel, 'The Jurisgenerative Role of Social Movements in United States Constitutional Law'.

[470] Scheingold, 'Constitutional Rights and Social Change: Civil Rights in Perspective', 86.

[471] David Kennedy, 'International Human Rights Movement: Part of the Problem?' (2002) 15 Harvard Human Rights Journal 101, 108.

There are a number of risks which scholars have determined; for instance, since litigation is costly, there is the risk that litigation Approaches take up a large part of a movement's resources. Albiston, 'The Dark Side of Litigation as a Social Movement Strategy', 64.

[472] Hilbink, 'You Know the Type...: Categories of Cause Lawyering', 663.

> "legal frames of reference tunnel the vision of both activists and analysts leading to an oversimplified approach to a complex social process – an approach that grossly exaggerates the role that lawyers and litigations can play in a strategy for change."[473]

Scheingold calls this exaggerated expectation toward the legal system and its reformative potential "the myth of rights."[474]

These processes might have an enduring impact on a social movement; the (limited) language of law might "take over" a movement's agenda, shaping its utopias and thus possibly blinding its members for other, more creative or radical concepts – to the degree of defining the very identity of the movement itself.[475] Moreover, the (radical) message of a movement might be diluted, compromising its potential to comprehensively and publically challenge prevalent social norms.[476]

However, as Eskridge also points out,

> "[l]egal rules and their enforcers strongly reinforced stigmas and disadvantages that not only provided important incentives and goals for minorities, but helped give concrete meaning to the 'minority group' itself. Much of what made it intelligible (as well as denigrating) to be a 'colored person' or a 'homosexual' or a 'retarded person' was the line drawn by law and the discourse stimulated by legal actors."[477]

This means that even before a movement resorted to law as a means to achieve justice, law has importantly shaped the *in*justice that the movement opposes. Law, of course, not only influences the movement itself, but also civil society at large. Refusal to engage in a legal discourse by a social movement might actually leave law's negative patterns unchallenged. By trying to re-

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[473] Scheingold, *The Politics of Rights. Lawyers, Public Policy, and Political Change*, 5.

[474] Ibid.

[475] Eskridge Jr, 'Channeling Identity-Based Social Movements and Public Law', 478-491.

[476] Polikoff, 'We Will Get What We Ask For: Why Legalizing Gay And Lesbian Marriage Will Not Dismantle The Legal Structure Of Gender In Every Marriage'.

[477] Eskridge Jr, 'Channeling Identity-Based Social Movements and Public Law', 422.

shape law, social movements can address and mitigate the damaging stereotypes which law carries. As Eskridge notes, "[j]ust as constitutional law has influenced the rhetoric, strategies, and norms of social movements, so the movements have affected the rhetoric, strategies, and norms of public law."[478]

In the end, however, law is a social reality, which exists whether we like it or not. Just like societal or cultural discourses, it will necessarily affect the people subjected to it, in multiple ways – by creating and re-negotiating their understanding of justice, normativity, equality, categories such as man, woman, straight, gay, and so on. McCann observes that

> "legal knowledges to some degree shape, or prefigure, the identities and practical activities of subjects in society. Learned legal conventions mould the very terms of citizen understanding, expectation and interaction with others. Law is thus a significant part of how we learn to live and act as citizens in society. Legal constructs shape our very imagination about social possibilities."[479]

In a Foucauldian sense, law can be understood as a power discourse that encompasses us all, and that we cannot escape by just refusing to engage in it.[480] Thus, posing an either/or question – either resorting to the law or rejecting the law as an arena of activism – makes little sense, since the law *already* exerts real influence on the social reality of a movement's constituents. In fact, assuming that there was some kind of extra-legal core to a movement which only later gets translated into legal language, would be tantamount with believing that a movement can constitute itself without being influenced by the society or culture it is surrounded by. In other words: a movement will be influenced and shaped by the legal environment it operates in, whether it chooses to adopt legal strategies, or not.

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[478] Ibid, 423.

[479] Michael McCann, 'Introduction' in Michael McCann (ed), *Law and Social Movements* (Ashgate 2006), xii. This is, in fact, also the point that the CLS movement convincingly argues.

[480] See the discussion of Foucault *supra,* at 107.

Similarly, the assumption that a lawyer will automatically – and mainly – understand a movement's cause, and the system at large, in terms of law,[481] seems somewhat reductive. It overstates the influence of one discourse (law) over other possible discourses, such as society, culture or political views. A lawyer is not only defined by her profession – in fact, she might have only chosen this profession in order to further a movement's cause.[482] Nonetheless, an activist should also not overestimate the potential of law and litigation,[483] but carefully assess different approaches in relation to the objectives of the movement.

And in fact, a movement usually consists of a range of different professionals, who – ideally – mutually profit from each other's expertise in different disciplines.[484] For instance, as we shall see in the US case study presented at the end of this thesis,[485] the US LGBT movement drew on lawyers, media experts, community organizers, and others.[486] Consequently, it used law as one of its methods for change – but with an eye to the overlying strategy, making sure to fit its litigation approaches within the greater narrative (which, of course, was also – but not exclusively – influenced by its legal approaches).[487]

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[481] This is suggested e.g., by Hilbink. Hilbink, 'You Know the Type...: Categories of Cause Lawyering', 663.

[482] This seems to be in fact the case with many, if not all, the 18 US LGBT rights activists I interviewed in the course of this dissertation; their motivation to become a lawyer was closely linked to their desire to promote LGBT rights. I will discuss these interviews more in depth in Chapter 6.

[483] See Scheingold's warning regarding the myth of rights. Scheingold, *The Politics of Rights. Lawyers, Public Policy, and Political Change*, 5.

[484] I provided a definition of the term "social movement" in the introduction of this thesis *supra,* at 28; see also the discussion of the European LGBT movement in Section 1.2.

[485] In Chapter 6, Section 17.3.

[486] Kevin Cathcart, Lambda Legal – Defense and Education Fund USA (2014); Interview with Geoff Kors, Government Policy Director, NCLR – National Center for Lesbian Rights USA (telephone call, 19 March 2014); Interview with Jack Lorenz, Deputy Director - Programs and Development, Equality California (Los Angeles, CA, USA, 18 March 2014).

[487] Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014); Interview with Evan Wolfson, Founder and Executive Director, Freedom to Marry, New York, NY, USA (New York, NY, USA, 18 April 2014). I will discuss this in greater detail in Chapter 6, Section 17.3.

Taking this in mind, the question does not seem to be *whether* to engage with law – but *when* and *how*.[488] Moreover, refraining from participating in the forming of legal meaning by ways of litigation and other legal methods, would mean to relinquish a powerful avenue of contributing to shape society and, in a certain sense, of democratic participatory volition.

Indeed, advocates of strategic social reform litigation view their approach as a deeply democratic endeavour.[489] They underline the participatory character of "lawyering for social change," claiming it would open a gateway for individuals to directly take part in a form of policy making which had usually been reserved for certain elites. Apart from establishing a more balanced access to the judicial system, "lawyering for social change" might be an especially promising route for minority groups with scarce hopes to harness politicians to their agendas, be it due to a lack of support in the general population or because they do not dispose of a powerful political lobby.[490] In fact, litigation is sometimes the only possibility available to such groups to take part in influential decision-making processes.[491]

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[488] There are a lot of interesting accounts of how litigation should be used in a circumspect way, touching on a variety of different aspects of lawyering. For one, of course, any movement would be well advised to be thoughtful and strategic about their use of resources. Interesting debates on the lawyer-client relationship and the empowerment of communities, see, e.g.: Lopez, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice*; Israël, 'Rights on the Left? Social Movements, Law and Lawyers after 1968 in France'.

On the effect of funding on movements and its strategies, see, e.g., Catherine R. Albiston and Laura Beth Nielsen, 'Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change' (2014) 39 Law and Social Inquiry 1.

On the interplay of movements, organisations (NGOs) and law, see, e.g., Edelman, Leachman and McAdam, 'On Law, Organizations, and Social Movements'.

On the importance of legal clinics in the area of public interest law, see Margaret Martin Barry, Jon C. Dubin and Peter A. Joy, 'Clinical Education for this Millenium: The Third Wave' (2000) 7 Clinical Law Review 1; Trubek, 'Crossing Boundaries: Legal Education and the Challenge of the New "Public Interest Law"'.

[489] Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change'.

[490] Hunter, 'Lawyering for Social Justice', 1017; see also: Ackerman, 'Beyond Carolene Products', 732 (describing how some minority groups are so stigmatized or overlooked that they are unlikely to generate the necessary political sympathy for pushing for their claims on the legislative level).

[491] Hunter, 'Lawyering for Social Justice', 1017.

## 4. Conclusions to Chapter 1 and Intermediary Findings

Since this Chapter contains the theoretical foundations for strategic litigation, it is expedient to shortly reflect on what has been discussed so far with regard to the research question laid out at the beginning of this dissertation, and take stock of what remains to be shown in the following part.

As I have pointed out at the beginning of my dissertation, there are three fundamental inquiries in order to answer the research question of this thesis: *Is strategic litigation at the CJEU and the ECtHR an **emancipatory** and **feasible** approach for the advancement of LGBT rights in Europe?* [492]

The *first inquiry* asks whether the Courts exert sufficient influence to justify such an attempt.[493]

I hope to have provided an answer to the first inquiry in Section (2).[494] Both the CJEU and the ECtHR have established themselves as influential institutions, contributing to European policymaking.[495] By way of judicial review, they have the power to check national acts against EU law (in case of the CJEU)[496] or the European Convention of Human Rights (in case of the ECtHR).[497]

[492] See *supra,* at 12.

[493] See *supra*, at 15.

[494] See *supra*, at 61.

[495] See, e.g.: Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and other Essays on European Integration*; Weiler, 'The Transformation of Europe'; Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance'; Keller and Stone Sweet, 'Assessing the Impact of the ECHR on National Legal Systems'; Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*.

[496] Shapiro, 'The European Court of Justice', 326.

[497] Bertelsen, 'Consensus and the Intensity of Judicial Review in the European Court of Human Rights. Some Reflections from National and International Law'.

The CJEU has been described as the "supreme court" of the European Union;[498] there is hardly any question that its judgments influence EU and Member States' policies.[499] The ECtHR – while having to strike a delicate balance between the enforcement of the ECHR and the fact that its authority hinges, to a great extent, on its acceptance by its Member States[500] – nonetheless exerts considerable influence with regard to human rights policy development.[501] In fact, Stone Sweet and Keller have dubbed the ECHR "the most effective human rights regime in the world."[502] The Court's judgments establish enduring principles that radiate beyond single cases.[503]

While these developments (especially in the context of the CJEU) have been observed with scepticism by some scholars who fear that "governing through the courts" might be an anti-democratic practice ("separation of powers objection"),[504] I hope to have proven that this does not have to be the case. Indeed, understanding the courtroom as a political space where different groups can negotiate their legal views can actually be understood as intrinsically democratic.[505] Moreover, while the normative premises of policy-making by courts have been challenged, the *fact* that it *is, indeed, happening*, has seldom been challenged.[506]

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498 Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure', 21.

499 Conant, 'Europeanization and the Courts: Variable Patterns of Adaptation Among National Judiciaries', 97; Alter, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration', 242; Stone Sweet, *The Judicial Construction of Europe*, 21; Shapiro, 'The European Court of Justice', 326.

500 Wildhaber, 'Rethinking the European Court of Human Rights', 212.

501 Stone Sweet and Keller, 'The Reception of the ECHR in National Legal Orders', 3, 6.

502 Ibid, 3.

503 "erga omnes" effect; see, e.g.: Besson, 'The Erga Omnes Effect of Judgments of the European Court of Human Rights - What's in a Name?'.

504 See discussion in Section 2.3.

505 See discussion in Section 2.

506 Robertson, *The Judge as Political Theorist. Contemporary Constitutional Review*,16; see also (regarding the role of the judge as adapting law to social reality, among other things): Barak, *The Judge in a Democracy*, 7-9.

Hence, the first inquiry – are the CJEU and the ECtHR political spaces, and do they exert sufficient influence to justify strategic LGBT rights litigation[507] – can be answered in the affirmative.

Thus, the question remains if – and how – civil society can participate.

As we have seen, one of the main criticisms of critical legal theories (which the "lawyering of social change movement" builds on) concerns the fact that access to justice is not egalitarian, but rather elitist ("law-sceptical objection").[508] Consequently, if it is *not possible* to address a court and forward arguments in support of a reform agenda – or if these arguments will *not adequately be heard* – attempting cause lawyering will be in vain from the outset. Similarly, if the case law of the Courts provides little incentive for activist intervention, strategic litigation might not be the right way to go.

This relates to the second subset of my second inquiry – *Do European Courts provide procedural spaces for activist (LGBT rights) lawyers*?[509]

I have given an overview of the different positions on this fundamental question in Section (3),[510] concluding that viewing adjudication as a purely hierarchical process is an epistemological reduction of reality. Civil society actors have always contributed to its development, as scholars like Siegel[511] or Cover[512] contend. Robertson suggests that judges act like appliers of political theory;[513] this means also that they need to at least address and refute convincing arguments, but cannot simply ignore them. Moreover, law and adjudication exists

[507] See *supra*, at 15.

[508] Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change', 9.

[509] See *supra*, at 16.

[510] *Supra,* at 78.

[511] Siegel, 'The Jurisgenerative Role of Social Movements in United States Constitutional Law'.

[512] Cover, 'Nomos and Narrative. Foreword to the 1982 Term of the Supreme Court'.

[513] Robertson, *The Judge as Political Theorist. Contemporary Constitutional Review*, 21.

not separated from, but situated in social reality; and since law requires interpretation, this reality will figure into judges' deliberations. This provides space for activist intervention.

Second, Sections (1) and (3) have dealt with the question of agency of (minority group) activists. Whereas critical legal theories have been sceptical in this regard ("law-sceptical objection"), they do not preclude agency, as I have shown.[514] Indeed, critical legal theoretical accounts of law as fluid and indeterminate provide a basis for activist interventions.[515]

The "lawyering for social change movement," as well as the "cause lawyering" approach, furthermore relate how litigation can be (and has been) used to promote minority (and in particular LGBT)[516] rights.[517]

The first subset of the *second inquiry*[518] consists of the question of whether the procedural make-up of a court (including standing requirements, transparency guarantees, adequate procedural remedies, or admissibility conditions)[519] grants access to justice to activist lawyers. Procedural law also would have to enable activist lawyers to participate in a case – either as counsel or as third party intervener, i.e., in the form of *amicus curiae*. Therefore, an assessment of procedural requirements is a *precondition* for establishing the possibility of impact lawyering at a given court. I will address this question in the following chapter (Chapter 2).[520]

[514] I have expanded on this in Section 3.2.4.

[515] Coombe, 'Room for Manoeuver: Toward a Theory of Practice in Critical Legal Studies', 92.

[516] See, e.g., Cummings and NeJaime, 'Lawyering for marriage equality'; Helfer and Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe'.

[517] Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change'; Scheingold, 'Constitutional Rights and Social Change: Civil Rights in Perspective'. See especially the comprehensive discussion on "lawyering for social change" in Section 1.

[518] See *supra*, at 16.

[519] See discussion in Chapter 2.

[520] *Infra,* at 129.

The second subset of my *third inquiry*[521] asks whether the respective case law of the Courts can be analysed in an actor-centred way – and whether it provides room for activist intervention. In other words, is it possible for activists to advance an emancipatory legal discourse and actively participate in legal meaning forming?

To answer this question, it needs to first be considered whether law itself is elitist ("law-sceptical objection"), or whether it can be constructed in a progressive way. This issue, as I have shown in Section (3),[522] has been extensively studied by legal theory's accounts on the nature of law and adjudication – with varying answers provided by different streams of thought, including deliberations on "agency" of actors within the legal system.[523] However, I believe that I have shown that critical legal accounts do provide a theoretical basis for using law in an emancipatory way, especially. Moreover, shying away from legal approaches (which might in itself be an elitist choice) could well mean leaving the field to conservative or illiberal actors.

Cause lawyering – and strategic litigation in particular – might thus be understood as a form of active re-appropriation of the legal field, of subverting elitist discourses and infusing law with progressive meaning. Thus, finding an "activist legal language" can in itself be an emancipatory endeavour (I will expand on this in the following Section 4.1.). This corresponds with the third subset of my *third research inquiry*: *How could an activist reading of the European Courts' LGBT rights case law look like?*"[524] I will propose such a reading to describe the CJEU's and the ECtHR's case law in the form of a "strategic opportunities litigation" framework in Chapter 3.[525]

Chapters 4[526] and 5[527] will then apply this analytical framework to the Courts' respective case law, addressing (together with Chapter 3) the third subset of my *third inquiry* (*How could an activist reading of the European Courts' LGBT rights case law look like?*)[528]

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[521] *Supra,* at 17.

[522] *Supra,* at 78.

[523] See discussion in Section 3.2.4.

[524] *Supra,* at 18.

[525] *Infra,* at 175.

[526] *Infra,* at 201.

But before turning to the practical part of this dissertation, it is worthwhile to take a closer look at the lessons learned from the theoretical considerations in Chapter 1.

## 4.1. Finding an Activist Language: "Interpretative Interventions"

One of the important points made by critical legal theories is that law is a text, filled with meaning by way of communicative practice.[529] There is no *one right way* to understand a text, since reading it already is interpreting.[530] These processes cannot be separated. Hence, there is no pre-interpretative meaning of a text;[531] and usually, a text enables a number of different interpretations.[532]

Contributing to the interpretation of a term thus is *an active way to participate in judicial decision-making*.[533] Law and its categories are fluid; strategically contributing to more progressive constructions in the courtroom can positively shape law.[534] Addressing the hidden bias and underlying notions of legal categories, and pushing for alternative interpretations of legal terms, might be a promising social change strategy.

Such "interpretative interventions" are, in my view, in line with critical accounts of law as social construct and communicative act. They hold the potential to challenge the hegemonic prevalence

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[527] *Infra,* at 201.

[528] *Supra*, at 18.

[529] See discussion in Section 3.2.

[530] In the context of the ECHR, Greer makes this point when he observes that the Convention demands the exercise of discretion, since the text itself requires interpretation in order to be applicable: "…the general and abstract language of the text, and the fact that the overall purpose and meaning of the Convention require interpretation, make the exercise of discretion by both national authorities and the Court inevitable." Steven Greer, *The Interpretation of the European Convention on Human Rights: Universal Principle or Margin or Appreciation* (CoE Human Rights Files No. 17 2010), 14.

[531] Barak, *Purposive Interpretation in Law*, 9.

[532] Ibid, 9; 19-21.

[533] See discussion on this issue in Section 3.2.4.

[534] See discussion in Section 3.2.3.

of antiquated notions of gender and sexuality by deconstructing legal categories, exposing stereotypes and proposing alternative constructions. Activist lawyers can thus contribute to the development of law in the courtroom.

"Interpretative interventions" can activate the emancipatory potential of law. The more successful activist lawyers are in suggesting a certain interpretation, the greater influence they exert.[535] In fact, Nan Hunter writes: "In my view, ... the single most common and powerful activity within social change lawyering has become the use of litigation to secure enforcement and expansive interpretation of statutes."

However, the question remains how these recognitions can be translated into practice, and inform case law analysis. This is particularly relevant since an actor-centred approach to case law and adjudication is often absent in European legal literature.[536]

To this end, I have devised a "strategic litigation opportunities" framework[537] for analysis of the CJEU's and the ECtHR's case law; it differs from "traditional" case law analysis approaches by taking an activist point of view. The main aim of the framework is to propose a reading of European LGBT case law in a way that allows for an evaluation of its emancipatory potential.

However, before diving into the "strategic litigation opportunities" framework (which also

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[535] Hunter, 'Lawyering for Social Justice', 1012.

[536] There are some exceptions; however, such inquiries are mostly made by political scientists, rather than legal scholars. See, e.g., R. Daniel Kelemen, 'Suing for Europe: Adversarial Legalism and European Governance' (2006) 39 Comparative Political Studies 101; Rachel A. Cichowski and Alec Stone Sweet, 'Participation, Representative Democracy, and the Courts' in Bruce E. Cain, Russel J. Dalton and Susan E. Scarrow (eds), *Democracy Transformed? Expanding Political Opportunities in Advanced Industrial Democracies* (Oxford University Press 2003); Börzel, 'Participation Through Law Enforcement: The Case of the European Union'. Legal scholarship in this context is often written by practitioners; see, e.g., Lilla Farkas and Declan O'Dempsey, *How to Present a Discrimination Claim: Handbook on seeking remedies under the EU Non-discrimination Directives* (Publications Office of the European Union 2011); James A. Goldston, 'Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges' (2006) 28 Human Rights Quarterly 492.

[537] I will present this framework in Chapter 3.

includes suggestions for possible strategic activities for LGBT rights advocates),[538] and applying it to the Courts' case law,[539] I will examine whether the procedural make-up of both courts allows for activist intervention.

[538] In Chapter 3, Section 9.

[539] In Chapters 4 and 5.

## CHAPTER 2

## PROCEDURAL CONSIDERATIONS

In this chapter, I will look into the procedural make-up of both the CJEU and the ECtHR (examining elements such as access to justice, standing, and the possibility of third party intervention, among other things). This inquiry can be seen as a *precondition* for strategic litigation. If procedural requirements present obstacles for litigants and/or third party interveners, cause lawyering will not be an option; therefore, this particular inquiry is necessary for assessing whether there is at all a possibility for advocates to successfully address the European High Courts.

The CJEU and the ECtHR display a number of notable particularities. Whereas the formal conditions for invoking the ECtHR are not overly complex, procedures before the CJEU are a different story altogether. Due to the hybrid nature of the EU,[540] the CJEU displays a number of peculiarities, requiring closer examination. One of the main concerns regarding the CJEU's suitability to protect individual rights is connected to the *raison d' être* of the EU legal structure at large. The European legal system, as Bogdandy writes, "started as a functional legal order: it was set up in order to integrate the European peoples and States, mainly through an integration of their national economies. European law has been an instrument for political and social transformation of completely new dimensions for democratic societies, not meant to *protect*, but rather to *change* them with a view toward a common European future."[541] Therefore, the direct protection of individual rights was arguably not one of the primary aims of the CJEU as the highest court of the European Union.[542] Consequently, the almost complete lack of direct *locus*

[540] See *supra*, note 220. Others argue that the CJEU is indeed a kind of constitutional court of the European Union, pointing *inter alia* to its ability to judicially review national norms against EU law. Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance', 25. For an overview on the CJEU and its complexities, see, e.g., Stone Sweet, 'The European Court of Justice'.

[541] Armin von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37 Common Market Law Review 1307, 1308.

[542] Sanja Tepavčević, 'The Position of the Individual in the European Union through the Lens of the Access to Justice' (2017) 1 EU and Comparative Law Issues and Challenges 292, 299.

*standi* could be seen as a major obstacle to engaging the Court via strategic litigation.[543] Hence, the evaluation of the CJEU's procedural make-up in will be more extensive than the one of the ECtHR.

I will start with an investigation of the CJEU in Section (5).[544] First, I will give an overview of the procedural make-up of the CJEU and turn to a doctrine that importantly shapes access to justice in the context of the CJEU – the doctrine of "direct effect." After that, I will conduct an examination into the different procedural remedies available at the CJEU. Concluding, I will argue that the formal framework of the CJEU – particularly the preliminary reference procedure – allows for strategic litigation in the area of LGBT rights.

In Section (6),[545] I will discuss the procedural make-up of the ECtHR, focusing on both the standing of applicants and the opportunities of third party interventions. This inquiry is somewhat shorter than the previous one concerning the CJEU, since, as I have mentioned, the CJEU is by far the more complex Court in terms of procedural requirements.

At the end of this chapter,[546] I will present a few deliberations on whether the procedural requirements of the CJEU and the ECtHR make these Courts interesting fora for strategic litigation.

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[543] For an overview of standing requirements before the CJEU, see Eliantonio and others, *Standing Up for your Right(s) in Europe. A Comparative Study on Legal Standing (Locus Standi) Before the EU and Member States' Courts*, 25-50.

[544] See Chapter 2, Section 5.

[545] See Section 6.

[546] See Section 7.

## 5. Advocacy Opportunities before the CJEU: The Special Case of the Court of the European Union

The Court of Justice of the European Union (CJEU) is comprised of the European Court of Justice (ECJ), the General Court (GC; formerly Court of first instance, CFI), as well as a number of specialized courts (formerly judicial panels).[547]

The GC (then CFI) was established in 1988[548] to relieve the ECJ's caseload.[549] It was originally conceptualised as an institutional part of the ECJ, but was eventually developed into an independent court with its own jurisdiction.[550] While it initially mainly heard staff cases,[551] the GC now resides over specific preliminary reference cases,[552] as well as over a number of direct actions.[553] In the meanwhile, a specialised "European Civil Service Tribunal" has been established to reside over staff cases.[554] However, an appeal to the GC is possible.[555]
In certain cases, the GC's decisions are subject to review by the ECJ.[556]

The ECJ is the most influential court of the European Union in terms of developing CJEU case law. Judges to the ECJ (one for each Member State) are appointed by the governments of the

[547] Article 19 (1) Consolidated Version of the Treaty on European Union [2012] OJ C 326/13.

[548] Council Decision No. 88/591/ECSC, EC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities [1988] OJ L 319/1.

[549] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (5 edn, Oxford University Press 2011), 60.

[550] Ibid, 59-60.

[551] Ibid, 60.

[552] Article 256 (3) TFEU.

[553] Article 256 (2) TFEU. Most importantly annulment actions (Article 263 TFEU), actions for failure to act (Article 265 TFEU), and damages actions (Article 268, referring to Article 340 TFEU).

[554] Council Decision No. 2004/752/EC, Euratom of 2 November 2004 establishing the European Union Civil Service Tribunal [2004] OJ L 333/7.

[555] Article 256 (1) TFEU.

[556] Article 256 TFEU.

Member States, as are 11 Advocates General (AG).[557] The AGs assist the ECJ (and sometimes the GC) by submitting reasoned opinions on cases; however, not every case will require such an opinion.[558] The AG's opinion is a recommendation on how to decide a case; it is not binding, but in many cases, the Court will follow its reasoning.[559]

In the following, I will refer to the "CJEU," except for instances where it is expedient to make a distinction between the different institutions under its roof.

The CJEU delivers its opinions in a single ruling; there are no dissenting or concurring opinions. Differing judicial views can be expressed in one judgement, sometimes resulting in somewhat ambiguous rulings.[560] Apart from this, an opinion of the AG can contain divergent views on an issue. Such instances of inconsistency and disagreement can provide interesting opportunities for strategic litigation, as I will argue.[561]

Importantly, the doctrines of "supremacy"[562] and "direct effect," developed by the CJEU, have importantly contributed to making EU law accessible to citizens. Indeed, Claire Kilpatrick writes that the CJEU introduced "supremacy" and "direct effect" with hope to

> "ensure that private individuals, through litigation before national courts, and the use of the preliminary reference mechanism … would provide both more and better compliance by Member States with EC law obligations they had assumed."[563]

This of course, as a consequence, allows private litigants to mobilize the Court for the protection

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[557] Articles 253-255 TFEU regulate the selection procedure. The term of office for judges and the AG is six years (reappointment is possible). See also: Article 20 of the Protocol (No. 3) on the Statute of the Court of Justice of the European Union [2010] OJ C 83/210; Commission Decision 94/90 of 8 February 1994 on public access to Commission documents [1994] OJ L 46/58.

[558] Article 252 TFEU.

[559] Craig and de Búrca, *EU Law: Text, Cases, and Materials*, 62.

[560] Ibid, 63.

[561] See Section 8.3.

[562] Discussed in Section 2.1.

[563] Claire Kilpatrick, 'The Future of Remedies in Europe' in Claire Kilpatrick, Tonia Novitz and Paul Skidmore (eds), *The Future of Remedies in Europe* (Hart 2000), 2.

of their rights, which in turn opens up the Court for strategic litigation efforts. [564]

## 5.1. The Doctrine of "Direct Effect:" Enabling Access to Justice

In 1963, the CJEU declared that Union law constitutes rights which private citizens can enforce before their national courts (doctrine of "direct effect") in its landmark decision *Van Gend en Loos*.[565] As Schepel and Blankenburg put it: *Van Gend en Loos* gave "community law to the people."[566] Indeed, *Van Gend en Loos* stressed the importance of the "vigilance of individuals concerned to protect their rights amounts to an effective supervision"[567] in addition to other monitoring mechanisms.

Moreover, the CJEU ruled that, in order to ensure the full effectiveness of the protection of individuals' rights, they were also entitled to receive damages in case of an established breach of Union law.[568] Apart from this, there are a number of legal instruments aiming to ensure citizen's

[564] For an overview see, e.g., Sacha Prechal, 'Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union' in Catherine Barnard (ed), *The Fundamentals of EU Law Revisited* (Oxford University Press 2007), 37; Bruno de Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2 edn, Oxford University Press 2011), 323.

[565] Case 26/62, *NV Algemene Transport- en Expeditie Onderneming Van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1 [1963] ECR 1.

[566] Schepel and Blankenburg, 'Mobilizing the European Court of Justice', 28.

[567] *Van Gend & Loos* (Case 26/62) [1963] ECR 1.

[568] Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and Others v Italian Republic* ECLI:EU:C:1991:428 [1991] ECR I-5357, paras 28-46; Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others (Factortame)* ECLI:EU:C:1996:79 [1996] ECR I-1029, paras 15-23; Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, *Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v Bundesrepublik Deutschland* ECLI:EU:C:1996:375 [1996] ECR I-4845, paras 20-29; Case C-224/01, *Gerhard Köbler v Republik Österreich* ECLI:EU:C:2003:513 [2003] ECR I-10239, paras 30-59, and others.

access to justice and the protection of their rights under EU law.[569]

In terms of cause lawyering, this means that in cases where EU law provisions are more favourable than national rules, activist lawyers can strive to demand the adaptation of their national legal order to more advantageous European standards. At the very least, courts will be required to interpret national legal provisions in a manner that does not contradict EU law (duty of consistent interpretation).[570]

Two notions of direct effect have to be distinguished: Vertical direct effect (direct effect against state actors) and horizontal direct effect (in other words, when EU law provisions grant rights against private parties). Treaty articles will develop both vertical and horizontal direct effect

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[569] For example, Article 31 of the Citizens' Rights Directive establishes that EU citizens and their family members should be guaranteed judicial safeguards in the Member States, in case that their rights were violated by national residency requirements, deportations, etc. 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 (Citizens' Rights Directive) [2004] OJ L 158/77.

The Race Equality Directive also provides access to justice guarantees for victims of discrimination, e.g., in Article 7. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Equality Directive) [2000] OJ L 180/22.

Furthermore, Directives like the Legal Aid Directive aim to facilitate access to justice in cross-border disputes. Commission Directive 2002/8/EC of 6 February 2002 amending Directives 72/168/EEC and 72/180/EEC concerning the characteristics and minimum conditions for examining vegetable and agricultural varieties respectively (Legal Aid Directive) [2002] OJ L 037/7.

Additionally, policies like the Stockholm Programme, adopted in 2009, deals with matters related to judicial standards and procedural consistency and prioritizes, among other things, access to justice for citizens of the European Union. European Council Notice of 4 May 2010, The Stockholm Programme – An open and secure Europe serving the citizen [2010] OJ C 115/1, Section 1.1; European Commission Communication from 20 April 2010, Delivering an area of freedom, security and justice for Europe's citizens – Action Plan Implementing the Stockholm Programme, COM [2010] 171 (final).

[570] Barnard, 'Introduction: The Constitutional Treaty, the Constitutional Debate and the Constitutional Process', 38. Moreover, national courts have the duty to balance the requirement of "effective judicial protection" regarding EU law rights against national procedural and remedial rules. (principle of effectiveness and equivalence). Craig and de Búrca, *EU Law: Text, Cases, and Materials*, 231; Claire Kilpatrick and Bruno de Witte, 'Introducing the Role of Collective Actors and Preliminary References in the Enforcement of EU Fundamental Rights Law' in Elise Muir and others (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17), 1.

"provided that it is intended to confer rights on individuals and that it is sufficiently clear, precise and unconditional."[571]

While Regulations, according to Article 288 TFEU, are directly applicable in that they automatically become a part of the domestic legal order of a Member State, this is not the case for Directives. In principle, Directives need to be implemented into national law by Member States in order to develop legal force.

However, it is well established that Member States institutions (including, of course, national courts) are required to interpret national law "in light of" Directives ("harmonious interpretation" or "vertical indirect effect" of Directives).[572] This is the most important theory that the CJEU has advanced to ensure that Directives develop their full force,[573] and it is a powerful instrument to hold Member States to their obligations under EU law.

Importantly, the obligation to interpret national law in conformity with Directives also applies to national provisions that *predate* the Directive and/or are *not specifically connected* to it.[574] In fact, this interpretive obligation applies to the national legal system *as a whole*.[575]

The limits of "harmonious interpretation" are reached where national law cannot reasonably bear a certain construction.[576] It is up to the national court to decide if and when this point is

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[571] Craig and de Búrca, *EU Law: Text, Cases, and Materials*, 277. The legal basis for this is Article 288 TFEU; The CJEU has developed these conditions in its case law, especially in *Van Gend & Loos* (Case 26/62) [1963] ECR 1, Section II B; Case 41/74, *Yvonne Van Duyn v Home Office* ECLI:EU:C:1974:133 [1974] ECR 1337, para 12; *Defrenne II* (Case C-43/75) [1976] ECR 455, paras 28-42; and others.

[572] Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* ECLI:EU:C:1984:153 [1984] ECR 1891, paras 26-28; Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentación SA* ECLI:EU:C:1990:395 [1990] ECR I-4135, para 8; Joined Cases C-397/01 to C-403/01, *Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* ECLI:EU:C:2004:584 [2004] ECR I-8835, paras 115-118; and others.

[573] Craig and de Búrca, *EU Law: Text, Cases, and Materials*, 200.

[574] Ibid, 202.

[575] *Pfeiffer and Others* (Joined Cases C-397/01 to C-403/01) [2004] ECR I-8835, para 118.

[576] Craig and de Búrca, *EU Law: Text, Cases, and Materials*, 203.

reached.[577]

Activists can make use of the doctrine of "harmonious interpretation" or "uniform interpretation" to advance more LGBT-friendly constructions of national law.[578]

Apart from these cases of "indirect effect," the CJEU held that individuals may, under certain circumstances, rely *directly* on rights provided by Directives ("direct effect").[579] Mainly, individuals can directly invoke a Directive provision against their state if it is sufficiently clear and unconditional to be applied directly by a national court, and if the Member State has not incorporated it in a timely manner (vertical direct effect).[580]

Moreover, the CJEU held that Member States are prohibited from enacting measures that would

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[577] Of course, in such a case, courts might still be required to set aside national provisions. In Mangold, for instance, the Court held that "It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired." Case C-144/04, *Werner Mangold v. Rüdiger Helm* ECLI:EU:C:2005:709 [2005] ECR I-9981, para 78.

[578] Adam Weiss, European Roma Rights Centre (ERRC) (2014); Robert Wintemute, King's College London (2014). See also Chapter 3, Section 8.4.

[579] Some scholars argue that there is a difference between "direct effect" and "direct applicability;" see, e.g., a summary of this debate by Prechal. Prechal, 'Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union', 226. However, this seems to be largely an academic debate, which is of limited interest for the purpose of the present work.

[580] The reasons for this are the binding nature of Directives, which will be more effective if individuals can indeed demand their enforcement; the fact that national courts are allowed to refer questions regarding any EU law instrument to the CJEU; and finally, the argument that Member States should not benefit from failing to incorporate Directives into national law. *Van Duyn* (Case 41/74) [1974] ECR 1337, para 12; Case 148/78, *Pubblico Ministero v Tullio Ratti* ECLI:EU:C:1979:110 [1979] ECR 1629, paras 22-23.

Regarding the concrete meaning of non-application in a timely manner and the conditions for individuals to rely on Directives, see, e.g., Case 8/81, *Becker v Finanzamt Münster-Innenstadt* ECLI:EU:C:1982:7 [1982] ECR 53, para 25; Case C-316/93, *Nicole Vaneetveld v Le Foyer SA and Le Foyer SA v Fédération des Mutualités Socialistes et Syndicales de la Province de Liège* ECLI:EU:C:1994:82 [1994] ECR I-763, paras 18-19; Case C-303/98, *Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* ECLI:EU:C:2000:528 [2000] ECR I-7963, paras 43-45 and 66-70; Joined Cases C-453/02 and 462/02, *Finanzamt Gladbeck v Edith Linneweber and Finanzamt Herne-West v Savvas Akritidis* ECLI:EU:C:2005:92 [2005] ECR I-1131, paras 33-37 and 41-43; Case C-346/97, *Braathens Severige AB v Riksskatteverket* ECLI:EU:C:1999:291 [1999] ECR I-3419, para 29; Case C-476/01, *Criminal Proceedings against Felix Kapper* ECLI:EU:C:2004:261 [2004] ECR I-1377, paras 71-72, 78; and others.

compromise the Directive's objectives even *prior* to the end of the implementation period.[581] In its 2005 *Mangold* decision, the CJEU held that Member States had to "refrain from taking any measures seriously liable to compromise the attainment of the result prescribed" by a Directive which was soon to be implemented in domestic law.[582] It also stated that a national court could set aside conflicting national legislation without having to wait for the correct implementation of a Directive[583] – a big step to ensure effective anti-discrimination protection of individuals.[584]

Interestingly, the Court also held in *Mangold*[585] (and later in *Kücükdeveci*)[586] that the principle of non-discrimination *based on age*, derived from the general principle of equal treatment,[587] could develop horizontal direct effect.[588]

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[581] Case C-129/96, *Inter-Environnement Wallonie ASBL v Régione Wallone* ECLI:EU:C:1997:628 [1997] ECR I-7411, paras 36, 41-50.

[582] *Mangold* (Case C-144/04) [2005] ECR I-9981, para 67.

[583] Ibid, para 78.

[584] The Court held in *Mangold*: "[A]bove all, Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. Indeed ... the sole purpose of the Directive is 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation', the source of the actual principle underlying the prohibition of those forms of discrimination being found, as is clear from the third and fourth recitals in the preamble to the Directive, in various international instruments and in the constitutional traditions common to the Member States. The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law. Where national rules fall within the scope of Community law ... the Court must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with such a principle. Consequently, observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition of a Directive intended to lay down a general framework for combating discrimination on the grounds of age, in particular so far as the organisation of appropriate legal remedies, the burden of proof, protection against victimisation, social dialogue, affirmative action and other specific measures to implement such a Directive are concerned." Ibid, paras 74-76. The Court confirmed the horizontal direct effect of the principle of non-discrimination on grounds of age again in Case C-555/07, *Kücükdeveci v Swedex GmbH & Co. KG* ECLI:EU:C:2010:21 [2010] ECR I-365, para 43.

[585] *Mangold* (Case C-144/04) [2005] ECR I-9981, paras 75-78.

[586] *Kücükdeveci* (Case C-555/07) [2010] ECR I-365, para 43.

[587] For an in-depth discussion of the "principle of equality," see Chapter 4, Sections 11.1 and 12.1.

[588] See also *ČEZ,* concerning the principle of non-discrimination based on nationality as a general principle of law (in the context of the EAEC Treaty); Case C-115/08, *Land Oberösterreich v ČEZ as* ECLI:EU:C:2009:660 [2009] ECR I-10265.

In a nutshell, the doctrine of "direct effect" (and the various subsets of doctrines flowing from it) gives non-public actors the chance to directly engage with the opportunities provided by the EU acquis and demand the enforcement of EU law within their national legal systems.[589]

## 5.2. Procedural Remedies at the CJEU

In order to establish whether procedures before the CJEU allow for civil society participation, it is important to take a closer look at the opportunities provided by the formal procedural rules governing these procedures, since they set the legal framework within which activist litigants can participate in judicial decision-making.[590] Indeed, procedural remedies for private litigants have significantly been strengthened in the past decades;[591] for instance, by expanding the possibilities for individuals to evoke EU law before their national courts (and thus, in consequence, eventually before the CJEU as well).[592] There are a number of instruments with which litigants can challenge EU law or acts of the European institutions; however, sexual orientation discrimination is arguably most salient in "national" contexts (e.g., discrimination by a private or state employer, non-recognition of a family status by domestic authorities, etc.).

The following part seeks to examine the different types of claims that can be brought before the Court of Justice of the European Union (CJEU).[593] In particular, this evaluation will try to discern elements that hint to the potential for strategic litigation efforts.

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[589] Börzel, 'Participation Through Law Enforcement: The Case of the European Union', 134.

[590] Kelemen writes: "[f]or private enforcement to play a meaningful role, there must be effective access to justice for private parties to enforce those norms." R Daniel Kelemen, 'American-Style Adversarial Legalism and the European Union' (2008) 37 EUI Working Papers / RCSAS , 5.

[591] Claire Kilpatrick describes the development of these remedies through the Court's case law (based on the principles of effectiveness and equivalence of EU law and to the expense of national procedural autonomy), Kilpatrick, 'The Future of Remedies in Europe', 3-8. See also: Carol Harlow, 'A Common European Law of Remedies?' in Claire Kilpatrick, Tonia Novitz and Paul Skidmore (eds), *The Future of Remedies in Europe* (Hart 2000), 70.

[592] Mostly through the preliminary reference procedure. See Section 5.2.2.

[593] The Treaty on the functioning of the European Union (TFEU) determines how and which cases can be brought before the Court of Justice of the European Union (CJEU) or the General Court (GC, former Court of First Instance, CFI). The different procedures are laid down in Section 5 of the TFEU, in Articles 251-281.

The European Court system knows a range of different actions, with highly diverging *modi operandi* and reach. The *locus standi* of individual litigants is of particular concern when examining these actions, since strategic litigation requires activist lawyers to be able to address the Court in some way.

For instance, Article 259 TFEU gives member states the possibility to sue one another for infringing the Treaties; however, it does not provide standing to private actors and is such not particularly suited for strategic litigation efforts. Moreover, the number of cases brought forward under this Article doesn't supersede single digits.[594]

Article 268 TFEU, referencing Article 240 TFEU provides compensation claims for non-contractual liability (torts), in case that the Union's institutions or representatives have caused damage to individuals or undertakings.[595] This action for damages can be sought independently of other EU law remedies; however, applicants are required to first approach their national courts for redress.[596]

In the following, I will examine three particular procedures – the infringement procedure, the preliminary reference procedure and the annulment action – for their potential to accommodate strategic litigation. My main focus lies on the preliminary reference procedure,[597] since it is by far the most influential of the lot.[598] My examination of procedural law will place emphasis on elements which enable or discourage litigation, such as standing requirements (at the beginning and throughout the whole process), third party intervention possibilities, transparency, and so on.

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[594] Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance', 13.

[595] Article 268 TFEU, referencing Article 340 TFEU.

[596] Eliantonio and others, *Standing Up for your Right(s) in Europe. A Comparative Study on Legal Standing (Locus Standi) Before the EU and Member States' Courts*, 35.

[597] Article 267 TFEU.

[598] Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure', 9.

### 5.2.1. Infringement Procedures

Under Article 258 of the Treaty on the Functioning of the European Union (TFEU), the European Commission can hold Member States responsible for non-compliance with an obligation arising under the Treaties (so called "infringement procedure").[599] The Commission can either proactively investigate violations of Treaty obligations by a Member State, or it can follow up on complaints lodged by individuals, companies or Member States.[600] However, the Commission has full discretion in deciding whether it wants to initiate infringement proceedings or not.[601]

In the first phase of the infringement procedure, the Commission invites the Member State in question to explain its points of view, providing an opportunity to reach an informal agreement. If this is not successful, the Commission formally informs the Member State of the specific breach it is accused of, to which the State may reply. If still no agreement can be reached, the Commission issues a "reasoned opinion," stating the exact grounds of the alleged infringement, and urging the Member State to comply within a certain time frame.[602] Only after the expiration of this period will the Commission refer the case to the CJEU.

Most disputes actually do not reach the Court, but are settled at a pre-litigious stage,[603] which is why this process has sometimes been labelled "hidden jurisprudence."[604] Francis Snyder observed that the Commission can use the threat of litigation before the Court as part of its negotiating strategy during preliminary stages of the infringement procedures.[605] He thus called

[599] Article 258 TFEU provides the basis for determining a fine for a Member State that failed to comply with its obligations under the Treaties.

[600] Francis Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 Modern Law Review 19, 27.

[601] Ibid, 30.

[602] Craig and de Búrca, *EU Law: Text, Cases, and Materials*, 413.

[603] Over 90%. Ibid, 413.

[604] Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', 30.

[605] Ibid, 31.

the Commission the "ultimate repeat player in Community litigation,"[606] referring to Marc Galanter's definition of "repeat player" as an entity which is constantly involved in certain forms of litigation, benefitting from its accumulated know-how and skills in navigating the judicial system.[607]

Trying to instigate the Commission to pursue proceedings under Article 258 TFEU might *prima facie* seem like an interesting intervention opportunity for civil society activists. Indeed, many of the incidents that cause the Commission to initiate infringement proceedings were brought to its attention by citizens.[608] The Commission itself has acknowledged and welcomed this by, for instance, introducing a standardized complaint form for individuals wishing to report an alleged violation.[609] However, it has also stated that the main purpose of infringement procedures was not to examine the merits of individuals' claims, but rather, to hold Member States to their obligations.[610]

There are a number of elements that make this procedure less appealing in terms of its participatory potential. First of all, the fact that the Commission has full discretion in deciding whether to initiate proceedings or not relegates individual complainants to mere supplicants. As mentioned before, they have no legal right to have their claim examined by the Commission, nor do they have an appeal, should the Commission decide to refrain from pursuing the complaint.[611]

The mere fact that claimants do not have a formal title to force the Commission to pursue their

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606 Ibid, 30.

607 Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change', 9.

608 Craig and de Búrca, *EU Law: Text, Cases, and Materials*, 410.

609 Ibid, 410.

610 Ibid, 410. See also: Commission, 'Eighteenth Annual Report on Monitoring the Application of Community Law' COM (2001) 309 final.

611 Börzel, 'Participation Through Law Enforcement: The Case of the European Union', 133-134. Of course, there is the possibility to file a complaint with the European Ombudsman if a citizen or a business is of the opinion that the Commission's refusal to take up or continue infringement procedures establishes a case of maladministration (according to Article 228 TFEU). However, while this option undeniably presents a tool to get the Commission to reconsider its reluctance regarding infringement procedures in specific cases, this doesn't substantively alter the arguments brought forward in the following part.

complaint cannot in and of itself be considered an impediment for social change activists, but merely an invitation to be creative – it might, however, impede strategic litigation in the strict sense, since the procedure (in its pre-litigious phase) is not, essentially, a court proceeding and thus, does not lend itself to litigation.[612] Moreover, the lack of legal standing is not only an issue at very beginning, when the claim is lodged. Generally, a complainant cannot become a party to the proceedings at any stage of the infringement procedure, due to its bilateral character (Commission – Member State).[613] Indeed, the CJEU confirmed that there was no right for third parties to access the pleadings before the Court, and that disclosure of these pleadings would compromise on-going proceedings.[614]

Hence, bringing forward factual or legal arguments or otherwise contributing to the course of the proceedings is close to impossible; participation is mostly restricted to the initial complaint that prompts the Commission to act.

#### 5.2.1.1. Limited Transparency as a Major Obstacle for Strategic Litigation

Connected to this is the issue of transparency. Naturally, participatory endeavours such as cause lawyering benefit from a high availability of information. Prechal and de Leuw note (albeit not in the context of strategic litigation):

> "Citizens need to know who, why and how decisions have been made so that those who have made them can be held accountable. In other words, democracy and political accountability are two intertwined notions. Their relation to transparency is that transparency is a quintessential precondition for proper functioning democracy and

[612] For a discussion on the distinction between strategic litigation and cause lawyering, see Section 1.2.

[613] As, e.g., pointed out by the Court of First Instance (CFI) in the Petrie Case. Case T-191/99, *David Petrie, Victoria Jane Primhak, David Verzoni and Others v Commission of the European Communities, ECLI:EU:T:2001:284* ECLI:EU:T:2001:284 [2001] ECR II-3677, para 70.

[614] Case T-36/04, *Association de la Presse Internationale ASBL (API) v Commission of the European Communities* ECLI:EU:T:2007:258 [2007] ECR II-3201, paras 59-140; Joined Cases C-514/07 P, C-528/07 P and C-532/07 P, *Kingdom of Sweden and Others v Association de la presse internationale ASBL (API) and European Commission* ECLI:EU:C:2010:541 [2010] ECR I-8533, paras 77-102.

accountability." [615]

Within the EU, it is generally recognised that transparency is necessary for democratic participation;[616] in fact, it is understood to be a main policy concern.[617] The "concept of openness" was introduced in 1992 as an attachment to the Maastricht Treaty, in Declaration 17 on the right of access to information.[618] Building on this concept, the Commission and the Council promulgated a code of conduct, giving applicants a title to appeal refusals of access to certain official documents, either through judicial proceedings under former Article 230 EC (now Article 263 TFEU, see also discussion below), or by filing a complaint with the European Ombudsman under Article 195 EC (now Article 228 TFEU).[619] The Treaty of Amsterdam introduced a new Article 255 EC (now Article 15 TFEU) which stated that "[i]n order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible."[620] Regulation (EC) No. 1049/2001 is a manifestation of this principle. It translates the requirements of Article 255 EC (now Article 15 TFEU) as a requirement to provide access to documents of the European Parliament, Council and Commission, stating "[t]he purpose of this Regulation is to give the

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[615] Sacha Prechal and Magdalena E. de Leeuw, 'Transparency: A General Principle of EU Law' in Ulf Bernitz, Joakim Nergelius and Cecilia Cardner (eds), *General Principles of EC Law in a Process of Development* (Kluwer Law International B. V. 2008), 205. Prechal and de Leeuw also point to the fact that transparency increases democratic legitimacy. Ibid, 205.

[616] See, e.g., Recital (2) of the Preamble of the Regulation regarding public access to EU documents: "Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union." Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43.

[617] Prechal and de Leeuw, 'Transparency: A General Principle of EU Law', 201. The CJEU also uses the term "general principle of transparency", Case C-260/04, *Commission of the European Communities v Italian Republic* ECLI:EU:C:2007:508 [2007] ECR I-07083.

[618] Declaration on the right of access to information, Treaty on European Union, signed at Maastricht on 7 February 1992 (Maastricht Treaty) [1992] OJ C 191/1, at 101.

[619] Council and Commission Code of Conduct No. 93/730/EC Concerning Public Access to Council and Commission Documents [1993] OJ L 340/41; Commission Decision 94/90 of 8 February 1994 on public access to Commission documents [1994] OJ L 46/58.

[620] Article 255 EC (now Article 15 TFEU).

fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty."[621]

In the context of infringement procedures, the availability of documents becomes especially salient, since complainants are excluded from participating in the procedure itself. The Commission has ample possibilities to deny complainants access to documents drafted during the infringement proceedings.

First of all, informal communications need not be understood as documents in the meaning of the Regulation (EC) No 1049/2001.[622] Article 4 of the Regulation lists a number of exceptions from the principle that documents should be publically accessible, among them concerns for the privacy of actors involved in infringement procedure negotiations.[623] Here, the Commission is usually granted a wide margin for assessing whether it discloses documents or not.[624]

Thus, as matters stand, infringement proceedings are a rather exclusionary instrument of monitoring Member States' compliance with Treaty obligations. They have therefore been called an "elite politico-administrative procedure" which "incorporates techniques of 'elite' diplomacy and intergovernmental relations…"[625] In the phase in which infringement proceedings are entirely controlled by the Commission – that is, in pre-litigious stages – these proceedings are

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[621] Recital (4) of the Preamble of Regulation (EC) No. 1049/2001 [2001] OJ L 145/43.

[622] The definitions of Article 3 (a) and 2 (5), (6) of ibid might exclude informative documents meant for internal circulation. See also: Maja Augustyn and Cosimo Monda, 'Transparency and Access to Documents in the EU: Ten Years on from the Adoption of Regulation 1049/2001.' (2011) 2011 EIPAScope 17.

[623] Even though the CJEU, following a judgment by the Court of First Instance, held in *Sweden/AP* that documents in the realm of an infringement procedure would no longer automatically fall under the exception of Article 4(2) regarding the protection of court proceedings, it granted the Commission wide discretion regarding its decision not to disclose documents during a pre-litigious stage in *LPN*, in order not to endanger the trust between Commission and Member States. *Sweden and Others v API and Commission* (Joined Cases C-514/07 P, C-528/07 P and C-532/07 P) [2010] ECR I-8533, paras 77-102; Joined Cases C 514/11 P and C 605/11 P, *Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission* ECLI:EU:C:2013:738 [2013] , paras 55-61.

[624] Deirdre Curtin and Päivi Leino-Sandberg, 'Openness, Transparency and the Right of Access to Documents in the EU. In-Depth Analysis' (2016) 63 EU Working Papers / RSCAS , 14-16.

[625] Carol Harlow and Richard Rawlings, 'Promoting accountability in multilevel governance: a network approach' (2007) 13 European Law Journal 542, 448.

distinguished importantly from other (potentially) elitist proceedings[626] in that they present an "essentially closed, inter-party set of negotiations…"[627] In other words, neither did they mean to enable, nor do they *de facto* enable, public participation.

This is not to say that civil society activists cannot in any way make use of the possibilities provided by infringement proceedings; as Kelemen puts it, the "EU has long relied on private parties to serve as the eyes, ears, and ultimately, the long arm, of community law…"[628] Indeed, the Commission strongly counts on observations made by private parties to become aware of possible breaches of Treaty obligations by Member States.[629] Creative strategies that take into account the specific protocol and mode of operation of the Commission or its members might achieve promising successes.

However, infringement procedures do not lend themselves to strategic litigation in the strict sense,[630] for the reasons outlined above. The procedure is constructed in a way that encourages whistleblowing, but not necessarily independent and self-determined bottom-up judicial activism that aims to control the trajectory of its own impetus. However, it needs to be stressed that non-litigious cause lawyering or other forms of activism might be quite successful in this context. For instance, Schepel and Blankenburg have pointed out that the Commission itself might view the infringement procedure as a way to enhance citizen participation; furthermore, the fact that there are no noteworthy formalities nor expenses make filing a complaint according to this procedure very cost- and time-efficient. If proceedings do reach the CJEU, the Court most often will find in favour of the Commission. [631] In other words, even in the absence of procedural guarantees, it literally does not cost much to try to get the Commission to act, and the potential benefits are well worth the effort.

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[626] Ibid, 450.

[627] Ibid, 550.

[628] Kelemen, 'Suing for Europe: Adversarial Legalism and European Governance', 109.

[629] Börzel, 'Participation Through Law Enforcement: The Case of the European Union', 133.

[630] See discussion on strategic litigation and cause lawyering in Section 1.

[631] Schepel and Blankenburg, 'Mobilizing the European Court of Justice', 16-17.

Another interesting thought is whether the Commission could be compared to a "repeat player" in the sense of Marc Galanter's description of actors in the judicial system.[632] This automatically begs the question of whether the Commission itself might act as a representative of civil society concerns – and in particular, of LGBT rights. Whereas this is a seductive idea, the dynamics of action by the Commission are not quite comparable to "cause lawyering" approaches in an activist sense. The Commission might be a repeat player; however, unlike a social movement or a civil rights organisation, it does not have a civil rights agenda (at least not officially), and thus, its activities hardly qualify as "cause lawyering." Rather, it is more comparable to an administrative organisation that aims to ensure (via litigation, if necessary) the correct application and implementation of EU law, among other things. Therefore, it is be fair to say that to file a popular complaint is an additional / supplemental form of civil societal participation, which could be complemented by more comprehensive litigation strategies. Infringement procedures therefore only peripherally lend themselves for an examination of cause lawyering, much less strategic litigation.

### 5.2.2. Preliminary Reference Procedures

The procedure that has produced the biggest amount of litigation by far is the preliminary reference procedure under Article 267 TFEU. It provides:

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
> (a) the interpretation of the Treaties;
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union…"

This means that the CJEU has jurisdiction in cases where a Member State allegedly breached its obligations under EU law in the widest sense. While the CJEU will not directly determine

[632] Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change'. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', 30.

whether a national law is compatible with EU law, but rather offer an "interpretation" of the respective EU law or Treaty provision,[633] the result often is a *de facto* evaluation of the validity of national legislation.[634] The CJEU has held that "provisions or concepts taken from Community law should be interpreted uniformly."[635] This, of course, means that the interpretation advanced by the Court directly affects the national law in question. Moreover, due to *supremacy* of EU law, national law creates an obligation for the national court to redress the situation.[636]

The CJEU's competence to examine the "validity" of EU institutional acts extends to Directives, Regulations or decisions, which is particularly important in cases where an individual claims that his rights arising of such an act have been infringed.[637] A national court or tribunal which has to deal with such a question in a judicial capacity may ask the CJEU for its authoritative assessment of the case in light of relevant EU law, if it is convinced that this is necessary in order to pass judgment.

However, the CJEU merely decides on questions of law, not of fact. The national court is responsible for the fact finding part of the proceedings; after clarification of the relevant EU law issue by the CJEU, the matter is again deferred to the national court for a final decision in light of the CJEU's assessment. In addition, the CJEU can refuse to give a preliminary ruling due to lack of jurisdiction for a number of different issues: for instance, because the matter didn't arise out of a contentious jurisdiction,[638] because the referring cannot be considered a court or tribunal

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[633] Craig and de Búrca, *EU Law: Text, Cases, and Materials*, 444.

[634] Thomas de la Mare and Catherine Donnelly, 'Preliminary Rulings and EU Legal Integration: Evolution and Stasis' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011), 367, 368.

[635] Case C-280/06, *Autorità Garante della Concorrenza e del Mercato v Ente Tabacchi Itialiani – ETI SpA and Others and Philip Morris Products SA and Others v Autorità Garante della Concorrenza e del Mercato and Others* ECLI:EU:C:2007:775 [2007] ECR I-10893, para 21.

[636] Craig and de Búrca, *EU Law: Text, Cases, and Materials*, 444.

[637] Ibid, 444.

[638] Case C-111/94, *Job Centre Coop. ARL.* ECLI:EU:C:1995:340 [1995] ECR I-3361, paras 9-11.

in the meaning of Article 267,[639] or because the connection of the issue at hand with EU law is not sufficiently clear,[640] among other reasons.[641]

Nonetheless, if a relevant issue arises before a national court or tribunal of last instance (i.e., whose decision cannot be appealed under national law), then this institution is required to bring the matter to the attention of the CJEU.[642] However, if the issue in question is "so obvious as to leave no scope for any reasonable doubt," the tribunal may refrain from referring.[643] The CJEU may, in addition to answering the questions presented to it by the national court or tribunal, also review the respective EU measure itself (according to Article 277 TFEU).

Tridimas has described the preliminary references jurisdiction of the CJEU as

> "all-embracing, mandatory, and exclusive. It has been all-embracing in that the possibility of making a reference has been open to all national courts and tribunals irrespective of their position in the national judicial hierarchy. … The Court's jurisdiction has also been mandatory in the sense that it is binding on Member States and, under Article 234(3), courts of last instance are under an obligation to make a reference. The final feature, namely exclusivity, derives from the division of jurisdictions between the CJEU and the CFI [Court of First Instance, now General Court] when the latter was established. Whilst the CFI was granted jurisdiction to hear direct actions, preliminary references were reserved for the CJEU. Indeed, the rationale behind the establishment of

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639 Case C-134/97, *Victoria Film A/S* ECLI:EU:C:1998:535 [1998] ECR I-7023, paras 14-18.

640 Order of the Court, 28 June 2000, Case C-116/00, *Criminal proceedings against Claude Laguillaumie* ECLI:EU:C:2000:350 [2000] ECR I-4979, paras 14-22.

641 For an overview, see Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure'.

642 There are two theories that define the "no appeal" requirement: the concrete theory argues that tribunals are included which offer no appeal in the particular type of case in question, whereas the abstract theory only views tribunals as included which are never subject to appeal. Craig and de Búrca, *EU Law: Text, Cases, and Materials*, 446.

643 'Acte Clair' Doctrine. See Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* ECLI:EU:C:1982:335 [1982] ECR 3415, para 21. But: the mere fact that the Court has already decided a similar case does not necessarily relieve a last-instance national court from its obligation to refer: Case C-461/03, *Gaston Schul Douane-Expediteur BV v Minister van Landbouw, Natuur en Voedselkwalitiet* ECLI:EU:C:2005:742 [2005] ECR I-10513, para 25.

> the CFI was to alleviate the CJEU's mounting case law and ensure that the latter could concentrate in ensuring the uniform interpretation of Community law."[644]

Bluntly put, however, the CJEU still remains the main judicial institution entitled to make crucial decisions; in fact, as Tridimas has pointed out, "(t)hese changes … bring the CJEU closer to assuming the role of a Supreme Court of the Union."[645] However, CJEU cannot be seen as the equivalent to a court of appeals or a traditional "supreme court" (particularly in the realm of "preliminary reference procedures"), since its role is restricted to examining a case's conjunctions with EU law (the referred question(s)), not the case as a whole.[646]

Tridimas' description also illustrates the pre-eminence of the preliminary reference procedure compared to other procedures of the CJEU, especially in terms of its impact on national jurisdictions and European Union law in general. Preliminary rulings have importantly shaped EU law and the powers of the Court itself.[647]

At first glance, these observations make the preliminary reference procedure very interesting for social change advocates. But to answer the question of whether the preliminary reference procedure could be a promising venue for strategic social change litigation, it is not enough to state that the CJEU has, in fact, the power to review national legislation and to reshape Union law. Only if litigants can interact with the court in a way that allows them to take part in the judicial decision making process, can they actively contribute to the formation of EU law in practice. Furthermore, as mentioned, this procedure gives them an instrument to challenge disadvantageous national provisions.

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644 Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure', 13.

645 Ibid, 21.

646 Trevor C Hartley, *The foundations of European Community law: an introduction to the constitutional and administrative law of the European Community* (Oxford University Press, USA 2007), 287.

647 Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure', 11; Stone Sweet and Brunell, 'The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961–95', 68.

The issue of the position of private litigants in this context is tricky, since, as it is also the case in the infringement procedure, they do not have the possibility to directly address the CJEU. During the national proceedings, litigants can suggest that the court refer the case to the CJEU; however, they have no right to *request* a reference.[648]

The preliminary reference procedure usually starts with the referring court requesting a preliminary ruling of the CJEU. Parties to the proceedings before the national courts have the right to receive their national court's decision regarding the initiation of a preliminary reference procedure. What is more, they can submit written observations to the CJEU.

Article 23 of the Statute of the Court of Justice of the European Union states:

> "Within two months of this notification, *the parties*, the Member States, the Commission and, where appropriate, the institution, body, office or agency which adopted the act the validity or interpretation of which is in dispute, shall be entitled to submit statements of case or written observations to the Court."[649] *(emphasis added)*

Parties are granted a period of two months after notification of the order for reference to submit written observations. This period has been described as extremely short by advocates, especially since sometimes, LGBT rights advocates will not be involved in a case from the outset.[650] The brevity of this period, taken together with the fact that LGBT rights cases referred to the CJEU usually develop within a local context (and often without the knowledge of major European LGBT rights organisations), make the formation of a comprehensive European litigation strategy difficult. However, activists have gone to great lengths to compensate for these circumstances, such as closely monitoring the official CJEU journal for relevant cases, and keeping each other updated about any recent development. [651]

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[648] Lars Hornuf and Stefan Voigt, 'Preliminary References—Analyzing the Determinants that Made the ECJ the Powerful Court it Is' Berkeley Program in Law & Economics Working Paper Series <http://ssrn.com/abstract=1843364> accessed 13 April 2013.

[649] Protocol (No. 3) on the Statute of the CJEU [2010] OJ C 83/210.

[650] Robert Wintemute, King's College London (2014).

[651] Ibid; Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014).

During the written stage, the CJEU will determine the size of the panel: 3, 5 or 15 judges (Grand Chamber), or as a full court.[652] Then, it will decide whether an oral hearing and an opinion of the Advocate General (AG) are necessary. If an oral hearing is held, the parties can argue their case at this stage, and the Court and the AG can question them. The AG will (if necessary) issue her opinion, and the Court will deliberate on it and then, deliver its verdict.[653]

This means that litigants have a right to provide the CJEU with their perspective regarding the questions at hand. They are also entitled to receive all relevant documents regarding the procedure and even review whether their arguments have been faithfully reproduced.[654]

Perhaps most importantly, the litigants are allowed to participate in the hearing, make observations and comment on other participants' submissions.[655] The importance of these procedural guarantees cannot be overstated; litigants are thus entitled to plead their case directly to the Court. This might indeed be the most relevant difference to the infringement procedure, where complainants have no such opportunities and can indeed consider themselves lucky if they are granted access to documents drafted during the negotiations.

The discretion regarding whether and which questions to refer to the CJEU rests fully with the national court or tribunal.[656] However, the parties can, in the framework of their national judicial

[652] Protocol (No. 3) on the Statute of the CJEU [2010] OJ C 83/210, Article 16.

[653] Proceedings before the General Court (GC) are similar; the main difference is the absence of the AG. However, there is the option that one of the judges will temporarily take on the role of AG. Ibid, Article 49.

[654] Carl Otto Lenz, 'The Role and Mechanism of the Preliminary Ruling Procedure' (1994) 18 Fordham International Law Journal 388, 401.

[655] Ibid, 402.

[656] See, e.g., *CILFIT* (Case 283/81) [1982] ECR 3415, para 9: "[T]he mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of Article 177 [now Article 267 TFEU]."

possibilities, assist the national court in formulating a reference question.[657] As an array of scholarship points out, national courts are usually not reluctant to address the CJEU.[658] LGBT rights advocates I interviewed have reported different experiences in this regard. They reported that the success of suggesting a reference to a national court differs from country to country. Usually, the UK was seen as a good place to push for a reference.[659]

Adam Weiss (ERRC) elaborated on the issues with asking a national court to refer:

> "In the UK I found that the courts aren't always willing to refer, but it's always a part of the process, asking [whether a referral would make sense]. Elsewhere in Europe, it might be more difficult to get courts to refer. ... In some jurisdictions, the lawyers are saying: Oh, the national judges will feel insulted if we suggest to them that they make a reference. Because that's a way of saying that they don't know the answer to the

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[657] The willingness of a court to base its reference on the suggestions of the parties is highly dependent on the national judicial situation, as well as the concrete court and judge. Karen Alter and Jeannette Vargas, 'Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy' (2000) 33 Comparative Political Studies 452, 460.

[658] See, e.g., Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*; Börzel, 'Participation Through Law Enforcement: The Case of the European Union'; Burley and Mattli, 'Europe Before the Court: A political Theory of Legal Integration'; George Tridimas and Takis Tridimas, 'National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure' (2004) 24 International Review of Law and Economics 125; and many others.

There have been various explanations regarding the question of why national courts refer cases to the CJEU. While an elaboration of these reasons would go beyond the scope of this dissertation (since the mere fact that courts are usually not reluctant to make referrals suffices for the purposes of the argument), it is worthwhile to point out that Stone Sweet and Brunell have provided an overview of the different strands of scholarship in this matter: Stone Sweet and Brunell, 'The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961–95', 68; Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance'; See also: Kelemen, 'Suing for Europe: Adversarial Legalism and European Governance', 104.

Whereas the courts usually follow the CJEU's evaluation, there are a few exceptions: In *Inzirillo*, the French *Cour de Cassation* which had referred the case decided, after receiving the preliminary ruling and against the CJEU's assessment, that EC law was not applicable, after all. Case 63/67, *Vito Inzirillo v. Caisse d'Allocations Familiales de l'Arrondissement de Lyon* ECLI:EU:C:1976:192 [1976] ECR 2057.

Works that examine implementation of CJEU rulings by national courts are, e.g., Joseph Weiler, 'A Quiet Revolution: The European Court and Its Interlocutors' (1994) 26 Comparative Political Studies 510; Joest Korte, *Primus Inter Pares: The European Court and National Courts. The Followup by National Courts of Preliminary References ex Art. 177 of the Treaty of Rome: A Report on the Situation in the Netherlands* (Nomos Publications 1991), 85.

[659] Matthew Evans, AIRE Centre, London, GB (2014); Adam Weiss, European Roma Rights Centre (ERRC) (2014); Robert Wintemute, King's College London (2014).

> question. ... I was involved in a case in Ireland, where one judge was saying: Why should I of all the judges in all of Europe be the first one to ask this question? ... In some jurisdictions, it's not very common to refer to EU law at all. You just refer to the national law which transposes the EU Directive. ... In France, you only refer to an EU Directive if you're claiming that it hasn't been transposed properly. So you would never bring a Directive in for matter of interpretation, the way you would in an English court. And as a result, it's unusual to find yourself in the position of asking for a reference at all, because usually no one involved is even aware that there's EU law that's relevant."[660]

One of the major challenges, as Adam Weiss noted (and this was echoed by other activists) was the lack of awareness of EU law, both on parts of lawyers and judges.[661] Also, the high dependency on the national level for achieving a reference meant that the cooperation with experienced lawyers on the ground was vital.[662] This of course pressed internationally operating LGBT rights advocates to search for allies versed in national law, EU law and LGBT rights alike;[663] or, at the very least, to find lawyers willing to cooperate in an LGBT rights litigation strategy. Here, activists reported mixed experiences; some conceded that a few lawyers were usually eager to participate in such endeavours, due to the publicity and reputation they entailed.[664] Other activists reported more opposition from national lawyers, due to language barriers, unfamiliarity with strategic litigation (especially on the EU level), or a disinterest in cooperation more generally.[665]

However, these practical issues did not demotivate activists from bringing litigation before the

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[660] Adam Weiss, European Roma Rights Centre (ERRC) (2014).

[661] Ibid; Matthew Evans, AIRE Centre, London, GB (2014); Robert Wintemute, King's College London (2014); Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014).

[662] Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014).

[663] Robert Wintemute, King's College London (2014).

[664] Matthew Evans, AIRE Centre, London, GB (2014); Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014).

[665] Adam Weiss, European Roma Rights Centre (ERRC) (2014); Robert Wintemute, King's College London (2014).

CJEU. In fact, if a reference was achieved, the CJEU was often seen as a more efficient forum than the ECtHR.[666] Moreover, a good rapport within the national court system and the reputation as an expert usually helped advocates in a national judicial proceeding.[667]

Therefore, litigants are in a more advantageous situation compared to complainants in an infringement procedure. They are parties to a case at the national level and thus, enjoy a wide array of procedural guarantees before their national courts. The fact that they have the right to have their issue decided puts them in a stronger position compared to complainants in an infringement procedure who can merely encourage the Commission to initiate investigations. The procedural right to be heard provides litigants with a chance to present a compelling case and to focus their efforts on convincing their national judges that the issue before them requires CJEU involvement. The number of preliminary references presented to the CJEU has steadily grown over the years; this trend is likely to continue.[668]

### 5.2.2.1. Standing of Third Parties in Preliminary Reference Procedures

While the CJEU does usually not provide for *amicus curiae* briefs or similar third party interventions, there are certain exceptions.[669] In order to submit observations, an "interest in the

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[666] Robert Wintemute, King's College London (2014); Adam Weiss, European Roma Rights Centre (ERRC) (2014); Matthew Evans, AIRE Centre, London, GB (2014).

[667] Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014); Robert Wintemute, King's College London (2014).

[668] This growth has been well documented: See, e.g., Alec Stone Sweet, 'The European Court of Justice and the judicialization of EU governance' (2010) 5 Living Reviews in European Governance 2, 13; R. Kelemen, 'Suing for Europe: Adversarial Legalism and European Governance', 111; Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure', 16.

However, the number of references brought forward varies from Member State to Member State. For instance, in 2009, Germany addressed the CJEU 59 times, whereas Ireland and Luxembourg didn't file a preliminary reference request at all. European Union Agency for Fundamental Rights (FRA), *Access to justice in Europe: an overview of challenges and opportunities* (Publications Office of the European Union 2011) 34, <http://fra.europa.eu/sites/default/files/fra_uploads/1520-report-access-to-justice_EN.pdf> (accessed 13 April 2013).

[669] Jessica Maria Almqvist, 'The Accessibility of European Integration Courts from an NGO Perspective' in Tullio Treves and others (eds), *Civil Society, International Courts and Compliance Bodies* (Asser Press 2005), 277.

result of the case" must be shown.[670] However, in CJEU proceedings, third parties must have been involved already on a national stage before the submission of a reference request, if they wish to submit written observations to the CJEU.[671]

A number of national jurisdictions provide certain organisations with the right to support claimants, represent one or more individual claimants in a trial, or even participate (on behalf of a claimant) as a party themselves. This often occurs in the context of anti-discrimination proceedings.[672]

A particularly interesting example is the United Kingdom. Associations with sufficient interest in a matter connected to discrimination are granted standing to initiate administrative judicial review actions against public authorities. They don't have to be victims of the wrongful act themselves in order to do so.[673] Moreover, national courts can allow NGOs who have proven their expertise in a certain area to bring forward "third party interventions," presenting their views on a legal point in a specific case.[674] There are many more examples, including the possibility to file *amicus briefs*, intervention on behalf of a party, pre-trial assistance, class actions, etc.[675]

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[670] Article 40, Protocol (No. 3) on the Statute of the CJEU [2010] OJ C 83/210.

[671] Order of the Court, 3 June 1964, Case 6/64, *Costa v ENEL* ECLI:EU:C:1964:34 [1964] ECR 614; Order of the President of the Court, 9 July 2006, Case C-305/05, *Ordre des barreaux francophones et germanophone and Others (Application of the French Bar)* ECLI:EU:C:2006:389 [2006] , para 9. The General Court (formerly CFI) has adopted a more inclusive interpretation of the term 'interest in the result,' therefore allowing interventions by certain interest groups, if its members' interests would be considerably affected by the forthcoming judgment. GC (formerly CFI): Order of the President of the Court, 17 June 1997, Joined cases C-151/97 P(I) and C-157/97 P(I), *National Power plc and PowerGen plc v British Coal Corporation and Commission of the European Communities* ECLI:EU:C:1997:307 [1997] ECR I-3491, para 66.

[672] The handbook "How to Present a Discrimination Claim," published by the Network of European Anti-Discrimination Experts, provides an exemplary overlook of relevant national rules. Farkas and O'Dempsey, *How to Present a Discrimination Claim: Handbook on seeking remedies under the EU Non-discrimination Directives*, 67.

[673] Ibid, 67.

[674] Ibid, 67.

[675] For an overview, see *id*., 66 to 72. See also: Bea Bodrogi, 'Legal Standing – The Practical Experience of a Hungarian Organisation' (2007) 5 European Anti-Discrimination Law Review 23, 25.

A number of EU anti-discrimination Directives actually require of Member States to make sure that victims of discrimination can fall back on the support and/or representation by special interest organisations.[676] It is interesting to note that these Directives also gave Member States the possibility to introduce an *actio popularis*. Thereby, an organisation has the opportunity to fight a discriminatory practice without the necessity of the occurrence of individual harm.[677] If such measures are adopted, the standing for (privileged) civil society organisations is significantly expanded.

These developments, in connection with the standing rules in Article 23 of the CJEU statute (which holds that parties on the national level are *also* parties before the CJEU in preliminary reference procedures)[678] greatly enhance the chances of civil society activists to make their views heard before the CJEU.[679] Whereas it is not entirely clear which organisations fall under art 9(2), or which actions are summarized by the term acting "on behalf" or "in support" of a

[676] E.g.: Race Equality Directive (2000/43/EC) [2000] OJ L 180/22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive) [2000] OJ L 303/16. Article 7(2) of the Race Equality Directive, and 9(2) of Employment Equality Directive the state: "Member States shall ensure that associations, organisations or other legal entities which have in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of these Directives are complied with, may engage, either on behalf or in support of the complainant, with his or her Approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under these Directives." Race Equality Directive (2000/43/EC) [2000] OJ L 180/22; Employment Equality Directive (2000/78/EC) [2000] OJ L 303/16. However, it is noteworthy that while the Race Equality Directive also demands the set-up of specific equality bodies (art 13), the Employment Equality Directive does not. Bell, 'The Principle of Equal Treatment: Widening and Deepening', 619.

[677] Bodrogi, 'Legal Standing – The Practical Experience of a Hungarian Organisation', 27. In 2016, 16 Member States had made use of this possibility. Jan Tymowski, *The Employment Equality Directive - European Implementation Assessment* (EPRS / European Parliament Research Service, 2016), 53.

[678] Protocol (No. 3) on the Statute of the CJEU [2010] OJ C 83/210.

[679] One example: Case C-388/07, *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulation Reform* ECLI:EU:C:2009:128 [2009] ECR I-1569, extending the scope of the Employment Equality Directive to include mandatory requirement age. It should also be mentioned that the Lisbon Treaty has introduced a number of interesting changes. Article 47 of the Charter of Fundamental Rights, which establishes the right "to an effective remedy and to a fair trial" became legally binding for EU institutions, as well as for Member States when implementing EU law. Articles 47, 51 of the Charter of Fundamental Rights of the European Union [2007] OJ C 303/1.

party,[680] the recent *ACCEPT* case beautifully illuminates the possibilities for NGOs to act as litigants in the absence of individual victims. In this case, a Romanian LGBT rights organisation sued a football club, following homophobic remarks of one of its trainers; remarkably, there was no tangible individual harm, but the NGO still was granted standing.[681] The case arose out of strategic litigation efforts and was aimed at reforming the unsatisfactory discrimination sanction regime under Romanian law.[682]

But even if a Member State provides no provisions that grant autonomous standing to civil society organisations[683] – the fact alone that individuals can usually freely choose their representation when appearing before court (as long as this representative fulfils certain formal criteria, e.g., being admitted to the national bar) opens participatory gateways for civil society organisations. With the consent of the claimant, they can thus proceed to strategically put their representative activity in the service of a larger purpose – namely, the advancement of a social change agenda.

These observations make the preliminary reference procedure a very interesting vehicle for social change litigation. Even though litigants formally cannot address the Court directly, the mechanisms and practices surrounding the procedure seem to facilitate strategic litigation (especially when compared to procedures such as the annulment action, which seems to have developed in the opposite direction). Elise Muir points out that collective actors, including civil

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[680] Generally, the exact set-up of such support systems is left to the Member State. Matteo Bonini-Baraldi, *Chapter 2 of the Report on Combating Sexual Orientation Discrimination in Employment: Legislation in Fifteen EU Member States*, 2004), 54, 55.

[681] *Asociația Accept* (Case C-81/12) [2013] IRLR 660.

[682] Activist lawyer Isutina Ionescu represented ACCEPT before the CJEU.

[683] A report on the implementation of the Employment Equality Directive found that in most Member States, "[t]he possibility of supporting the victim is generally more common than acting on their behalf, with such positive exceptions as the Slovak national equality body (National Centre for Human Rights) or an NGO seeking to protect the victims of discrimination, entitled to intervene as a third party in court proceedings. In Italy, only those associations that have been included in an official list may act on behalf or in support of victims of discrimination, and the list contains more than 550 associations. Collective redress, where a single organisation can act in the interest of many individual victims, is permitted for discrimination cases in 12 countries, while actio popularis – allowing organisations to act in the public interest on their own behalf, without a specific victim to support or represent – exists in 16 countries." (*citations omitted*). Tymowski, *The Employment Equality Directive - European Implementation Assessment*, 53.

society organisation and public actors such as equality bodies, have indeed played an important role in advancing EU anti-discrimination litigation via preliminary references.[684] The doctrines of "supremacy"[685] and "direct effect"[686] have greatly contributed to giving effect to the preliminary reference procedure for individual litigants. Paul Craig describes how private enforcement of EU law was not only *made possible* by direct effect – it was arguably preferred over public enforcement (if only in order to maintain a symbolic coherence and unity at the institutional level; in other words, it would look bad if the Commission was the one primarily suing States for non-compliance, so it was seen as more desirable if citizens themselves held their States responsible for breaches).[687] A similar argument is made by Joseph Weiler; he argues that through direct effect, "individuals in real cases and controversies (usually against state public authorities) became the principal "guardians" of the legal integrity of Community law within Europe similar to the way that individuals in the United States have been the principal actors in ensuring the vindication of the Bill of Rights and other federal law."[688] Claire Kilpatrick relates how the Court built its "private enforcement" case law from *Simmenthal* to *Marshall II* (mostly in the area of gender discrimination) by favouring effective judicial protection over national autonomy considerations; however, she notes that in the late 90s / early 2000s, effectiveness has increasingly taken a backseat to national procedural autonomy.[689] Arguably, though, the introduction of the anti-discrimination Directives in the year 2000 and the case law based on those Directives has provided the Court with new leverage in the area of anti-discrimination law.[690]

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[684] Muir, 'Anti-Discrimination Law as a Laboratory for EU Governance of Fundamental Rights at the Domestic Level: Collective Actors as Bridging Devices', 113.

[685] See discussion in Section 2.1.

[686] See discussion in Section 5.1.

[687] Paul P Craig, 'Once upon a Time in the West: Direct Effect and the Federalization of EEC Law' (1992) 12 Oxford Journal of Legal Studies 453, 454-461.

[688] Weiler, 'The Transformation of Europe', 2414.

[689] Claire Kilpatrick, 'Turning Remedies Around: A Sectoral Analysis of the Court of Justice' in Gráinne de Búrca and Joseph HH Weiler (eds), *The European Court of Justice* (Oxford University Press 2001), 143-176. Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal* ECLI:EU:C:1978:49 [1978] ECR 629; Case C-271/91, *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority (Marshall II)* ECLI:EU:C:1993:335 [1993] ECR I-4367.

[690] Employment Equality Directive (2000/78/EC) [2000] OJ L 303/16; Race Equality Directive (2000/43/EC) [2000] OJ L 180/22.

Be that as it may, the preliminary reference procedure has, indeed, been employed by activists to further their agendas is somewhat known. One of the earliest examples is Elaine Vogel-Polsky, the lawyer who argued the *Defrenne* decisions in the late 1960s and 1970s.[691] With the purpose of advancing women's rights, she managed to convince the Court to establish that Article 119 EEC (now Article 157 TFEU), granting equal pay to women and men, was not just a programmatic expression of good will, but directly applicable.[692]

### 5.2.3. Annulment Actions

The annulment action serves to challenge acts by EU institutions. Article 263 TFEU provides the General Court (GC, formerly Court of First Instance, CFI) with the power to review acts of EU institutions, namely the Council, the Commission, the European Central Bank, the European Parliament and the European Council ("annulment actions"). An appeal to the Court of Justice is possible.

An application must be filed after two months of publication of the contested measure at latest.[693] This is a relatively short period of time, especially taking into account the necessity to establish the imminent adverse effect of the measure on a particular applicant. After two months, the measure might not even have been applied yet.

The Article distinguishes three kinds of applicants: privileged applicants with unrestricted standing, semi-privileged applicants with qualified standing, and non-privileged applicants with very limited standing. The first two categories are reserved for Member States (privileged) and EU institutions (privileged and semi-privileged); natural and legal persons, on the other hand,

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691 *Defrenne I* (Case C-80/70) [1971] ECR 445; *Defrenne II* (Case C-43/75) [1976] ECR 455; *Defrenne III* (Case C-149/77) [1978] ECR 1365.

692 Ultimately, the CJEU developed the doctrine of sex equality as a fundamental EU right. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*, 173.

693 Article 263 TFEU.

have a "non-privileged" status.[694] Article 263, para 4 TFEU states

> "any natural or legal person may … institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."

Whereas the wording of this Article refers explicitly to individuals, the *de facto* significance of this procedure for social change lawyering remains low.[695] This is mostly due to the highly restrictive interpretation of standing requirements by the CJEU.

*First*, a natural or legal person may pursue a claim when they are the specified addressees. The annulment action thus is a highly individualized remedy, directed at the annulment of a thoroughly personalized act.

*Second,* a person may present a claim if an act is of "direct concern" to them. "Direct concern" requires a direct causality between the concerned measure by an EU institution, and the individual damage suffered.[696] However, annulment actions brought against Directives have always been dubbed inadmissible, since the CJEU denied "direct" concern in cases where intermediate rules (such as national law, transposing a Directive) allowed Member States to exercise a certain amount of discretion.[697]

*Third*, the requirement of "individual concern" presents an almost insurmountable obstacle for access to justice of a natural or legal person. The CJEU has advanced a very narrow view on the

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[694] Eliantonio and others, *Standing Up for your Right(s) in Europe. A Comparative Study on Legal Standing (Locus Standi) Before the EU and Member States' Courts*, 27.

[695] Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance', 12.

[696] Cases C-51/71 to C-54/71, *International Fruit Company NV and others v Produktschap voor groenten en fruit* ECLI:EU:C:1971:128 [1971] ECR 1107; Case 207/86, *Asociación Profesional de Empresarios de Pesca Comunitarios (Apesco) v Commission of the European Communities* ECLI:EU:C:1988:200 [1988] ECR 2151, para. 12.

[697] Eliantonio and others, *Standing Up for your Right(s) in Europe. A Comparative Study on Legal Standing (Locus Standi) Before the EU and Member States' Courts*, 28.

standing requirements in this regard. In *Plaumann*,[698] the Court denied standing to a German corporation that sought the invalidation of a Commission decision regarding the import of mandarins from third countries. It stated:

> "Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain *attributes which are peculiar to them* or by reason of circumstances in which they are *differentiated from all other persons* and by virtue of these factors distinguishes them individually just as in the case of the person addressed. In the present case the applicant is affected by the disputed decision as an importer of clementines, that is to say, by reason of a commercial activity which may at any time be practiced by any person and is not therefore such as to distinguish the applicant in relation to the contested decision as in the case of the addressee."[699] (*emphasis added*)

In other words, even though the company was directly affected – since it indeed imported tangerines – it was not understood as "individually concerned," because there were was no distinct different treatment in comparison to others who carried out similar commercial activities. The standing requirements almost seem to be interpreted so narrowly as to demand a case of *ad hoc* legislation in order to concede the existence of individual concern. As a result, the *Plaumann test* has severely restricted private actors' ability to invoke Article 263 and thus, generated extensive criticism.[700]

In light of these considerations, the annulment procedure might not present the most suitable gateway for activist intervention. Indeed, such intervention was attempted by Greenpeace regarding the construction of two power plants on the Canary Islands, partly funded by the EU. After the CFI had denied the NGO's standing, an appeal was lodged to the ECJ. The Court

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[698] Case 25/62, *Plaumann & Co v Commission of the European Economic Community* ECLI:EU:C:1963:17 [1963] ECR 95.

[699] Ibid, para 107.

[700] See, e.g., Anthony Arnull, 'Private Applicants and the Action for Annulment since Codorniu' (2001) 38 Common Market Law Review 7; Xavier Lewis, 'Standing of Private Plaintiffs to Annul Generally Applicable European Community Measures: If the System is Broken, Where Should it be Fixed?' (2006) 30 Fordham International Law Journal 1496.

upheld its previous case law and thus, the decision of the CFI.[701] And while the Court had the chance to review its approach a number of times since then,[702] is has not taken the chance to open up the annulment procedure to individual litigants.

The Lisbon Treaty finally introduced an additional ground: to file an action against "a regulatory act that is of *direct concern* to them and *does not entail implementing measures*." (*emphasis added*)[703] This formulation leaves out the term "*individual* concern," thus theoretically broadening the circle of potential litigants. One of the most hotly debated issues in this regard was the meaning or "regulatory act" and its consequences for the *locus standi* requirements.

In its subsequent case law, the CJEU has specified the scope of this new legal ground.[704] Particularly, *legislative acts* are not included by the term "regulatory act,"[705] and the concept of "implementing measures" is interpreted very broadly.[706] Thus, the *locus standi* of individuals in annulment procedures remains restricted to regulatory acts that are not legislative, nor require implementation.[707] In other words, the CJEU did not take up the opportunity to significantly

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[701] Case C-321/95 P, *Greenpeace Council (Greenpeace International) and Others v Commission of the European Communities* ECLI:EU:C:1998:153 [1998] ECR I-1651, paras 27-35.

[702] The CFI, for instance, proposed amending the *Plaumann formula,* which would have resulted in a standing test more friendly towards individual litigants in Case T-177/01, *Jégo-Quéré and Cie SA v Commission of the European Communities* ECLI:EU:T:2002:112 [2002] ECR II-2365. The ECJ, however, opted to maintain its original restrictive position. Case C-236/02 P, *Commission of the European Communities v Jégo-Quéré and Cie SA.* ECLI:EU:C:2004:210 [2004] ECR I-3425; Case C-50/00, *Unión de Pequeños Agricultores v Council of the European Union* ECLI:EU:C:2002:462 [2002] ECR I-6677.

[703] For accounts on this development see, for instance, Rene Barents, 'The Court of Justice after the Treaty of Lisbon' (2010) 47 Common Market Law Review 709; Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law. Text and Materials* (2 edn, Cambridge University Press 2010), 245-267.

[704] Order of the General Court, 6 September 2011, Case T-18/10, *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* ECLI:EU:T:2011:419 [2011] ECR II-5599, paras 58-93; Case T-262/10, *Microban International Ltd. and Microban (Europe) Ltd. v European Commission* ECLI:EU:T:2011:623 [2011] ECR II-7697, paras 18, 26-27, 32.

[705] *Inuit Tapiriit Kanatami and Others v Parliament and Council* (Order of the General Court, 6 September 2011, Case T-18/10) [2011] ECR II-5599, paras 56-60.

[706] *Microban International and Microban (Europe) v Commission* (Case T-262/10) [2011] ECR II-7697, paras 33-38.

[707] Eliantonio and others, *Standing Up for your Right(s) in Europe. A Comparative Study on Legal Standing (Locus Standi) Before the EU and Member States' Courts*, 31-32.

extend standing requirements based on the new text; as some authors put it, the "basic policy underlying the system of judicial review has not been changed"[708] by the introduction of the new ground. Eliantonio and others write that even under the provision introduced by the Lisbon Treaty, "the applicant could only obtain access to justice by breaching the provisions of the contested measure and invoking its invalidity as a defence in criminal or administrative proceedings against him before a national court."[709] *Per definitionem*, circumstances that would allow for such an action would have to be very specific.

The restrictive standing and highly personalized reach of the annulment procedure makes it an unattractive vehicle for cause lawyering attempts. Annulment actions of private actors against Directives are *prima facie* excluded, either by the requirement "individual concern," or by the requirement of "non-legislative acts." In fact, Schepel and Blankenburg point out that despite a few attempts by civil rights organisations (especially Greenpeace) to instrumentalize this procedure to further their goals, the case law by the CJEU has crushed respective ambitions quite explicitly.[710]

And indeed, the CJEU itself endorses the view that annulment procedures are not intended to provide uninhibited access to justice for individuals; in the Court's perspective, private actors have, after all, the possibility to challenge the implementation of EU measures before their national courts.[711]

Therefore, it is safe to say that that annulment actions present little room for strategic litigation.

At this point, it is expedient to also mention Article 265 TFEU. In its third paragraph, this Article provides an action based on the "failure to act" of the European Parliament, the European Council, the Commission or the European Central Bank; as the annulment action, it also gives

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[708] Ibid, 31.

[709] Ibid, 32.

[710] Schepel and Blankenburg, 'Mobilizing the European Court of Justice', 22-27.

[711] Eliantonio and others, *Standing Up for your Right(s) in Europe. A Comparative Study on Legal Standing (Locus Standi) Before the EU and Member States' Courts*, 32.

standing to private actors under certain conditions.[712] However, the CJEU has held that Article 265 para 3 and Article 263 para 4 (annulment action) provide a basically identical method of recourse.[713] Hence, the same considerations apply here as for the annulment action.

### 5.2.4. Summary – Procedures CJEU

Based on this evaluation, it becomes clear that the procedure that provides the greatest potential for successfully employing litigation strategies to advance social change is the preliminary reference procedure under Article 267 TFEU. Other procedures might also hold interesting opportunities for civil society organisations, for instance, by combining judicial efforts with classical lobbying work, or by finding innovative new ways to engage key players. After all, when it comes to creativity, the sky is the limit. For the purpose of this dissertation, however, the formal requirements of the legal framework governing proceedings before the CJEU point to Article 267 TFEU as providing the most promising ground for lawyering for social change endeavours.[714] This is also supported by the fact that civil society organisations have used this procedure, time and again, to push for social reform.[715]

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[712] Article 265 para 3 TFEU holds: "Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion."

[713] E.g., in Case C-68/95, *T Port GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung ECLI:EU:C:1996:452* ECLI:EU:C:1996:452 [1996] ECR I-6065, para. 59.

See also: Eliantonio and others, *Standing Up for your Right(s) in Europe. A Comparative Study on Legal Standing (Locus Standi) Before the EU and Member States' Courts*, 35.

[714] Not only LGBT rights groups have (successfully) litigated before the CJEU by way of the preliminary reference procedure; one of the most famous examples is probably the set of test cases that made the provision of equal pay (then Article 119 EEC, now Article 157 TFEU) directly applicable. *Defrenne I* (Case C-80/70) [1971] ECR 445; *Defrenne II* (Case C-43/75) [1976] ECR 455; *Defrenne III* (Case C-149/77) [1978] ECR 1365. Preliminary reference procedures have also extensively been used by Roma Rights groups, such as the ERRC or the ERTF. Jacquot and Vitale, 'Law as a Weapon of the Weak? A Comparative Analysis of Legal Mobilization by Roma and Women's Groups at the European Level', 594; Adam Weiss, European Roma Rights Centre (ERRC) (2014).

[715] A recent research project has focused on the opportunities provided by the preliminary reference procedure for activist collective action in the area of discrimination, data protection and asylum, outlining instances of *de facto* activist interventions in this context. Elise Muir and others (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17).

## 6. Advocacy Opportunities before the ECtHR – Overview of Procedural Requirements

Within Europe, the ECtHR plays a significant role in shaping policies and influencing member states' political landscapes by its judgements.[716] Even though the ECtHR knows no formal obligation to adhere to precedent (such as a doctrine of *stare decisis*), there is a broad consensus among most scholars that the Court usually aims to follow its previous case law in the name of legal certainty and transparency, or otherwise present convincing reasons for not doing so. In 2000, Luzius Wildhaber, then president of the ECtHR, wrote: "… I would suggest that precedents are followed regularly, but not invariably; that 'for the sake of attaining uniformity, consistency and certainty', precedents should normally be observed, where 'they are not plainly unreasonable and inconvenient' …"[717]

In *Christine Goodwin v UK*, the Court stated:

> "While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases … However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved … It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and

[716] Laurence R Helfer and Erik Voeten, 'Do European Court of Human Rights Judgments Promote Legal and Policy Change? (Preliminary Draft)' Working Paper Series <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1850526 > accessed 27 February 2012, 2.

[717] Luzius Wildhaber, 'Precedent in the European Court of Human Rights' in Paul Mahoney and others (eds), *Protecting Human Rights: The European Perspective* (2 edn, Carl Heymanns 2000), 1529.

evolutive approach would indeed risk rendering it a bar to reform or improvement …" (*citations omitted*)[718]

This indicates that although the Court observes that there is, *de facto*, an adherence to precedent, it will not keep itself from departing from it for the sake of effective human rights protection. However, this also suggests that the Court certainly cannot do so at random, and that there need to be convincing reasons. This structured and moderate flexibility might be one of the corner stones for advocates to – on the one side – rely on positive rulings, and on the other hand present convincing reasons for the Court to reconsider antiquated notions.[719]

The 47 judges to the ECtHR are elected by the Parliamentary Assembly of the Council of Europe (PACE), from a list of candidates nominated by the Member States.[720] Each Member State has the right to nominate three candidates. Judges are elected for a term of nine years; reappointments are not permitted.[721] The Court is organized into five administrative sections, each containing a judicial chamber including a president and vice president.[722] If a case, pending before a Chamber, raises a serious question affecting the interpretation of the Convention, the Chamber may relinquish its jurisdiction to the Grand Chamber,[723] which includes the Court's President, Vice President, the Section Presidents and the national judge.[724] In exceptional cases, the Grand Chamber will also hear cases based on a request of referral by the parties.[725]

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[718] *Christine Goodwin v UK* App no 28957/95 (ECtHR, 11 July 2002), para 74.

[719] For a comprehensive review of the Court's approach regarding overruling its own case law, see: Alastair Mowbray, 'An Examination of the European Court of Human Rights' Approach to Over-Ruling Its Previous Case Law' (2009) 9 Human Rights Law Review 179.

[720] Article 22 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

[721] Article 23 ECHR, as amended by Protocol 14.

[722] Article 25 ECHR.

[723] Article 30 ECHR.

[724] Article 26(5) ECHR.

[725] Article 43 ECHR.

The ECtHR has jurisdictions to decide complaints on ECHR violations, either by individuals or by States; it cannot, however, become active on its own accord. The procedural rules of the European Court of Human Rights are fairly straightforward. It is a court of last resort, which means that applications will only be admitted after all domestic remedies have been exhausted.[726] This should not present a problem for advocates who precisely wish to challenge a national law or practice.

An application has to be filed at most six months after the final national decision has been delivered.[727] However, the newly adopted Protocol 15 will reduce this time period to four months; it is not yet clear, however, when it will enter into force.[728] This also means that all relevant information, such as briefs and written comments, need to be delivered to the Court in the given time period. Previously, the Court had been quite lenient in accepting applications which were not entirely complete or displayed minor formal mistakes, in order to provide for the highest possible human rights protection standard. The recent developments might therefore complicate advocates' organisational and planning efforts.

[726] Article 35(1) ECHR. However, if the accession of the EU to the ECHR enters into force, there could be certain ambiguities regarding the prerequisites for the exhaustion of all domestic remedies: In other words, must applicants also show that they have tried to engage EU courts in this context? Given the limited *locus standi* for direct complaints to EU courts, this is an especially complex question. Article 3(6) of the negotiated draft agreement of the accession addresses this issue; however, details remain unclear. Finalised Draft of Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, *Final Report to the CDDH* (Strasbourg, 3 April – 5 April 2013), art 3(6), available at

http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1%282013%29008rev2_EN.pdf (accessed 5 April 2014).

For a more in-depth review of this issue, see Paul Craig, 'EU Accession to the ECHR: Competence, Procedure and Substance' (2013) 36 Fordham International Law Journal 1114, 1124.

[727] Article 35 ECHR.

[728] Protocol 15 (2013), amending the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention on Human Rights, as amended) (ECHR), Article 4.

When an application reaches the Court, it first will make a ruling on admissibility. A finding of inadmissibility (*a limine* inadmissibility) is usually made by a single judge. An inadmissibility decision is final.[729]

Helmut Graupner (*Rechtskomitee* Lambda, Austria) has criticised the low transparency of the Court's admissibility findings, which he explained with the high number of cases that the ECtHR had to deal with:

> "In the ECtHR, they have so many cases, you get inadmissibility decisions in identical cases where they found a violation some months before – and some months after. But you cannot challenge it."[730]

If the application is not found inadmissible, the Court (by a committee of 3 judges) decides whether it is repetitive, meaning that the Court has already ruled in a number of cases regarding the same question. If this is not the case, a Chamber of 7 judges will proceed examining the case (at this stage, an application can still be declared inadmissible).[731] If the Chamber decides to proceed, it will communicate the application to the respective government, giving them the opportunity to submit observations. Those observations are then transmitted to the applicant, giving her the option to issue a reply.[732]

Usually, the Court will decide on a case in a Chamber of 7 judges; however, in exceptional cases, a Chamber may relinquish a case directly to the Grand Chamber (17 judges). A case can also be referred to the Grand Chamber at a later stage in the proceedings. Within three months of

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[729] CoE, 'Your Application to the ECtHR. How to Apply and How Your Application Is Processed' (*European Court of Human Rights / Council of Europe,* 2018) <http://www.echr.coe.int/Documents/Your_Application_ENG.pdf> accessed 20 January 2018, 6.

[730] Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014). Graupner provided an in-depth overview of the Court's inconsistency when deciding on admissibility of applications in the context of same-sex rights, see: Helmut Graupner, 'Sexuality and Human Rights: A Global Overview' in Helmut Graupner and Philip Tahmindjis (eds), *Sexuality and Human Rights* (Routledge 2005), 121-125.

[731] CoE, 'Your Application to the ECtHR. How to Apply and How Your Application Is Processed', 6.

[732] Ibid, 6.

the delivery of a Chamber judgment, any party may issue a request to refer the case to the Grand Chamber; however, such requests are seldom accepted.[733]

Hearings are only held in about 30 Chamber or Grand Chamber cases a year; the rest of the cases is decided without a hearing.[734] At a hearing, both applicants and the government can present their argument and are questioned by the judges.

## 6.1. Standing of Third Parties in Proceedings at the ECtHR

Notably, the ECtHR enables third party interventions – or *amicus curiae* briefs. While an NGO does not have the right to file an application at the ECtHR (unless, of course, it is itself affected by a human rights violation), Article 36 of the Rules of the European Court of Human rights allow submissions by third parties on invitation by the President of the Court.[735] Interventions are usually brought either by persons or organisations who possess expertise regarding the factual and legal issues in question, or who are invested in the subject matter of the case.[736] There are two different situations in which the Court accepts *amicus curiae* participation: one, where the Court invites an intervention, and two, where the third party – on its own initiative – wishes to provide additional information, and the Court accepts this intervention.[737] The Court's attitude towards *amicus briefs* has changed over the years; while it formally did not allow for

[733] Ibid, 7.

[734] Ibid, 7.

[735] Article 36(2) ECHR; Article 44 (3)a of the Rules of the European Court of Human Rights 2016 (as amended), Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention on Human Rights, as amended) (ECHR).

[736] Nina Vajic, 'Some Concluding Remarks on NGOs and the European Court of Human Rights' in Tullio Treves and others (eds), *Civil Society, International Courts and Compliance Bodies* (Asser Press 2005), 97.

[737] Laura Van den Eynde, 'An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights' (2013) 31 Netherlands Quarterly of Human Rights 271, 277.

spontaneous third party interventions, it accepted such an intervention in a 1981 case[738] and subsequently amended its rules accordingly.[739]

Hennebel writes that the Court refers to *amicus curiae* briefs chiefly for three reasons: to establish whether there is European consensus; to get input on comparative law; and to define different interests at stake in a particular case.[740]

Over the years, third party participation has considerably increased.[741] Interestingly, landmark cases by the ECtHR overwhelmingly included interventions by civil society organisations;[742] a reason for this might be that third parties intervene most often in cases where *novel* human rights questions are at stake.[743] Accordingly, Grand Chamber judgments show a higher ratio of *amicus curiae* briefs.[744] While there is no proof that third party interventions manage to conclusively sway the Court in one direction or the other,[745] they do tend to provide information to the Court in complicated and controversial cases.[746]

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[738] In this case, the Court accepted an oral intervention of the British Trade Union Congress. *Young, James & Webster v UK* App nos 7601/76 and 7806/77 (ECtHR, 13 August 1981).

[739] Jorge E. Viñuales, 'Human Rights and Investment Arbitration: The Role of Amicus Curiae' (2006) 8 Revista Colombiana de Derecho Internacional 231, 242.

[740] Ludovic Hennebel, 'Le rôle des amici curiae davant la Cour européenne des droits de l'homme ' (2007) 71 Revue Trimistrielle des Droits de l'Homme 641, 658.

[741] Van den Eynde, for instance, shows that in 2010 alone, there were as many briefs as during the entire 11-year period between 1985 and 1996. Van den Eynde, 'An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights', 279.

[742] Cichowski, 'Civil Society and the European Court of Human Rights'.

[743] Van den Eynde, 'An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights', 282.

[744] Ibid, 280.

[745] Van den Eynde examined a sample of 237 cases where 294 briefs had been submitted and finds that in 78% of these cases, the Court found at least one human rights violation. While she holds that this is not sufficient to prove a positive correlation, she also writes "it cannot be concluded that this positive correlation does *not* exist, as it cannot be known what the results would have been without [the] intervention." (*emphasis added*). Ibid, 279, 293, 294.

[746] Ibid, 294.

Several LGBT rights organisations have repeatedly made use of the possibility of third party interventions in important same-sex rights cases.[747] ILGA-Europe, for instance, while not directly representing applicants,[748] has intervened in many famous LGBT rights cases.[749]

[747] See, e.g., *Karner* App no 40016/98; *Schalk & Kopf* App no 30141/04; and others.

[748] Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014).

[749] ILGA-Europe has intervened, *inter alia*, in *Oliari & Others v Italy* App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015); *X & Others v Austria* App no 19010/07 (ECtHR, 19 February 2013); *Vallianatos & Others v Greece* App nos. 29381/09 and 32684/09 (ECtHR, 7 November 2013); *Schalk & Kopf* App no 30141/04; *EB* App no 43546/02.

Information on ILGA-Europe's interventions is collected here: 'Interventions by ILGA-Europe and Partners' (*ILGA-Europe*) <https://www.ilga-europe.org/resources/guide-european-institutions/council-europe/lgbti-rights/ECtHR/interventions> (accessed 28 January 2018).

## 7. Conclusions to Chapter 2

The evaluation in the previous two sections has shown that the procedural make-up of both the CJEU and the ECtHR provides opportunities for strategic litigation.

Importantly, the doctrine of "direct effect" has greatly enhanced "access to justice" for litigants,[750] and thus, also for activist lawyers. Despite rather restrictive *locus standi* requirements at the CJEU, the preliminary reference procedure nonetheless provides opportunities for civil society actors. While the decision of whether to make a reference or not rests within the discretion of the national court, activist lawyers can suggest formulations of reference questions at the national level. LGBT activists have, in fact, applied this strategy, and reported diverging success, depending, *inter alia*, on the particular national forum or judge.[751] They identified several obstacles in this regard, such as limited awareness of EU law on the part of national judges and lawyers,[752] as well as a lack of experience with LGBT rights issues.[753] Moreover, since strategic litigation before the CJEU necessarily starts at the national level, the cooperation with adept lawyers on the ground was described as essential – however, these lawyers often did not dispose of extensive EU law knowledge, or LGBT rights expertise, or both.[754] Nonetheless, there have been successful collaborations – most notably, in the recent *Coman* case described *infra*.[755]

Once a case has successfully made its way to the CJEU, litigants have several procedural rights (hearing rights, submitting written observations, etc.), which give them an opportunity to provide the Court with their point of view. While the CJEU does not normally allow third party

[750] Schepel and Blankenburg, 'Mobilizing the European Court of Justice', 28.

[751] Adam Weiss, European Roma Rights Centre (ERRC) (2014); Robert Wintemute, King's College London (2014).

[752] Robert Wintemute, King's College London (2014)Adam Weiss, European Roma Rights Centre (ERRC) (2014); Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014); Matthew Evans, AIRE Centre, London, GB (2014).

[753] Robert Wintemute, King's College London (2014).

[754] Ibid.

[755] Case C-673/16, *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* ECLI:EU:C:2018:385 [2018] . See also discussion in Section 12.3.

interventions (e.g., by activist groups), there are exceptions if the third party has already participated in the case at a national stage. However, even if third parties are not allowed to submit their views, they can still participate in a preliminary reference procedure by way of counsel to the applicant (a route many activist lawyers have chosen, time and again).[756]

The ECtHR, however, allows for third party interventions, and *amicus curiae* interventions are especially common in landmark cases.[757] This might have contributed to the fact that there is an abundance of ECtHR LGBT rights jurisprudence, while the CJEU has only seen a few such cases.[758] Apart from that, activist lawyers also often acted as counsel to an applicant.[759] Consequently, LGBT rights organisations and/or activist lawyers have participated in a great number of LGBT rights cases at the ECtHR.[760]

In general, the ECtHR was described by most activists I interviewed as the more lenient court regarding activist participation.[761]

Apart from the obvious goal of creating positive law reform, processing before the Courts was also described as having added benefits, such as heightened media attention brought to LGBT

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[756] Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014); Adam Weiss, European Roma Rights Centre (ERRC) (2014); Robert Wintemute, King's College London (2014).

[757] Van den Eynde, 'An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights', 280.

[758] See case law samples in Chapters 4 and 5.

[759] Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014); Robert Wintemute, King's College London (2014).

[760] These include, but are not limited to: *Dudgeon v UK* App no 7525/76 (ECtHR, 22 October 1981); *Smith & Grady v UK* Apps no 33985/96 and 33986/96 (ECtHR, 27 September 1999); *Fretté v France* App no 36515/97 (ECtHR, 26 February 2002); *Karner* App no 40016/98; *EB* App no 43546/02; *Frasik v Poland* App no 22933/02 (ECtHR, 5 January 2010); *Schalk & Kopf* App no 30141/04; *Gas & Dubois* App no 25951/07; *X & Others* App no 19010/07; *Vallianatos* App nos. 29381/09 and 32684/09; *Pajić v Croatia* App no 47082/12 (ECtHR, 23 February 2016); *Chapin & Charpentier v France* App no 39651/11 (ECtHR, 9 June 2016); *Taddeucci & McCall v Italy* App no 51362/09 (ECtHR, 30 June 2016).

[761] Robert Wintemute, King's College London (2014); Matthew Evans, AIRE Centre, London, GB (2014); Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014).

issues, or exerting pressure on national courts and politicians.[762] Notably, many cases with activist participation became landmark cases.[763]

Having established that procedural conditions do, in fact, allow for activist intervention, positively answers the first subset of the second inquiry of the research question *(Do the European Courts provide access to justice for activist (LGBT rights) litigants?).* It is an important preliminary investigation, an assumption that this thesis depends on. After all, it would make little sense to evaluate the Courts' case law regarding spaces for activist interventions, if their procedural make-up precluded strategic litigation from the outset. Therefore, this chapter has established an important precondition for strategic litigation – namely, the fact that litigants *have access* to the Courts.

I will take a closer look at the Courts' case law and the opportunities provided therein for LGBT rights advocates in the following three chapters.

[762] Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014); Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014).

[763] Cichowski, 'Civil Society and the European Court of Human Rights'. This is also true in the realm of the CJEU: *Inter alia*, *Maruko, Römer, Hay* and *Coman* were activist cases. *Maruko* (Case C-267/06) [2008] ECR I-1757; Case C-147/08, *Jürgen Römer v Freie und Hansestadt Hamburg* ECLI:EU:C:2011:286 [2011] ECR I-3591; Case C-267/12, *Frédéric Hay v Crédit Agricole Mutuel de Charente-Maritime et des Deux-Sèvres* ECLI:EU:C:2013:823 [2013] ; *Coman and Others* (Case C-673/16) [2018].

# CHAPTER 3

# STRATEGIC LITIGATION OPPORTUNITIES FRAMEWORK

One of the contributions of this dissertation consists in proposing an activist-centred analysis of LGBT rights case law before the European High Courts. To this end, I have devised a framework to assess the potential for strategic litigation before the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR).

This "strategic litigation opportunities" framework suggests an analysis of both Courts' case law that reveals opportunities for LGBT rights activism. It importantly differs from traditional approaches, since it decisively abandons the usual academic stance of the "neutral observer." Having in mind that critical legal theories have challenged the mere possibility of neutrality in law,[764] the analysis I am proposing has a definite partisan viewpoint – that of LGBT rights advocacy.

This type of analysis draws on the theoretical considerations in Chapter 1. Critical legal theories have contended that law is a text and as such, requires interpretation.[765] Since law and legal categories are fluid, legal meaning can change over time.[766] This fact is reinforced by the application of a dynamic interpretation technique, both by the ECtHR[767] and often also by the CJEU.[768] Moreover, both Courts exert considerable influence on European policy, as I have shown in Chapter 1, Section 2, in answer to the first inquiry of my research question.[769] Therefore, proposing alternative constructions of legal terms via litigation is a way of

[764] See discussion in Section 3.2.

[765] Barak, *Purposive Interpretation in Law*, 9; 19-21. See also *supra*, note 530.

[766] See discussion in Section 3.2.3.

[767] Mowbray, 'The Creativity of the European Court of Human Rights', 69.

[768] While this doctrine is not as developed by the CJEU as by the ECtHR, several authors have noted that the CJEU does, in fact, often interpret EU law in a dynamic way. This is also mirrored by the opinions of Advocates General. See *supra,* note 230.

[769] The first inquiry is "Do the Courts exert sufficient influence to justify strategic LGBT rights litigation attempts?" See Introduction, Section 0.4.

participating in legal meaning forming.[770] The "strategic litigation opportunities" framework accordingly highlights indicators within the Courts' case law that point to instances where activist intervention may be particularly successful.

A precondition for this analysis is the answer to the first subset of the second inquiry of the research question: *Do the European Courts provide access to justice for activist (LGBT rights) litigants?*[771]

The usefulness of the "strategic litigation opportunities" framework is contingent on the assumption that the CJEU and the ECtHR allow standing to LGBT rights activists, be it as litigants, counsel to litigants or third party interveners. I hope to have provided a positive answer to this question in Chapter 2. An examination on the nature of judicial decision making in Chapter 1, Section 3, has furthermore provided input on the question of whether the arguments of (LGBT rights) litigants are adequately considered by the judges (subset 2 of the 2nd inquiry).[772] The present chapter will, *inter alia*, outline instances when the Courts have drawn on activist input[773] and thus, contribute practical examples to complement the theoretical considerations outlined in Chapter 1.

Both EU law and the ECHR contain provisions that can protect gays and lesbians from discrimination and other human rights violations.[774] Therefore, the CJEU and the ECtHR together establish a kind of European judicial control mechanism, encouraging states to adhere to a certain minimum standard in the treatment of lesbians and gays. This is a promising environment for strategic litigation. After all, if activists achieve a precedent before these Courts, they might generate the necessary impact to shape the entire European legal region.

[770] See discussion on this issue in Section 3.2.4.

[771] See summary of the research question, Section 0.4.1.

[772] See summary of the research question, Section 0.4.1.

[773] See Section 8.5.

[774] See also Chapter 4, Section 11, and Chapter 5, Section 14.

In this context, the main aim of the "strategic litigation opportunities" framework is to explore whether a change of perspective – namely, looking at the Courts' case law from the viewpoint of activist intervention possibilities, instead of assuming an allegedly objective bird's eye view – will reveal certain synergies and opportunities which might otherwise stay hidden. Applying this framework to the Courts' case law will distinguish certain indicators that may inform future strategic litigation strategies. The emerging patterns will draw up a rich repository of examples demonstrating how, time and again, the Court's reasoning has opened up opportunities for LGBT rights interventions.

If, for instance, a court uses *vague and ambiguous terms*, an "interpretative intervention" will arguably have more chances of success than when it is applied to an already well-established term. Concepts such as family, marriage, or tradition have been consistently examined and revised by the ECtHR as well as the CJEU, as I will show. These concepts are – perhaps mainly – sociological terms, subject to changing life realities. Their meaning is constantly re-negotiated through their use, *inter alia*, in case law.[775] These terms lack concise meaning and remain contested.[776] Terms such as "equality" or "discrimination" are similarly flexible.[777] Both Courts

[775] Judith Butler, for instance, pointed out that the creation of meaning is an on-going, fluid process. Butler, *Gender Trouble*, 33-44.

[776] This is shown, for instance, in the case law of the ECtHR by the high number of dissents and/or concurring opinions when concepts like "best interest of the child," "family," etc. are involved. See, e.g., Joint Partly Concurring Opinion by Judge Costa, joined by Judges Jungwiert and Traja, *Fretté v France* App no 36515/97 (ECtHR, 26 February 2002); Joint Partly Dissenting Opinion by Judges Bratza, Fuhrmann and Tulkens, *Fretté v France* App no 36515/97 (ECtHR, 26 February 2002);Concurring Opinion of Judge Costa, joined by Judge Spielmann, *Gas & Dubois v France* App no 25951/07 (ECtHR, 15 March 2012); Concurring Opinion of Judge Spielmann joined by Judge Berro-Lefévre, *Gas & Dubois v France* App no 25951/07 (ECtHR, 15 March 2012); Dissenting Opinion by Judge Villiger, *Gas & Dubois v France* App no 25951/07 (ECtHR, 15 March 2012); Joint partly dissenting opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, De Gaetano and Sicilianos, *X & Others v Austria* App no 19010/07 (ECtHR, 19 February 2013); Concurring Opinion of Judge Spielmann, *X & Others v Austria* App no 19010/07 (ECtHR, 19 February 2013). For the CJEU: Concepts such as "equality" need to be filled with meaning; their construction differs. In this area, there is a considerable divergence between the opinions of the Advocate Generals and the Court's reasoning. See, e.g., Case C-249/96, *Lisa Jacqueline Grant v South-West Trains Ltd.,* Opinion of AG Elmer ECLI:EU:C:1997:449 [1998] ECR I-621; Case C-443/15, *Parris v. Trinity College Dublin and Others,* Opinion of AG Kokott ECLI:EU:C:2016:493 [2016] . See also the discussion of the CJEU's and the ECtHR's case law in Chapters (5) and (6) respectively.

have developed these concepts to become more inclusive with regard to sexual minorities, as I will show. Advocates can contribute to developing such terms by advancing favourable interpretations via litigation.

The CJEU and the ECtHR have also consistently referred to a "consensus among the Member States" or "common legal traditions" in their case law. Despite (or because of) inconsistencies in this regard,[778] the referral to such *"consensus"* might constitute a highly interesting opportunity for LGBT rights activists. In the realm of this concept, activist lawyers have often presented comments or expertise.[779]

The most reliable signs that strategic intervention might be promising are found in instances of inconsistent reasoning or hesitation by the Courts. Likewise, shows of internal disagreement (as exemplified, *inter alia*, by dissents) may also point to the instability of the jurisprudential *status quo*. Indeed, the Courts' jurisprudence regarding same-sex rights is riddled with inconsistency, hesitation and disagreement.[780]

Additionally, the CJEU's self-imposed requirement that EU law should be interpreted "uniformly"[781] can provide additional food for argumentation for activist lawyers when trying to convince the CJEU to consistently apply its own standards.

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[777] De Witte, 'From a "Common Principle of Equality" to "European Antidiscrimination Law"', 1720; for "discrimination," see, e.g., the CJEU's development of its respective case law – especially regarding the question whether the differential treatment of same-sex partners amounted to sex discrimination, sexual orientation discrimination, direct or indirect discrimination – or was indeed justified. See discussion in Chapter 4, Section 12.1.

[778] For a detailed discussion of this concept, see Section 8.2.

[779] I will expand on this in the following chapters. See especially Section 8.5.

[780] The fact that the ECtHR's jurisprudence is inconsistent when it comes to its sexual orientation jurisprudence is also pointed out, e.g., by Helmut Graupner, 'Sexuality and Human Rights in Europe' (2008) 48 Journal of Homosexuality 107, 121. In the context of the CJEU *Parris* decision, this is pointed out by Möschel: Mathias Möschel, 'If and When Age and Sexual Orientation Discrimination Intersect: Parris. Case Note.' (2017) 54 Common Market Law Review 1835, 1842-1844; Case C-443/15, *Parris v. Trinity College Dublin and Others* ECLI:EU:C:2016:897 [2016] .

[781] Craig and de Búrca, *EU Law: Text, Cases, and Materials*, 200. See also discussions in Sections 5.1. and 8.4.

A noteworthy opportunity is established when the Courts, in their reasoning, expressly refer to information provided by advocacy groups. Civil society advocates are usually experts in their field;[782] a fact sometimes recognised by the Courts, as I will show.[783] LGBT groups and activists have repeatedly intervened in same-sex rights cases as counsel,[784] applicants,[785] third parties,[786] or a combination of the three.

Using indicators of strategic litigation opportunities as a structural matrix for a case law analysis should provide a more complex and actor-centred understanding of the Courts' case law and adjudication. It also allows for a systemic examination, tracing the genesis of LGBT rights cornerstones and setbacks (which in turn can transform into prospects for LGBT rights advocacy, as I hope to show). Thusly re-telling the case law as an activist "work in progress" permits us to explore the potential of law and litigation as a tool of emancipation.[787] Consequently, the addressees of the narratives I will present are activist litigants, acting as agents of social change. Therefore, this Chapter (and the following Chapters 4 and 5, which contain an application of this framework) mean to provide an answer to the second and third subsets of the third inquiry of my research question:

*Can the respective case law of the Courts be analysed in an actor centred way – and does it provide room for activist intervention? (3rd inquiry, 2nd subset)*
and
*How could an activist reading of the European Courts' LGBT rights case law look like? (3rd inquiry, 3rd subset)*

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[782] See, e.g., Interrights, *Strategic Litigation of Race Discrimination in Europe: From Principles to Practice. A Manual on the Theory and Practice of Strategic Litigation with Particular Reference to the EC Race Directive* (ERRC/INTERRIGHTS 2004), 62.

[783] See also Section 8.5.

[784] E.g., at the ECtHR: *EB* App no 43546/02; *JM v UK* App no 37060/06 (28 September 2010). E.g., at the CJEU: *Maruko* (Case C-267/06) [2008] ECR I-1757; *Hay* (Case C-267/12) [2013].

[785] E.g., in *Coman and Others* (Case C-673/16) [2018]; *Asociația Accept* (Case C-81/12) [2013] IRLR 660; *Dudgeon* App no 7525/76.

[786] E.g., in *Schalk & Kopf* App no 30141/04; *X & Others* App no 19010/07.

[787] See especially Chapter 1, Section 4.1.

The following table presents an overview of the opportunities outlined in the framework. It needs to be pointed out that the strategic litigation opportunities contained in this framework are *not exhaustive.*

| **Indicators for strategic litigation opportunities (in case law)** |
|---|
| Use of vague and ambiguous terms |
| Use of "European consensus" |
| Inconsistency, hesitation and disagreement |
| Requirement of "uniform interpretation of EU law" (*CJEU only*) |

| **Possible strategic litigation activities (for activist lawyers)** |
|---|
| Interpretative intervention* |
| Use of "right comparator" |
| Providing expertise |
| Use of incremental approach** |

** I include "interpretative intervention" in this table despite the fact that most activist interventions will be, on some level, "interpretative."*[788]

*** I include "use of incremental approach" in this table despite the fact that, like "interpretative intervention," it applies to most activist interventions.*

Based on this framework, I will examine the jurisprudence of the CJEU in Chapter 4, and the jurisprudence of the ECtHR in Chapter 5. Within the Courts' case law, I will discern distinct indicators that point to litigation opportunities, and suggest inferences for strategic litigation choices. Of course, there are frequent overlaps between the different types of indicators for "strategic litigation opportunities." The "strategic litigation activities" I suggest are also to be understood as interdependent (apart from being, of course, mere suggestions; no one can ultimately predict the concrete outcome of strategic litigation efforts).

[788] For a more detailed discussion of "interpretative intervention," see discussion in Chapter 1, Section 4.1.

## 8. Delineating "Indicators for Strategic Litigation Opportunities"

### 8.1. The Use of Vague and Ambiguous Terms

As we have seen in Chapter 1, law is language and as such, requires interpretation.[789] While this is always true, there are certain terms whose meanings are particularly fluid. Such is especially the case for concepts that carry not only legal, but also pronounced social meaning, and are thus subject to changing social norms – such as family, marriage, spouse, or tradition; but also broad legal terms such as "equality" [790] need interpretation in order to develop meaning. I will refer to these terms as *vague and ambiguous terms*.

Some of these terms (such as "family",[791] "family member",[792] or "marriage"[793]) are concepts that can be found in the legal texts the Courts operate with; other terms, such as "traditional family"[794] or "equality principle,"[795] have been developed by the Courts. The usage of such terms by the Courts presents an intervention opportunity for activist lawyers. In the course of these Courts' case law, the fluidity of these terms has become palpable. Just because the Courts

[789] See discussion in Chapter 1, Section 3.2.

[790] De Witte, 'From a "Common Principle of Equality" to "European Antidiscrimination Law"'.

[791] These terms can be found *inter alia* in: Article 8 ECHR; Citizens' Rights Directive (2004/38/EC) [2004] OJ L 158/77;Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 (Brussels IIa Regulation) [2003] OJ L 338/1; Council Regulation (EC) No. 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations [2009] OJ L 200/46; and others.

[792] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (Family Reunification Directive) [2003] OJ L 251/12.

[793] E.g., Article 12 ECHR; Citizens' Rights Directive (2004/38/EC) [2004] OJ L 158/77; Brussels IIa Regulation (EC) No. 2201/2003 [2003] OJ L 338/1; and others.

[794] See discussion in Section 15.2.2.

[795] Bell, 'The Principle of Equal Treatment: Widening and Deepening'. See also discussion in Chapter 4, Section 11.1.

have started out with a certain definition of a term – which invariably excluded same-sex couples – this does not mean that the same definition stood at the end of the story.[796]

Numerous cases have led the ECtHR to expand the scope of Article 12 ECHR, as I will show.[797] Likewise, the CJEU has advanced a conception of "spouse" which includes married same-sex partners,[798] or significantly developed the meaning of the "equality principle."[799]

Hence, these terms present an interesting intervention possibility for LGBT rights activists; by proposing progressive definitions of such terms, they might contribute to a more favourable construction of respective laws.

## 8.2. The Use of "European Consensus"

A concept that is particularly prone to diverging interpretations is the concept of "European consensus." This concept describes the result of comparative research, conducted by the Courts, into the common laws, traditions or public (social) attitudes within Member States.[800]

As of today, the Courts have not advanced a coherent theory of their practice of relying on *European consensus*.[801]

*Firstly*, there are several methods of conducting a *consensus* evaluation. Both the CJEU and the ECtHR usually research the laws of their Member States (EU Member States in the case of the

[796] An example is the exclusion of same-sex couples from the term "family" under the ECHR, which changed in 2010 with *Schalk & Kopf* App no 30141/04.

[797] See, forexample, the discussion of transgender* rights in the context of the ECtHR's marriage adjudication, Section 15.3.2.

[798] Most recently in *Coman and Others* (Case C-673/16) [2018].

[799] For an account on this, see De Witte, 'From a "Common Principle of Equality" to "European Antidiscrimination Law"'.

[800] Laurence R Helfer, 'Consensus, Coherence and the European Convention on Human Rights' (1993) 26 Cornell International Law Journal 133, 138.

[801] Sabine Gless and Jeannine Martin, 'The Comparative Method in European Courts: A Comparison between the CJEU and ECtHR?' (2013) 1 Bergen Journal of Criminal Law and Criminal Justice 36.

CJEU, Council of Europe Member States in the case of the ECtHR). In the context of its LGBT rights case law, the ECtHR has also looked at legal developments or trends within its Member States in order to establish *consensus*.[802] While this method is less common for the CJEU, AG Wathelet (in the recent *Coman* decision) has claimed that a dynamic interpretation of EU law made it expedient to look at legal developments, as well.[803] Apart from this, the ECtHR sometimes also observes the "social attitudes" among its Member States as part of its *consensus* examination,[804] at times backed up by scientific material (such as statistics),[805] as does the CJEU (albeit more seldom).[806]

The *second* point concerns the Courts' and Advocate Generals' construction of the *subject* for a *consensus* evaluation, or put differently: the *content* of *consensus*. This question is connected to the question of how to deal with the *absence of consensus* (i.e., legislative silence on a matter),[807] which is usually used as an argument to uphold the *status quo*[808] (albeit not always).[809] For instance, in *Maruko*,[810] AG Colomer noted "fierce debate" on the issue of same-sex marriage among Member States – but suggested that this particular construction of consensus was actually irrelevant for the case at hand. Another interesting example are the different consensus constructions in *Fretté*[811] and *EB*:[812] in the first case, the Court looked at Member States' attitudes towards same-sex parenting in general; the latter case, activists suggested a much narrower consensus construction. The Court in *EB*, while mentioning the

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[802] E.g., *Schalk & Kopf* App no 30141/04, paras 94, 95.

[803] *Coman and Others* (Case C-673/16) [2018], Opinion of AG Wathelet.

[804] E.g., *Schalk & Kopf* App no 30141/04, para 105; *Cossey v UK* App no 10843/84 (ECtHR, 27 September 1990), para 40; *EB* App no 43546/02, para 93, citing para 26.

[805] E.g., *Fretté* App no 36515/97, para 36; *Cossey* App no 10843/84, paras 40, 46; Case C-249/96, *Lisa Jacqueline Grant v South-West Trains Ltd.* ECLI:EU:C:1998:63 [1998] ECR I-621, paras 32-35.

[806] *Grant* (Case C-249/96) [1998] ECR I-621, paras 32, 33, 35.

[807] Case C-267/06, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen,* Opinion of AG Ruiz-Jarabo Colomer ECLI:EU:C:2007:486 [2008] ECR I-1757.

[808] *Fretté* App no 36515/97, para 42.

[809] *Oliari* App nos 18766/11 and 36030/11, para 177. See discussion *infra,* at 312.

[810] *Maruko* (Case C-267/06) [2008] ECR I-1757, Opinion of AG Ruiz-Jarabo Colomer, para 98.

[811] *Fretté* App no 36515/97.

[812] *EB* App no 43546/02.

construction advanced by activists as well as the government, did not actually refer to consensus in its reasoning).[813]

*Thirdly*, and connected to the *second* point, is the question of how the Courts decide that a *consensus* evaluation is necessary, or if, on the other hand, they do not find a reliance on *consensus* expedient. Usually, a reference to *consensus* is conducted if the Courts deal with sensitive and controversial issues. However, this is not always the case. In *Oliari*, for example, the ECtHR decided in favour of the applicant, even though it conceded there was fierce debate on the issue at hand.[814] Thus, it *de facto* rejected the importance of *consensus* in this case.

Even though the Courts' comparative practice has time and again led to disappointing LGBT rights decisions,[815] it can also open interesting litigation opportunities for advocacy, as we shall see.[816] Activists can attempt to creatively utilise the concept of "consensus;" input by civil society organisations can provide information to the Court as to the *existence* of consensus, or the *right way to conduct* such comparison. A particularly notable opportunity arises when this "strategic litigation opportunity" coincides with another opportunity: the Court's acceptance of NGOs as "experts."[817] Advancing advantageous constructions of *European consensus* can thus present an interesting strategic opportunity for activist lawyers.

While the comparative methods of the Courts display certain differences, this is not tangent to the fact that activist lawyers can make use of this concept (of course, taking in mind the particular focus of the respective Court and building their argument accordingly).

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[813] See comprehensive discussion *infra,* at 294.

[814] *Oliari* App nos 18766/11 and 36030/11, para 177.

[815] *Cossey* App no 10843/84; *Fretté* App no 36515/97; *Grant* (Case C-249/96) [1998] ECR I-621.

[816] This has been echoed by some of the LGBT rights activists I interviewed; e.g., Robert Wintemute, King's College London (2014).

[817] E.g. in *Karner* App no 40016/98, paras 27, 36.

## 8.2.1. The CJEU's Use of European Consensus

In the case law of the CJEU, *European consensus* plays a role when the Court evaluates contentious issues – as it often happens in LGBT rights cases.[818] One of its aims is to "ensure a coherent application of community law throughout the European Union... ."[819] In order to do so, it also draws inspiration from the "general principles" of law[820] and the "common constitutional traditions" of the Member States[821] – which, as some have argued, turns its comparison into a teleological exercise, since the Court not only compares the laws, but tries to draw inspiration from the "spirit" behind national laws.[822] Interestingly, Advocate General Wathelet, in his opinion in the recent *Coman* case,[823] also looked "trends" or "legal developments," rather than examining the legal *status quo*.[824] And at times, the Court also includes "social attitudes" in its examination.[825]

The CJEU and Advocates General often point to the case law of the ECtHR in such instances, particularly to evaluate the scope of the Charter of Fundamental Rights.[826] This kind of consensus evaluation is not without contention. Gless and Martin accordingly note that the CJEU's reliance on the ECtHR in human rights law issues might compromise the CJEU's interpretation monopole, particularly regarding its own established principles.[827]

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[818] E.g., in *Grant* (Case C-249/96) [1998] ECR I-621, para 32; *Maruko* (Case C-267/06) [2008] ECR I-1757.

[819] Gless and Martin, 'The Comparative Method in European Courts: A Comparison between the CJEU and ECtHR?', 38, 45.

[820] Ibid, 47.

[821] A reference to "constitutional traditions" of the Member States is explicitly mentioned in Article 6 (3) TEU.

[822] Gless and Martin, 'The Comparative Method in European Courts: A Comparison between the CJEU and ECtHR?', 45.

[823] *Coman and Others* (Case C-673/16) [2018].

[824] *Maruko* (Case C-267/06) [2008] ECR I-1757, Opinion of AG Ruiz-Jarabo Colomer, para 56.

[825] *Grant* (Case C-249/96) [1998] ECR I-621, paras 32, 33, 35.

[826] E.g., in ibid, para 33; see also AG Wathelet's opinion in *Coman*: *Coman and Others* (Case C-673/16) [2018], Opinion of AG Wathelet. Lenaerts and Gutman, 'The Comparative Law Method and the European Court of Justice: Echoes Across the Atlantic', 846, footnote 25.

[827] Gless and Martin, 'The Comparative Method in European Courts: A Comparison between the CJEU and ECtHR?', 51.

In the area of LGBT rights, the CJEU's observance of the ECtHR in human rights matters is not unproblematic, given that the Council of Europe (CoE) Member States are not congruent with EU Member States. Particularly states with non-progressive views, such as Turkey or Russia, are part of the CoE, but not the EU. However, since the ECtHR's case law on LGBT rights is much more comprehensive than the CJEU's, the CJEU's practice also holds opportunities. Providing the right ECtHR case for the establishment of *consensus* might be an interesting strategic intervention choice for advocates.

Moreover, the Advocates Generals (more than the Court itself) often cite academic literature in order to support their *consensus* construction.[828] Here, activists might find it useful to refer to respective academic works in support of their views.

The fact that the CJEU often uses *consensus* to ensure the uniform application of EU law, furthermore, connects this indicator of a litigation opportunity with the indicator *uniform application of EU law*, discussed *infra*.[829]

### 8.2.2. The ECtHR's Use of European Consensus[830]

The paramount importance of *European consensus* in the ECtHR's LGBT case law warrants a more in-depth analysis of this concept, since the ECtHR's margin of appreciation doctrine, in connection with its assessment of *consensus*, greatly affects its LGBT rights jurisprudence.[831] Simply put, the Court applies this method "in order to find a consensus on human rights among the European countries that have pledged obedience to the European Convention of Human

[828] E.g., AG Wathelet in *Coman*: *Coman and Others* (Case C-673/16) [2018], Opinion of AG Wathelet.

[829] Section 8.4.

[830] For a thorough investigation of this concept, see Helfer, 'Consensus, Coherence and the European Convention on Human Rights'; Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights'.

[831] Nicholas Bamforth shows this in the context of two LGBT rights cases, *Schalk & Kopf* App no 30141/04 and *PB & JS* App no 18984/02: Nicholas Bamforth, 'Families but not (yet) Marriages? Same-Sex Partners and the Developing European Convention 'Margin of Appreciation'' (2011) 23 Child and Family Law Quarterly 128, 139-141.

Rights (ECHR)."[832] In this regard, its motive for comparison somewhat differs from the CJEU's, which is usually concerned with the goal of safeguarding the harmonious application of EU law, as elaborated previously.[833]

The Court often uses *consensus* in order to determine the width of the margin of appreciation it affords to Member States when they "interfere" in rights protected by the Convention of Human Rights.[834] In the context of the ECtHR's jurisprudence, its "margin of appreciation" doctrine is of special relevance, since it figures prominently in many of the cases discussed below. It is used by the Court to determine the intensity of its judicial review.[835]

As mentioned above, is not always clear which elements the Court will consider when examining whether a *consensus* exists or not.[836] Helfer distinguishes three distinct factors that the Court usually relies on: 1) legal consensus; 2) expert consensus; and 3) European public consensus.[837]

Regarding the first element (legal consensus), the Court might look at the legal situation *as is*; other times, it will look whether there is a "development," "trend" or "evolution" among the legal situations of the ECHR Member States or look for "commonly accepted standards," rather than particular laws.[838]

The latter two types of *consensus* (expert and public) are particularly interesting; here, the Court

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[832] Gless and Martin, 'The Comparative Method in European Courts: A Comparison between the CJEU and ECtHR?', 37.

[833] *Infra*, note 819.

[834] Greer, *The Interpretation of the European Convention on Human Rights: Universal Principle or Margin or Appreciation*, 15.

[835] Bertelsen, 'Consensus and the Intensity of Judicial Review in the European Court of Human Rights. Some Reflections from National and International Law', 294; Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights', 241.

[836] Helfer, 'Consensus, Coherence and the European Convention on Human Rights', 138.

[837] Ibid, 139.

[838] Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights', 279.

does justice to the fact that it understands the Convention as a living instrument which as to be interpreted according to present-day European legal *and social* developments.[839] Moreover, these kinds of inquiry mean that activist groups can provide expertise in social or scientific questions. And indeed, in the context of LGBT rights, the Court has repeatedly looked for expert input, for example, regarding scientific research on the psychological effect on children of same-sex parent adoption,[840] or the meaning of sex/gender in transgender* cases.[841] Similarly, developments in public opinion or social attitudes have often played a role in LGBT rights cases.[842]

The Court's comparative practice also raises important questions regarding the legitimacy of giving such a high priority to *consensus*; after all, a conflict between public and individual interests is often inherent in human rights protection, especially when it comes to discrimination issues.[843] Referring to a *consensus* automatically means deferring to the majority, and this might *per definitionem* render minority protection efforts toothless – and in fact, many human rights cases deal with the protection of the rights of individuals pertaining to a minority against the biases of the majority.[844] Especially to connect the width of the margin of appreciation to such a concept, as is often done by the ECtHR, thus would establish "judicial double standards" and undermine "universal standards" of human rights.[845]

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[839] Helfer, 'Consensus, Coherence and the European Convention on Human Rights', 134.

[840] *X & Others* App no 19010/07, para 62.

[841] *Goodwin* App no 28957/95, para 63.

[842] E.g., in *Schalk & Kopf* App no 30141/04, paras 93-95; *Goodwin* App no 28957/95, para 85; *X & Others* App no 19010/07, para 139.

[843] Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 The Modern Law Review 671, 683.

[844] Yuakata Arai-Takashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2001), 211-212.

[845] Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 International Law and Politics 843, 844.

Apart from this, the evaluation of the Court has been criticised as often being rather inconsistent and superficial.[846] It has been held that the inconsistent way in which the Court applies its *consensus* examination lacks analytical precision, thus compromising the rule of law.[847]

However, it has also been argued that the reliance on *consensus* (and the conclusion the Court often draws from it regarding the margin of appreciation) is a necessary show of respect towards Member States, an "initial understanding that the Convention organs should not exceed their mandate, nor encroach on the primary responsibility of national authorities for the protection of rights and freedoms."[848] In fact, the reference of the Court to *consensus* might actually constitute one if its strengths, an almost diplomatic instrument guaranteeing that its judgments are complied with.[849]

Be that as it may – activist lawyers have been successful, as we shall see, in advancing favourable constructions of *consensus*.[850]

## 8.3. Inconsistency, Hesitation and Disagreement

Both Courts' case law displays instances of *inconsistency*,[851] *hesitation*[852] and *disagreement*.[853] These instances, as I will argue, may indicate a certain instability of the *status quo*; they might point to the fact that change might be possible.

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[846] Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights', 284; Ronald St. J. MacDonald, 'The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights' in Andrew Clapham and Frank Emmert (eds), *International Law at the Time of its Codification Essays in Honour of Roberto Ago* (Giuffrè 1987), 201; Helfer, 'Consensus, Coherence and the European Convention on Human Rights', 135.

[847] Jeffrey A. Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2004) 11 Columbia Journal of European Law 113, 138.

[848] Arai-Takashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, 233.

[849] Robert Wintemute, 'Consensus is the Right Approach for the European Court of Human Rights' (*The Guardian*, 12 August 2010) <https://www.theguardian.com/law/2010/aug/12/european-court-human-rights-consensus> (accessed 28 January 2018).

[850] E.g., in *X & Others* App no 19010/07.

In fact, it is rather unlikely that the Courts will suddenly change well-established, un-questioned jurisprudence; however, if *inconsistencies* within the Courts' own case law abound, or if the Courts show clear signs of *hesitation*, it might arguably be easier to sway the Court to rethink its approaches.

Sometimes, the Courts deliver highly technical and rather brief decisions, instead of undertaking a principled, well-argued evaluation of a case. Cass Sunstein has called such decisions "incompletely theorized," observing that such judgments are common in judicial practice and society as a whole; he claims that such judgments are seldom stringently argued in coherence with high-level-principles.[854]

Formalistic argumentations can be an indicator of *hesitation* and/or *inconsistency*, because they may reveal that judges shied away from a principled, thorough examination and reasoning. My argument is that these instances have often marked the beginning of impending reform.[855]

Likewise, *disagreement* is a strong indicator of impending change. It is important to mention that the ECtHR allows judges to file concurring opinions, as well as dissents. The relevance of separate opinions for impact litigation purposes cannot be overstated. For one, they increase transparency.[856] Activists can gain insights into the workings of the Court's decision making,

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[851] The fact that the ECtHR's jurisprudence is inconsistent when it comes to its sexual orientation jurisprudence is also pointed out, e.g., by Graupner, 'Sexuality and Human Rights in Europe', 121. In the context of the CJEU *Parris* decision, this is pointed out by Möschel: Möschel, 'If and When Age and Sexual Orientation Discrimination Intersect: Parris. Case Note.', 1842-1844. *Parris* (Case C-443/15) [2016].

[852] Formalistic decisions can be read as signs of hesitation. See, e.g., *Gas & Dubois* App no 25951/07, or *Parris* (Case C-443/15) [2016].

[853] See, e.g., *Cossey* App no 10843/84– a case with 8 dissenters in a total of 4 dissenting opinions.

[854] Cass R Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press 1998), 6-12.

[855] For instance, a short and formalistic ECtHR decision in *Cossey* (accepting a Member State's restriction on a transgender* person's right to marry) was followed by *Goodwin*, a long and well-reasoned decision dealing with the same issue – and coming to a much more transgender*-friendly conclusion. I will elaborate on this in the following chapters. *Cossey* App no 10843/84; *Goodwin* App no 28957/95.

[856] Antoine Buyse, 'Separate Opinions' 27 May 2008) <http://echrblog.blogspot.com/2008/05/separate-opinions.html > accessed 30 March 2014.

since separate opinions usually shed light on the arguments that were considered, and how they were weighed. Secondly, dissents may contain valuable cues for activists on the viability of a particular strategy that might work in the future.[857] Thirdly, as I will outline, dissents can also give important hints as to whether the Court might be ready to reconsider its approach in the near future.[858]

The CJEU, however, does not offer dissenting opinions. Nonetheless, the Advocate General delivers an opinion in most important cases (and she has done so in many cases dealing with same-sex rights so far).[859] The opinion of the Advocate General is publically available, and can at times provide interesting alternative constructions to the CJEU's opinion. Advocates can draw on such discrepancies for future litigation strategies.

## 8.4. Uniform Interpretation of EU Law

The CJEU, in addition, has a vested interest in maintaining the harmony of EU law.[860] This means that it minds its previous case law, trying to avoid *inconsistencies*.[861] In this sense, the CJEU – in the context of LGBT anti-discrimination law – also refers to its case law under Directives that do not expressly mention "sexual orientation," such as the Race Equality Directive,[862] in order to create a cohesive anti-discrimination-case law.[863]

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[857] The (progressive) reasoning of dissenting judges has often been adopted by the ECtHR in subsequent cases. E.g., in *Oliari,* the majority seemingly filled the concept of "family" under Article 8 "with meaning," as dissenters in *Schalk & Kopf* had suggested it should, by holding that same-sex couples had a right to some kind of legal protection. *Oliari* App nos 18766/11 and 36030/11; Joint dissenting opinion by Judges Rozakis, Spielmann and Jebens, *Schalk & Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010), para 4. See also discussion of this issue in Chapter 5, Section 15.2.7.

[858] This is particularly true if there is a high number of principled dissents, combined with a formalistic majority opinion.

[859] These are, *inter alia*, *Grant* (Case C-249/96) [1998] ECR I-621; *Maruko* (Case C-267/06) [2008] ECR I-1757; *Römer* (Case C-147/08) [2011] ECR I-3591; *Parris* (Case C-443/15) [2016], Opinion of AG Kokott; *Coman and Others* (Case C-673/16) [2018], Opinion of AG Wathelet.

[860] Craig and de Búrca, *EU Law: Text, Cases, and Materials*, 200.

[861] Conant, 'Europeanization and the Courts: Variable Patterns of Adaptation Among National Judiciaries', 97.

[862] Race Equality Directive (2000/43/EC) [2000] OJ L 180/22.

Activists have used the principle of *uniform interpretation* time and again to push for more LGBT-friendly interpretations of national law.[864] A notable example is the *Coman* case (discussed *infra*),[865] where the applicants asked the Court to advance a uniform interpretation of the term "spouse" under the EU Citizenship Directive which would include married same-sex partners.[866] The case was successful.

## 8.5. Recognition of NGOs as Experts

The ECtHR has relied on the expertise of NGOs time and again, especially when trying to establish whether a changed social reality needs to be accommodated within its jurisprudence.[867] This is especially relevant when the Court conducts a *consensus* evaluation, as the case law samples will show. This presents a notable opportunity for LGBT rights organisations, since the arguments and information they forward might be seen as particularly reliable by the Courts.[868]

While the CJEU – different to the ECtHR – has not directly referred to the input by NGOs in its reasoning (at least in the case law samples provided here), it is arguable that it processes information provided by LGBT rights groups, nonetheless. The fact that the Court accepts, more

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[863] For instance, in its *ACCEPT* case, the CJEU also cited *Feryn* – a case that arose under the Race Equality Directive. *Asociația Accept* (Case C-81/12) [2013] IRLR 660, para 36; Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV.* ECLI:EU:C:2008:397 [2008] ECR I-5187, para 40.

[864] Adam Weiss, European Roma Rights Centre (ERRC) (2014); Robert Wintemute, King's College London (2014).

[865] See Chapter 4, Section 12.3.

[866] *Coman and Others* (Case C-673/16) [2018].

[867] For instance, *Karner* App no 40016/98, paras 36, 37 (explicit mention); *Goodwin* App no 28957/95, para 84, citing Liberty's intervention paras 55-56; *Oliari* App nos 18766/11 and 36030/11, paras 171, 173, citing statistics provided by ARCD; *X & Others* App no 19010/07, paras 149, 150, which mirrors third party interveners' arguments in the submissions, Joint Written Comments of FIDH, ICJ, ILGA-Europe, BAAF, NELFA and ECSOL (submitted 1 August 2012) to *X & Others v Austria* App no 19010/07 (ECtHR, 19 February 2013), paras 16-19; *Vallianatos* App nos. 29381/09 and 32684/09, para 91, mirroring Written Comments of FIDH, ICJ, AIRE CENTRE and ILGA-EUROPE, submitted on 20 June 2011, *Vallianatos & Others v Greece* App nos. 29381/09 and 32684/09 (ECtHR, 7 November 2013), paras 2, 3, 5, appendix; and others.

[868] This is also confirmed by activists I interviewed. Matthew Evans, AIRE Centre, London, GB (2014); Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014).

and more, third party interventions, points to the fact that it considers their input valuable.[869] Moreover, Advocates General have used expertise provided by NGOs, as shown by AG Wathelet's *Coman* opinion[870] – and there can be no doubt that the Court acknowledges the opinions of Advocates General as highly relevant. At the very least, there is a point to be made that third party interventions enter the judges' thought process via their reception by the AGs.

[869] Almqvist, 'The Accessibility of European Integration Courts from an NGO Perspective', 277. See also discussion in Chapter 2, Section 5.2.2.1.

[870] Third Party Submissions*, Coman/Hamilton* (Romanian Constitutional Court, 2016), paras 44-46; *Coman and Others* (Case C-673/16) [2018], Opinion of AG Wathelet, paras 65, 98, citing *Pajić* in the footnotes (as suggested by Third Parties). *Pajić* App no 47082/12.

## 9. Delineating Strategic Litigation Activities

### 9.1. Interpretative Intervention as Strategy

As I have argued previously,[871] contributing to the interpretation of a term means actively participating in judicial decision-making. I have expanded on interpretation as a progressive activist intervention at length in Chapter 1.[872] In fact, most of strategic LGBT rights litigation can be understood as a form of "interpretative intervention," since litigation is, more often than not, concerned with suggesting progressive readings of law (such as, *inter alia*, including same-sex couples within the legal understanding of "family" under Article 8 ECHR,[873] suggesting that "spouse" should extend to same-sex partner(s) for the purpose of EU fee movement rights,[874] or that "equality" demands protection of LGBT minorities from discrimination).[875]

### 9.2. Choosing the Right Comparator

One example for using "interpretation" in a proactive way is the determination of the right *comparator*. Both in the CJEU's and in the ECtHR's case law, and particularly in the context of discrimination based on sexual orientation, the question of whether the situation of the applicant is *comparable* to the situation of somebody in a specific comparative group (the comparator) is of utmost importance, [876] especially in discrimination cases.

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[871] See, for instance, Chapter 1, Section 4.1.

[872] See discussion on this issue especially in Chapter 1, Sections 3.2. and 4.

[873] See discussion in Chapter 5, Section 15.2.5.

[874] See discussion in Chapter 4, Section 12.3.

[875] See discussion in Chapter 4, Section 11.1.

[876] Kees Waaldijk, 'Great Diversity and Some Equality: Non-Marital Legal Family Formats for Same-Sex Couples in Europe' in Marjolein van den Brink, Susanne Burri and Jenny Goldschmidt (eds), *Sexuality and Human Rights: Nothing but Trouble?* (SIM 2015), 55.

For instance, can (stable/registered/married) same-sex couples be compared to (married/unmarried/stable) different-sex couples, and for which purposes?[877] Here, advocates can constructively contribute by suggesting adequate comparators.

## 9.3. Providing Expertise

As described above, LGBT rights NGOs are at times accepted as *experts* by the Courts.[878] And indeed, they tend to be experts in their field, due to the fact that they constantly work on the issues debated in respective cases, and are usually well connected to the same-sex community and aware of academic and scientific developments in this area.[879]

Hence, they should indeed be able to present strong supportive evidence for the arguments made in a case. LGBT rights issues tend to be highly contentious, and taking in mind the many instances of hesitation and inconsistency in the Court's case law, it is safe to say that activists might at the very least be able to provide potentially favourable judges with food for thought and argumentation.

## 9.4. Using an Incremental Approach

As we shall see, proceeding with caution can sometimes yield better results than wanting too much, too soon.[880] This is certainly true for any form of social change litigation.

The use of an *incremental approach* was especially endorsed by US activists I interviewed.[881] Finding the correct "timing" to bring a certain law suit, and even discouraging litigation if it was

[877] Ibid.

[878] See Section 8.5.

[879] In fact, all activists I interviewed self-identified with the LGBT community.

[880] This is confirmed by some of the activists I interviewed; e.g., Robert Wintemute, King's College London (2014).

[881] See discussion in Chapter 6, Section 17.5.

seen as counterproductive in light of a larger strategy, was seen as paramount.[882]
Also in the European LGBT rights context, an *incremental approach* is often advisable.[883] It is especially relevant when choosing the right *comparator*.[884]

The use of an *incremental approach* makes most sense if strategic litigation is perceived as a long-term project, rather than putting the focus on winning the particular case at hand. It requires an evaluation of the Courts' case law as a whole and includes the assessment of *feasibility* of litigation of particular cases, in order not to throw back the social change project as a whole. In other words, it might be advisable to restrain from bringing a case if the risk of fortifying a Court's negative jurisprudence outweighs the chances of winning.

An *incremental approach* is especially recommendable in the area of same-sex marriage, given both the ECtHR and the CJEU caution not to interfere in Member States' autonomy in this regard.[885]

[882] Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014). Elizabeth Gill (ACLU) gives an example regarding a case in Arizona, brought forward by a small NGO, which was perceived as being counterproductive – both on legal grounds and based on the fact that the ACLU already was working on a more promising case in the region which had already reached the federal level. For the sake of protecting the NGO's identity (which I haven't spoken to), I will not disclose more information on this issue. Interview with Elizabeth Gill, ACLU – American Civil Liberties Union for Northern California (2014).

[883] This is especially true in the context of "same-sex marriage." See discussion of this issue in Chapter 5, Section 15.3.

[884] See, e.g., the discussion in Chapter 5, Section 15.2.7.

[885] See, e.g., the Courts' continued confirmation that they do not wish to interfere in Member States' autonomy with regard to the *access* of same-sex couples to marriage. *Parris* (Case C-443/15) [2016]; *Hämäläinen v Finland (GC)* App no 37359/09 (ECtHR, 16 July 2014); *Charpentier* App no 39651/11; and many others.

## 10. Conclusions to Chapter 3

Assessing the same-sex case law of both the CJEU and the ECtHR under a "litigation opportunities framework" can illuminate the various opportunities for LGBT rights intervention in the Courts' jurisprudence. This analysis decisively abandons, as previously mentioned,[886] a "neutral" perspective and instead looks at the case law from an activist's point of view.

In the next two chapters (4 and 5), I will analyse the Courts' case law by applying the "strategic litigation opportunities" framework. I will start off both case law samples with a short introduction of the relevant written law.

In order to preserve the intrinsic dynamics of the Courts' case law, I will keep, as much as possible, to the chronology of the cases. Within the Courts' case law, I will create distinctive narratives, based on particular LGBT rights agenda issues. In the realm of the CJEU, these are the emergence of sexual orientation discrimination and the principle of equal treatment (Section 12.1.), especially regarding employment discrimination based on relationship status (Section 12.1.1.); LGBT NGOs as litigants (Section 12.2.); and the inclusion of married same-sex partners in the meaning of "spouse" under the Citizens' Rights Directive (Section 12.3.).

Regarding ECtHR case law, these narratives concern the ECtHR's treatment of same-sex families (15.2.), and same-sex marriage (15.3.). While there are only two narratives, they are much more comprehensive than the CJEU case law narratives, also because the ECtHR has developed a larger body of case law on LGBT rights issues than the CJEU.

These case law narratives aim to tell the story of the development of same-sex rights through the lenses of activist opportunities and intervention possibilities. Case law is presented as a *field for activist opportunities*, created by an ever-transforming case law. A metaphor might help explaining my approach: a suiting image for the way that the Courts' jurisprudence is conceptualised might be that of a *cross-country race*, with LGBT rights activists as the runners. Obstacles need to be overcome (or worked around) in order to reach the finishing line. There are

[886] See Chapter 1, Section 4.1

strict rules that need to be adhered to in order not to be disqualified, but creativity and resourcefulness are important to win (as is a good deal of athletic skill). A lot of scholarship, in a manner of speaking, seems concerned with the *rules* of the cross-country race – in other words, it examines the length of the tracks or the depth of the water jumps that participants have to cross; or it contemplates whether *it is fair* that someone is disqualified for knocking over a hurdle. The approach of this thesis, on the other hand, asks *what it takes* for an athlete *to win* under the *given circumstances*. However, it needs to be clarified that "winning" does not mean the victory *in a particular case*, but rather, the improvement of the (legal) situation for LGBT minorities at large. Strategic LGBT rights litigation is consequently understood as a long-term endeavour, a work-in-progress.

The "strategic litigation opportunities" framework can thus be seen as a kind of *case law reading raster* from an activist viewpoint. It reassembles the Courts' LGBT rights case law in a way that reveals its reformative potential. In other words, the analysis presented in the next chapters assesses the case law's capacity to be a vehicle for social change.

Hence, Chapters 3, 4 and 5 supply an answer to the *third inquiry* of the overall research question *(Is strategic litigation at the CJEU and the ECtHR an **emancipatory** and **feasible** approach for the advancement of LGBT rights in Europe?)*

The third inquiry asks: *Can the case law of the European Courts be analysed and utilised in a progressive LGBT-rights enhancing way?*

It has three subsets:

- *Do European Union law and European human rights law protect LGBT rights?*
- *Can the respective case law of the Courts be analysed in an actor-centred way – and does it provide room for activist intervention?*
- *How could an activist reading of the European Courts' LGBT rights case law look like*?[887]

[887] See the summary of the research question in the introduction, Section 0.4.1.

The *first subset* is a preliminary inquiry, rather than a contribution to the research question *per se*. Laws protecting LGBT rights – while not under all circumstances necessary for strategic LGBT rights litigation to work – are certainly useful for legal LGBT rights activism. Therefore, the next two chapters will include an overview of the most important legal materials in this regard.

The *second* subset has already been partly addressed in Chapter 1, showing that law requires interpretation and that reading, presenting and constructing law in an activist way can already be an emancipatory act, an "interpretative intervention."[888] Chapter 1 has also addressed concerns forwarded by critical legal theory, namely the suitability of law and adjudication to develop emancipatory impact at all, based on the fact that it is hierarchical and elitist ("law-sceptical objection").[889] I have shown that critical theories themselves allow room for more optimist views on law,[890] and that the "lawyering for social change" approach in particular points out how litigation can be used to advance a progressive agenda.[891]

Chapters 3, 4 and 5 contribute to answering both the *second* and the *third subset* of the third research inquiry by applying the "strategic litigation opportunities" framework to the case law narratives in the next two Chapters and thus, providing a practical example of how an activist centred reading of the Courts' LGBT case law could look like – and thus, a practical test of the theoretical considerations advanced in Chapter 1.

As a result, the third inquiry of the research question – *Can the case law of the European Courts be analysed and utilised in a progressive LGBT-rights enhancing way?* – will be answered in the affirmative.

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[888] See intermediary findings in Chapter 1, Section 4.

[889] See *supra,* at 12.

[890] See Chapter 1, especially Sections 3.2.4. and 4.

[891] See Chapter 1, Section 1.

# CHAPTER 4

# THE CJEU AND SAME-SEX RIGHTS

The CJEU has time and again been asked to determine the scope of protection afforded to same-sex couples under EU law, both in the ambit of anti-discrimination and free movement. When looking at the respective case law from a litigation opportunities perspective, interesting patterns emerge, as I will show.

The CJEU has dealt most comprehensively with same-sex rights in the area of non-discrimination, particularly regarding employment benefits attached to relationship status.[892] Recently, it has also ruled on same-sex rights in connection with free movement,[893] concerning the question of whether a married same-sex partner qualified as "spouse" under the Citizens' Rights Directive.[894]

This Chapter first contains first an overview of relevant EU equality and anti-discrimination laws and principles. Then, it presents a sample of the CJEU's case law on same-sex rights. I have organised this sample in three distinctive *narratives*, which aim to develop the Court's case law on four LGBT rights agenda topics while applying the "strategic litigation opportunities" framework drafted in the previous chapter. This kind of analysis will reveal indicators within the case law that point to litigation opportunities for same-sex rights activism.

The *first* narrative (Section 12.1.) relates the CJEU's development of equality and anti-discrimination law *before* and *after* the adoption of the Treaty of Amsterdam and the subsequent adoption of the Employment Equality Directive.[895] It shows the evolution of the CJEU's jurisprudence in the area of anti-discrimination under the Directive, which provided new and

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[892] E.g., in *Grant* (Case C-249/96) [1998] ECR I-621, *Maruko* (Case C-267/06) [2008] ECR I-1757, Opinion of AG Ruiz-Jarabo Colomer, Case C-147/08, *Jürgen Römer v Freie und Hansestadt Hamburg,* Opinion of AG Jääskinen ECLI:EU:C:2010:425 [2011] ECR I-3591, and others.

[893] *Coman and Others* (Case C-673/16) [2018].

[894] Citizens' Rights Directive (2004/38/EC) [2004] OJ L 158/77.

[895] Employment Equality Directive (2000/78/EC) [2000] OJ L 303/16.

interesting opportunities for strategic activist interventions.[896] It particularly focuses on the CJEU's treatment of same-sex couples in the context of anti-discrimination (in Section 12.1.1.). This narrative is the most comprehensive one of the three narratives.

The *second* narrative (Section 12.2.) will provide an example of a same-sex rights organisation that has advanced discrimination claims the absence of an individual victim. Here, I will focus on the *ACCEPT* case.[897]

Finally, the *third* narrative (Section 12.3.) examines the CJEU's treatment of same-sex spouses in the ambit of the Citizenship Directive.[898] Here, I will focus on the *Coman* case.[899]

Before presenting these narratives, I will provide an overview of relevant EU law in Section 11. EU anti-discrimination law has experienced significant growth in the last one and half decades, both in terms of primary and secondary EU legislation and in terms of the application of respective provisions by the CJEU.[900] Additionally, free movement law contains interesting provisions, relevant for same-sex rights.

Taking also in mind the ever-growing toolkit of procedural rights and guarantees outlined in Chapter 2, this means that litigants have certain leverage to challenge domestic discriminatory practices and provisions by claiming their non-compliance with EU law.

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[896] Muir, Kilpatrick, Miller and de Witte have collected a number of articles, showing how EU law in (*inter alia*) the area of discrimination now provide opportunities for collective action: Muir and others (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum*.

[897] *Asociația Accept* (Case C-81/12) [2013] IRLR 660.

[898] Citizens' Rights Directive (2004/38/EC) [2004] OJ L 158/77.

[899] *Coman and Others* (Case C-673/16) [2018].

[900] See, e.g., Kelemen, 'American-Style Adversarial Legalism and the European Union', 6, 7.

## 11. Same-Sex Rights in EU Law

### 11.1. Equal Treatment and Non-Discrimination

The emergence of EU equality and anti-discrimination arguably started with strategic litigation. Historically, the CJEU's anti-discrimination case law evolved out of the area of gender equality law. This development was propelled by establishing the direct applicability of Article 157 TFEU (then Article 119 EC), requiring equal pay for men and women for equal work (or work of equal value). This was achieved by activist litigation, resulting in the *Defrenne* decisions.[901] As mentioned earlier, in 1966, Belgian lawyer and activist Elaine Vogel-Polsky – as a response to Belgium's failure to implement the equal-pay requirement laid down in Article 157 TFEU (then Article 119 EC) – recruited Gabrielle Defrenne, a former flight attendant, in order to create a test case – with great success.[902]

This has marked the beginning of the development of a considerable corpus of jurisprudence and legislation in the area of sex discrimination in employment,[903] which was eventually expanded, particularly with the adoption of then Article 13 EC (now Article 19 TFEU) in the Treaty of Amsterdam, to include discrimination on other grounds, such as sexual discrimination.[904]

Today, Articles 2 and 3 of the Treaty on the European Union (TEU) underscore the commitment of the Union to non-discrimination and minority protection as part of its core values. Arts 8, 9 and 10 of the Treaty on the Functioning of the European Union (TFEU) contain clauses requiring the EU to promote equality and combat discrimination *inter alia* on grounds of sexual

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[901] *Van Gend & Loos* (Case 26/62) [1963] ECR 1; *Defrenne I* (Case C-80/70) [1971] ECR 445; *Defrenne II* (Case C-43/75) [1976] ECR 455; *Defrenne III* (Case C-149/77) [1978] ECR 1365.

[902] Jacquot and Vitale, 'Law as a Weapon of the Weak? A Comparative Analysis of Legal Mobilization by Roma and Women's Groups at the European Level', 593.

[903] Bell, 'The Principle of Equal Treatment: Widening and Deepening', 615.

[904] Ibid, 612.

orientation. Apart from this, secondary legislation[905] as well as a plethora of resolutions, policy papers and other soft law devices deal with sexual orientation discrimination.[906]

As mentioned above, the Treaty of Amsterdam introduced Article 19 TFEU (then Article 13 EC) in 1999, giving the EU a clear mandate to take action to combat discrimination:

> "(1) Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or *sexual orientation*." (*emphasis added*)

The inclusion of "sexual orientation" in Article 19 TFEU (then Article 13 EC) was in no small part due to lobbying efforts by LGBT rights groups, such as ILGA-Europe and ÉGALITÉ (an organisation of LGBTI staff members of EU institutions).[907]

Additionally, Article 21 of the Charter of Fundamental Rights of the European Union explicitly prohibits discrimination based on sexual orientation;[908] however, the applicability of the Charter is limited to EU law and EU institutions, and only binds Member States when they are

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[905] Most importantly the Employment Equality Directive (2000/78/EC) [2000] OJ L 303/16. The introduction of a new comprehensive anti-discrimination Directive is being discussed since 2008, including, among others, the ground of sexual orientation. Commission Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM [2008] 0426 final.

[906] For a general overview see: Kees Waaldijk and Matteo Bonini-Baraldi, *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive* (Asser Press 2006), 24; Bell, 'The Principle of Equal Treatment: Widening and Deepening', 611; Mark Bell, *Anti-Discrimination Law and the European Union* (Oxford University Press 2002).

[907] Nico J. Berger, 'Queer Readings of Europe: Gender Identity, Sexual Orientation and the (Im)potency of Rights Politics at the European Court of Justice' (2000) 9 Social & Legal Studies 249, 255; Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014).

[908] Article 21(1) of the Charter of Fundamental Rights [2007] OJ C 303/1.

implementing EU law.[909]

Based on Article 19 TFEU, Directive 2000/78/EC introduced a general framework for equal treatment in employment and occupation (Employment Equality Directive), which prohibits sexual orientation discrimination (among other things).[910] Article 19 TFEU as well as Article 21 of the Charter of Fundamental Rights of the European Union (CFREU) express the values that underpin the Employment Equality Directive. Hence, the Directive needs to be interpreted in accordance with these Articles.[911]

In the area of non-discrimination, the "principle of equal treatment" also plays an important role. In its case law, the CJEU has developed the concept of "general principles"[912] inherent in EU law, which it derived from common legal traditions of the Member States, as well as various international human rights instruments,[913] among them the European Convention of Human Rights.[914] These rights were sometimes referred to as the "unwritten bill of rights" of the EU.[915] Among these, the CJEU has recognised an autonomous "general principle" of equal treatment.[916] The Court understands the equality principle as entailing a fundamental personal human right of non-discrimination.[917] I will expand on this principle, and its relation to anti-discrimination (particularly in the ambit of sexual orientation) in Section 12.1.

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[909] Article 6 TEU [2012] OJ C 326/13; Article 51Charter of Fundamental Rights [2007] OJ C 303/1.

[910] Employment Equality Directive (2000/78/EC) [2000] OJ L 303/16. It was introduced in the same year as the Race Equality Directive; many of the concepts of the two Directives are similar. Thus, the Court often cross-references its respective case law. Race Equality Directive (2000/43/EC) [2000] OJ L 180/22.

[911] Case C-303/06, *Coleman v Attridge Law and Steve Law* ECLI:EU:C:2008:415 [2008] ECR I-5603, paras 43-47.

[912] General principles are fundamental principles that form the basis of a legal system. Takis Tridimas, *The General Principles of EU Law* (2 edn, Oxford University Press 2006), 1.

[913] De Witte, 'From a "Common Principle of Equality" to "European Antidiscrimination Law"', 1716.

[914] Craig and de Búrca, *EU Law: Text, Cases, and Materials*, 383-386.

[915] De Witte, 'From a "Common Principle of Equality" to "European Antidiscrimination Law"', 1716.

[916] Kaczorowska-Ireland, *European Union Law*, 125; Bell, 'The Principle of Equal Treatment: Widening and Deepening', 611.

[917] Bell, 'The Principle of Equal Treatment: Widening and Deepening', 611.

As we shall also see in the Section 12.1., the Court seems friendly towards an expansive understanding of rights protection in the area of anti-discrimination.[918] Indeed, the development of the Court's anti-discrimination case law strongly suggests that it understands the principle of equal treatment as a fundamental right which deserves special protection – Gillian More, for instance, talks of the "constitutionalisation" of this principle.[919] Mark Bell reaches a similar conclusion, stating

> "it is evident that the principle of equal treatment, in various manifestations, has undergone a gradual process of constitutionalisation. … The constitutional trajectory has been influential in releasing anti-discrimination legislation from the shackles of a market integration rationale and repositioning it within the framework of human rights protection."[920]

These developments and provisions set the legal stage for LGBT rights activism in the area of non-discrimination before the CJEU.

## 11.2. Same-Sex Families and Free Movement

Next to anti-discrimination law, the area of free movement provides ample room for exploration by LGBT rights activism, as a number of scholars have pointed out.[921]

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[918] Ibid, 637.

[919] Gillian More, 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011), 548.

[920] Bell, 'The Principle of Equal Treatment: Widening and Deepening', 638.

[921] The issue has started to be examined in the 1990s, for instance by Jessurun d'Oliveira, 'Lesbians and Gays and the Freedom of Movement of Persons' in Kees Waaldijk and Andrew Clapham (eds), *Homosexuality: A European Community Issue Essays on Lesbian and Gay Rights in European Law and Policy* (Martinus Nijhoff 1993). For recent literature, see, e.g.: Alina Tryfonidou, 'EU Free Movement Law and the Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition' (2015) 21 Columbia Journal of European Law 195; Jorrit Rijpma and Nelleke Koffeman, 'Free Movement Rights for Same-Sex Couples Under EU Law: What Role to Play for the CJEU?' in Daniele Gallo, Luca Paladini and Pietro Pustorino (eds), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer 2014); MV Lee Badgett, 'Separated and Not Equal: Binational Same-Sex Couples' (2011) 36 Signs: Journal of Women in Culture and Society 793 (this article deals, among other things, with the European situation); finally, the legal analysis part of the following book also deals to a large extent with mobility rights: Robert Wintemute, Luca Trappolin and Alessandro Gasparini (eds), *Confronting Homophobia in Europe: Social and Legal Perspectives* (Hart 2012), and others.

Apart from the Employment Equality Directive, two Directives are particularly relevant in the context of same-sex family recognition within EU Member States: the Citizens' Rights Directive[922] in the ambit of free movement; and the Family Reunification Directive[923] in the context of legal immigration. Both the Citizens' Rights Directive and the Family Reunification Directive provide certain residency benefits to (*inter alia*) third-country family members of EU citizens and other legal residents within the EU, in order to ensure the effectiveness of free movement rights, as well as providing for fair treatment of legal immigrants to the EU.[924]

The Citizens' Rights Directive, regulating the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, awards a special status to the "spouses" of EU citizens,[925] automatically giving them the right to join or accompany the latter.[926] The Family Reunification Directive requires States to facilitate entry and residence to certain family members of legal third-country immigrants who fall under its scope, including their access to employment and/or education. "Spouses" and minor children of legal immigrants have a privileged position.[927]

However, the term "spouse" is controversial in EU law,[928] since, as mentioned before, family law is *in principle* in the competence of the Member States. Especially in the context of same-sex couples, there are a number of different legal regimes of recognition, both within the countries, as well as regarding the recognition of relationships that were institutionalized abroad.[929]

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[922] Citizens' Rights Directive (2004/38/EC) [2004] OJ L 158/77.

[923] Family Reunification Directive (2003/86/EC) [2003] OJ L 251/12.

[924] Scott Titshaw, 'Same-Sex Spouses Lost in Translation? How to Interpret "Spouse" in the E.U. Family Migration Directives' (2016) 34 Boston University International Law Review 45, 51-55.

[925] Article 2(2)a Citizens' Rights Directive (2004/38/EC) [2004] OJ L 158/77.

[926] Article 3(2) ibid.

[927] Article (4)1 ibid.

[928] Titshaw, 'Same-Sex Spouses Lost in Translation? How to Interpret "Spouse" in the E.U. Family Migration Directives', 49.

[929] Waaldijk provides a comprehensive overview of different recognition regimes across Europe in Waaldijk, 'Great Diversity and Some Equality: Non-Marital Legal Family Formats for Same-Sex Couples in Europe'.

A number of scholars had therefore repeatedly called for a EU law conceptualisation of the term "spouse."[930] As Alina Tryfonidou noted (before the CJEU's *Coman* decision),[931] same-sex partners were especially disadvantaged, because not sharing the privileged status of "spouses" critically affected their mobility within the EU.[932] She wrote,

> "contrary to well-established practice with respect to key concepts in EU legislation, such as the term 'worker,' where the ECJ has insisted that a uniform EU meaning should be attributed to them, there is a clear 'jurisprudential reticence to interpret autonomously concepts of [EU] law which lie in the sphere of family law.' Hence, it is not surprising that the Court has been reluctant to provide its own independent definition of the term."[933] (*Citations omitted*)

Until its recent *Coman* decision,[934] the CJEU had remained silent on this matter with regard to the Family Reunion Directive and the Citizens' Rights Directive.[935] *Coman*, however, has brought clarity at least insofar that the term "spouse" must include same-sex spouses for the purposes of the Citizens' Rights Directive.[936] While this is doubtlessly a victory, the reach of this decision is limited to same-sex *spouses* (as opposed to *registered partners*) in the ambit of the Directive[937] (for now).[938]

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[930] See, e.g., Tryfonidou, 'EU Free Movement Law and the Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition'; Titshaw, 'Same-Sex Spouses Lost in Translation? How to Interpret "Spouse" in the E.U. Family Migration Directives'; Rijpma and Koffeman, 'Free Movement Rights for Same-Sex Couples Under EU Law: What Role to Play for the CJEU?'.

[931] *Coman and Others* (Case C-673/16) [2018].

[932] Tryfonidou, 'EU Free Movement Law and the Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition', 212-215.

[933] Ibid, 210-211, citing Christine Denys, 'Homosexuality: A Non-Issue in Community Law?' (1999) 24 European Law Review 419, 420.

[934] *Coman and Others* (Case C-673/16) [2018].

[935] In the1986 *Reed* case, the CJEU found that the term "spouse" did not apply to a same-sex couple. However, Reed was decided before any European country allowed same-sex marriage, and before the above-mentioned Directives entered into force. Case 59/85, *State of the Netherlands v Ann Florence Reed* ECLI:EU:C:1986:157 [1986] ECR 1283.

[936] *Coman and Others* (Case C-673/16) [2018].

[937] Ibid, paras 45-46, 51.

## 12. Case law-Narratives

### 12.1. Narrative One: Sexual Orientation Discrimination and the General Principle of Equality

This narrative deals with the development of the CJEU's case law on employment discrimination connected to relationship status, particularly (but not exclusively) in the area of sexual orientation discrimination.

*Grant*[939] was the first CJEU case dealing with sexual orientation discrimination in employment contexts. The applicant in *Grant* contested a policy by her employer, which granted travel concessions to the partners of employees as long as they were of the opposite sex.

*Grant* was a strategic litigation case advanced by the UK based LGBT rights NGO Stonewall.[940] The 1992 CJEU (then Court of Justice of the EC) decision in *P v S*[941] seemed to have created a promising climate for LGBT rights litigation. *P v S* dealt with a transgender* individual who was discriminated against by her employer because she wanted to undergo gender reassignment surgery. Since the Court had found that the facts of *P v S* amounted to "sex discrimination," the lawyers in *Grant* attempted to argue that if an individual was treated differently because of her sexual orientation, this was also a form of discrimination on grounds of sex.[942]

The Court investigated, *inter alia*, whether a) a same-sex couple was in a comparable situation to a different-sex couple, whether b) the present issue constituted discrimination based on sex, and

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[938] See more comprehensive discussion in Section 12.3.

[939] *Grant* (Case C-249/96) [1998] ECR I-621.

[940] Mark Bell, 'Shifting Conceptions of Sexual Discrimination at the Court of Justice: From P v S to Grant v SWT' (1999) 5 European Law Journal 63, 77, 78.

[941] Case C-13/94, *P v S and Cornwall County Council* ECLI:EU:C:1996:170 [1996] ECR I-2143.

[942] Bell, 'Shifting Conceptions of Sexual Discrimination at the Court of Justice: From P v S to Grant v SWT', 69, 70.

whether c) there were other obligations arising out of EU equality law, which would cover the issue at hand.

It held that even though the facts at hand indeed might constitute discrimination based on Grant's sexual orientation (as opposed to discrimination based on sex), this ground of discrimination was not covered by the EU gender equality acquis.[943] However, it is necessary to mention that the Court decided the case *before* the introduction of the Employment Equality Directive.[944]

In *Grant*, the Court found that "stable relationships between two persons of the same-sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex,"[945] given the absence of a "consensus" on this matter among Member States.[946] Interestingly, in order to evaluate said *consensus*, the Court also referred to ECtHR jurisprudence to establish that many countries still treated homosexual and heterosexual couples differently.[947]

The argument of the Court regarding the question whether discrimination based on sex had taken place was quite formalistic: Since male and female same-sex partners would have been equally disadvantaged, there was no discrimination based on gender in the present case.[948] Here, the Court compared female same-sex partners to male same-sex partners, stating that the latter group would have been equally excluded from the benefits. Would it have chosen to compare Grant's female partner to a (hypothetical) male partner (who *would* have been granted the benefits), the

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[943] Waaldijk and Bonini-Baraldi, *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive*, 21.

[944] Employment Equality Directive (2000/78/EC) [2000] OJ L 303/16.

[945] *Grant* (Case C-249/96) [1998] ECR I-621, para 35.

[946] Ibid, paras 32, 33.

[947] Ibid, paras 32-35, citing, *inter alia*, *Kerkhoeven & Others v the Netherlands* App no 15666/89 (EComHR, 19 May 1992); *X & Y v UK* App no 9369/81 (EComHR, 3 May 1983).

[948] *Grant* (Case C-249/96) [1998] ECR I-621, paras 27, 28.

outcome might have been different.[949] The Court deviated in its assessment from the evaluation of AG Elmer,[950] who also opined that sexual orientation discrimination was not covered by the acquis, but who (quite intricately) argued that the present case was, in fact, a matter of *sex discrimination*:

> "[The contested provision] makes the concessions conditional … on the cohabitee's being of the 'opposite sex' to the employee. The discrimination is therefore, under the objective content of the provision, exclusively gender-based. Gender is simply the only decisive criterion in the provision. If the rule had been gender-neutral so that the concessions were given, without discrimination, to all employees who submitted a declaration that for at least the last two years they had been living in a permanent relationship, Lisa Grant would have obtained the pay benefit … . Gender is thus, objectively, the factor that leads to discrimination relating to pay against a particular group of employees. … The fact that [the contested provision] does not refer to a specific sex as the criterion for discrimination, but lays down a more abstract criterion ('opposite sex') can, in my view, make no difference, since the decisive point ... is whether discrimination is exclusively or essentially based on sex, whereas the fact that the discrimination is, de jure or de facto, on the basis of a specific sex cannot be decisive."[951]

The Court, however, did not think so.[952] Nonetheless, even though it refused to find that sexual orientation discrimination was included in the meaning of "discrimination based on sex," it recognised that differential treatment of same-sex partners could eventually amount to *discrimination based on sexual orientation*.[953] The Court did examine the meaning of the general principle of equality in this context, conceding that it existed regardless of the existence of

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[949] The Court's choice of comparators is also criticised by Mark Bell. He writes – comparing the Court's decision in *Grant* with its previous decision on transgender* rights in *P v S* (Case C-13/94) [1996] ECR I-2143– "It is also on the question of comparators that the Court has created the greatest confusion and contradiction." Bell, 'Shifting Conceptions of Sexual Discrimination at the Court of Justice: From P v S to Grant v SWT', 74.

[950] *Grant* (Case C-249/96) [1998] ECR I-621, Opinion of AG Elmer, para 22.

[951] Ibid, paras 23-25.

[952] *Grant* (Case C-249/96) [1998] ECR I-621, paras 46-47.

[953] Ibid, para 48. It did not consider, however, whether this was the case in the present situation, given that it had reached the conclusion that such discrimination was not covered by EC law.

express legislation. Nonetheless, it believed that this principle did not apply to sexual orientation.[954] In other words, the Court did not negate that discrimination had taken place – however, a discrimination not covered by EU law.[955]

*Grant* has been qualified as a serious setback for same-sex rights by some[956] and as a milestone by others.[957] From an activist perspective, *Grant* contains a number of interesting "strategic litigation opportunities."

*First,* the Court's reference both to the legal situations within Member States, and to ECtHR jurisprudence in this regard, is noteworthy. The Court conducted a *consensus* evaluation regarding the Member States' treatments of same-sex couples:

> "As for the laws of the Member States, while in some of them cohabitation by two persons of the same sex is treated as an equivalent to marriage ... in most of them it is treated as equivalent to a stable heterosexual relationship outside marriage ... or else is not recognised in any particular way."[958]

Then, it observed that

> "The European Commission of Human Rights for its part considers that despite the modern evolution of attitudes towards homosexuality, stable homosexual relationships do

[954] Ibid, paras 41-48.

[955] Ibid, para 47.

[956] Mark Bell, 'Gender Identity and Sexual Orientation: Alternative Pathways in EU Equality Law' (2012) 60 The American Journal of Comparative Law 127, 132; Berger, 'Queer Readings of Europe: Gender Identity, Sexual Orientation and the (Im)potency of Rights Politics at the European Court of Justice', 254.

[957] "[I]t implies that the fact-situation does indeed constitute sexual orientation discrimination. Given the evolution of Community law, [this] conclusion stands as an important milestone: differential treatment among employees with regard to the sex of their unmarried partner must now be taken to fall within the meaning of sexual orientation discrimination. It seems likely that the Court will consider the Directive applicable to such facts as those present in *Grant*." Waaldijk and Bonini-Baraldi, *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive*, 21

[958] *Grant* (Case C-249/96) [1998] ECR I-621, para 32.

not fall within the scope of the right to respect for family life under Article 8 of the Convention ... "[959]

Finally, it concluded that

"in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriage or stable relationships outside marriage between persons of opposite sex."[960]

Here, the Court conducted an investigation into the *laws* of the Member States, but also into the *attitudes* and *trends*, as supported by its reference to the European Commission of Human Rights (EComHR). These observations also illuminate the CJEU's close observation of the ECtHR in matters of same-sex rights.[961]

Interestingly, the Court conflated these examinations, by looking into the standpoint of the ECtHR on the rights of same-sex couples in order to establish that the "evolution of modern attitudes" has not yet let to an inclusion of same-sex couples in the meaning of "family" under Article 8.[962] In fact, this means that the Court relied on the ECtHR's assessment of "attitudes" regarding same-sex families, which in turn is usually heavily informed by the *ECtHR's own examination of consensus* among *its* Member States (the laws of which are arguably more diverse than those of EU Members). Drawing on this investigation, the CJEU held that "*consequently, an employer is not required by Community law* to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who

[959] Ibid, para 33.

[960] Ibid, para 35.

[961] Lenaerts and Gutman write that this is especially true for the CJEU's interpretation of EU law the area of LGBT rights, particularly regarding the conceptions of the ECtHR regarding concepts such as marriage, or spouse. Lenaerts and Gutman, 'The Comparative Law Method and the European Court of Justice: Echoes Across the Atlantic', 851-853. Lenaerts and Gutman also hold that U.S. Supreme Court jurisprudence is "echoed" in the CJEU's assessment. Ibid.

[962] *Grant* (Case C-249/96) [1998] ECR I-621, paras 32, 33, 35.

is married to or has a stable relationship outside marriage with a partner of the opposite sex."[963] (*emphasis added*)

Another noteworthy point is that the Court did not – as it could have done – examine Member States' legal trends concerning sexual orientation discrimination in employment contexts,[964] but chose to focus on the Member States' and the ECtHR's views on same-sex families and same-sex marriage.[965] (It needs to be pointed out, however, that by time of the *Grant* decision, the ECtHR had not yet understood disparate treatment based on "sexual orientation" as constituting discrimination in family and marriage matters.)[966]

Even though in the *Grant* case, this inquiry turned out disadvantageous, LGBT rights activists could still draw interesting conclusions: For one, if they can convincingly argue that "attitudes regarding homosexuals" have evolved, this might positively influence the construction of *consensus* and thus, further their case.

Alternatively, they might point out that the High Contracting Parties of the ECHR are not congruent with the EU Member States. The very states that are party to the ECHR, but not the EU (such as Russia or Turkey), arguably hold rather conservative views on LGBT rights, skewing the balance of a "consensus" examination into a less progressive direction. Thus, there might be an argument to be made that in the context of LGBT rights, attitudes within the EU are, as a whole, more progressive than within ECHR Member States.

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[963] Ibid, para 35.

[964] Bell notes: "[I]n *Grant*, the Court appears to have ignored the general legal trends on questions of sexual orientation. More specifically, the Court did not make any reference to the question of Member States' legislation on sexual orientation discrimination in employment. Given that this is a central facet of the case, it seems quite extraordinary that this was not perceived as relevant to the examination of the laws of the Member States. This is especially so when one considers that 7 of the 15 Member States have now enacted relevant legislation, and most of these within the past decade, indicating a clear trend in favour of the prohibition of such discrimination." (*citations omitted)* Bell, 'Shifting Conceptions of Sexual Discrimination at the Court of Justice: From P v S to Grant v SWT', 72.

[965] *Grant* (Case C-249/96) [1998] ECR I-621, paras 33-34.

[966] The ECtHR would only find a violation of Article 14 ECHR (discrimination) in this context in *Salgueiro Silva da Mouta v Portugal* App no 33290/96 (ECtHR, 21 December 1999) – a case decided one year after *Grant*.

In this regard, another argument that LGBT rights activists might advance is that relying fully on the ECtHR it is questionable in light of the CJEU's position as highest Court of the European Union (with an interpretation monopole on EU law) – a thought also expressed by Gless and Martin:

> "The CJEU is the highest court in the EU, with a mandate to align national law to EU law where necessary. ... It is therefore interesting, yet rather dangerous in the long run ... that the Luxembourg Court resorts to the case law of the Strasbourg Court in all human rights issues. The latter is ... not a European vision. The Luxembourg Court's reliance on Strasbourg case law might initially increase the acceptance of the CJEU's judgments in the Member States, but on the other hand, it may – despite being a time-consuming and possibly painful development – get in the way of its own principles and interpretations."[967]

Nonetheless, given that the CJEU seems to watch the ECtHR particularly closely in the area of LGBT rights,[968] activists might be well advised to present a thorough and convincing sample of ECtHR case law supporting their case, in any event.[969]

*Second*, the fact that the Court deviated substantially from AG Elmer's opinion is interesting, as it is a show of *disagreement*. Considering also that the Court's assessment was rather formalistic and short, this might be a hint that there was *hesitation* or *disagreement* within the panel of judges; all in all a sign that the last word has not been spoken yet on the issue of sexual-orientation-discrimination.

*Third*, this judgment shows that discrimination, albeit a legal term, is not clear cut, but rather allowed for different interpretations. The question of the scope of "sex discrimination" played an important role in this case; and here, as commentators have noted, the evaluation of the Court

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[967] Gless and Martin, 'The Comparative Method in European Courts: A Comparison between the CJEU and ECtHR?', 51.

[968] Lenaerts and Gutman, 'The Comparative Law Method and the European Court of Justice: Echoes Across the Atlantic', 846, footnote 25.

[969] That they often already do, is demonstrated, e.g., by the recent *Coman* case, as I will show in Section 11.3. *Coman and Others* (Case C-673/16) [2018].

was – especially regarding its previous decision in *P v S*,[970] where it seemed to have expanded its understanding of "sex discrimination" – surprising.[971]

Furthermore, concepts such as "equality" also qualify as *vague and ambiguous* terms, since they have to be filled with societal and practical meaning. The interpretation of such terms contains considerable leverage for turning the outcome of a case into one direction or the other.[972] Bruno De Witte writes: "Equality is not only broad; it is also *empty* because it does not in itself contain the standards by which the uniform or differential treatment of two persons can be assessed."[973]

However, the very emptiness of such concepts establishes them as *vague and ambiguous terms*, which might provide avenues for same-sex advocacy groups to participate in the creation of workable policies. Especially in equality cases, the *adequate construction of a comparable situation* or *the right choice of a comparator* is paramount and not always obvious;[974] this can be vital for the assessment of a case.[975] In *Grant*, the Court held that same-sex partners were not

[970] *P v S* (Case C-13/94) [1996] ECR I-2143.

[971] Bell, 'Shifting Conceptions of Sexual Discrimination at the Court of Justice: From P v S to Grant v SWT', 69, 70.

[972] Belavusau and Kochenov write that the CJEU (then 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 activist Court was able to achieve to foster emancipation causes for LGBT individuals in the 1990s." Uladzislau Belavusau and Dimitry Kochenov, 'Federalizing Legal Opportunities for LGBT Movements in the Growing EU' in Koen Slootmaeckers, Heleen Touquet and Peter Vermeersch (eds), *The EU Enlargement and Gay Politics* (Springer 2016), 78.

[973] De Witte, 'From a "Common Principle of Equality" to "European Antidiscrimination Law"', 1717.

[974] Bell writes: "The Court considered the position of unmarried same-sex couples in relation to unmarried *and married* opposite-sex couples, where in fact, the only circumstances directly relevant to this case was the position of unmarried opposite-sex and unmarried same-sex couples. ... It is also on the question of comparators that the Court has created the greatest confusion and contradiction. It is impossible to reconcile the approach taken to comparators in *P* with that in *Grant*." Bell, 'Shifting Conceptions of Sexual Discrimination at the Court of Justice: From P v S to Grant v SWT', 72, 74. The Court found in its ruling on *P v S* that discrimination against persons undergoing gender reassignment was included in the meaning of "sex discrimination." *P v S* (Case C-13/94) [1996] ECR I-2143.

[975] Bell, 'Gender Identity and Sexual Orientation: Alternative Pathways in EU Equality Law', 140.

comparable to a heterosexual couple,[976] and that Lisa Grant was thus not discriminated against based on her gender.[977]

It needs to be added that at the time when *Grant* was decided, there was already talk of expanding the EU's anti-discrimination competence.[978] The Treaty of Amsterdam, which would amend the (then) EC Treaty accordingly, was already in the making and was adopted just a year later.[979] Thus, it is reasonable to assume that the Court, knowing that change was imminent, felt inclined to exercise judicial restraint and wait instead for the legislative development[980] – and indeed, the Court itself stated that the immanent adoption of the Treaty of Amsterdam would enable the legislator to act in this regard.[981]

And indeed, in *Mangold*,[982] a case that was decided seven years after *Grant*, the Court showed considerably less constraint. While *Mangold* was a case dealing with age discrimination (and not sexual orientation discrimination), it importantly contributed to the CJEU's development of the equality principle – particularly in relation to the Employment Equality Directive.[983] Since this Directive is one of the main secondary EU law instruments protecting same sex rights, the *Mangold* case (and subsequent cases, such as *Lindorfer*,[984] *Kücükdeveci*[985] or *Bartsch,*[986] discussed *infra*) require a more in-depth investigation.

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[976] *Grant* (Case C-249/96) [1998] ECR I-621, paras 29-36.

[977] Ibid, paras 46-48.

[978] Bell, 'The Principle of Equal Treatment: Widening and Deepening', 618.

[979] Ibid, 618.

[980] Gabriel N. Toggenburg, '"LGBT" Go to Luxembourg - On the Stance of Lesbian Gay Bisexual and Transgender Rights Before the European Court of Justice' (2008) 5 European Law Reporter 174, 179.

[981] *Grant* (Case C-249/96) [1998] ECR I-621, para 48.

[982] *Mangold* (Case C-144/04) [2005] ECR I-9981.

[983] Employment Equality Directive (2000/78/EC) [2000] OJ L 303/16.

[984] Case C-227/04 P, *Maria-Luise Lindorfer v Council of the European Union* ECLI:EU:C:2007:490 [2007] ECR I-6767.

[985] *Kücükdeveci* (Case C-555/07) [2010] ECR I-365.

[986] Case C-427/06, *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* ECLI:EU:C:2008:517 [2008] ECR I-7245.

*Mangold* was brought forward at a time when the deadline for transposing the Employment Equality Directive into German domestic law had not yet passed.[987] The Court decided not to wait; it stated that the German rule in question needed to be examined regarding its compatibility with the "principle of non-discrimination based on age," to which the Directive merely gave expression.[988]

However, it was not clear after *Mangold* whether the Court based its decision on the existence of a general principle that prohibited age discrimination *specifically*, or whether it meant the implications of *Mangold* to translate to the other forms of discrimination included in the general principle of equality, as well.[989]

This question, of course, is particularly relevant in the context of sexual orientation discrimination, since the Court had still denied in *Grant* that any such effects could be derived from the general principle of equality. However, in the meantime, Article 19 TFEU (then Article 13 EC) had been adopted with the Amsterdam Treaty – explicitly including "sexual orientation" as a suspect ground for discrimination[990] – as well as subsequent secondary anti-discrimination-legislation on the matter, such the Employment Equality Directive.

An interesting perspective on the interplay of the general principle of equality and the Employment Equality Directive was suggested by AG Sharpston in her opinion on the *Lindorfer* decision (2007), a case dealing (again) with age discrimination,[991] where she advanced a particular reading of *Mangold*. In her view, *Mangold* did not hint to the existence of a *specific* principle of non-discrimination based on age. Rather, she held that the Employment Equality Directive was an expression of the general principle of equality, establishing merely a

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[987] Andrea Eriksson, 'European Court of Justice: Broadening the Scope of European Nondiscrimination Law' (2009) 7 International Journal of Constitutional Law 731, 736.

[988] *Mangold* (Case C-144/04) [2005] ECR I-9981, paras 74-76. See also discussion in Chapter 2, Section 5.1.

[989] Bell, 'The Principle of Equal Treatment: Widening and Deepening', 636.

[990] De Witte, 'From a "Common Principle of Equality" to "European Antidiscrimination Law"', 1720.

[991] Case C-227/04 P, *Maria-Luise Lindorfer v Council of the European Union,* Opinion of AG Sharpston ECLI:EU:C:2006:748 [2007] ECR I-6767, paras 51-72.

framework for its application.[992] In other words, the authoritative source to prevent discrimination was the Treaty provision; the Directive only laid out the details. Moreover, Sharpston argued "prohibitions of specific types of discrimination clearly fall also within the general rule that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified."[993] Sharpston maintained a similar line of argumentation in *Bartsch*,[994] another case dealing with age discrimination. Indeed, in *Kücükdeveci*, the Court picked up on the notion that the Directive only gave expression to the general principle of equality.[995]

It is arguable – especially when following Sharpston's view – that the horizontal effect of the principle of equal treatment should thus *also* extend to all prohibitions of discrimination on specific grounds.[996] This would mean that individuals would have remedies against private employers even if the Member State failed to correctly transpose an anti-discrimination Directive into national law. However, the Court has as of yet remained silent on this issue.[997] (Notwithstanding the debate on the "horizontal effect" of the principle of equal treatment: a similar result could arguably be achieved by re-interpreting national provisions in light of EU

[992] Ibid, para 58.

[993] Ibid, para 58.

[994] Case C-427/06, *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH,* Opinion of AG Sharpston ECLI:EU:C:2008:297 [2008] ECR I-7245, paras 58-59. For an assessment of AG Sharpston's stand, see Thomas Papadopoulos, 'Criticizing the Horizontal Direct Effect of the EU General Principle of Equality' SSRN Research Paper (2011) <http://ssrn.com/abstract=1912212> accessed 20 April 2014, 8.

[995] *Kücükdeveci* (Case C-555/07) [2010] ECR I-365, para 50. Indeed, this notion is confirmed by a number of scholars, as well; see, e.g., Bruno de Witte, writing that the antidiscrimination laws "reduced the emptiness of the equality formula. One way in which this happened was by signalling new suspect grounds of discrimination, which previously were not considered to give particular cause for concern." Among these, de Witte mentions age and sexual discrimination, included by Article 19 TFEU (then Article 13 EC). He goes on to state: "The other way the meaning of discrimination was specified is the insistence on the fact that both direct *and indirect* discrimination are prohibited." De Witte, 'From a "Common Principle of Equality" to "European Antidiscrimination Law"'. 1720.

[996] Mirjam de Mol, 'Case Note: Kücükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law' (2010) 6 European Constitutional Law Review 293, 302.

[997] Bell, 'The Principle of Equal Treatment: Widening and Deepening', 636.

law[998] – especially since most Member States have passed some legislation following their obligations imposed by the Directive – or by setting aside conflicting domestic legislation.)[999]

The question of whether sexual orientation discrimination cases can be linked to the CJEU's (extensive) age discrimination case law under the Employment Equality Directive came up a few years later, in *Maruko.*[1000] AG Colomer (almost in passing)[1001] wondered whether the Court's extensive interpretation on the prohibition of age-discrimination in the ambit of the general principle of equality in *Mangold* could also be translated to discrimination based on sexual orientation. He conceded that this principle was of fundamental nature – which he also deduced from the European Convention of Human Rights, as well as the Charter of Fundamental Rights of the European Union.[1002] However, according to him (and without further explanation),

> "[t]hat fundamental nature affords the principle of non-discrimination on grounds of sexual orientation a different status from the one attributed to the prohibition of discrimination on grounds of age in Case C144/04 *Mangold* [2005] ECR I9981. The classification of the latter prohibition as a general principle of Community law (paragraph 75) was used by the Commission as the basis for its reasoning..."[1003]

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[998] "Indirect effect" of EU law. *Von Colson* (Case 14/83) [1984] ECR 1891; *Marleasing* (Case C-106/89) [1990] ECR I-4135.

[999] *Amministrazione delle Finanze dello Stato / Simmenthal* (Case 106/77) [1978] ECR 629. The Court has not followed a coherent approach in the matter of the hierarchical relationships between discrimination grounds. Many things remain unclear: the conditions under which Directives can develop horizontal direct effect; whether and to what degree the principle of equal treatment could in fact develop direct effect; and whether all grounds of discrimination should be treated the same. (This involves a possible hierarchy between different anti-discrimination Directives, but also different grounds within the ambit of Employment Equality Directive (2000/78/EC) [2000] OJ L 303/16 – e.g., concerning age on one hand and sexual orientation on the other.) Bell, 'The Principle of Equal Treatment: Widening and Deepening', 618-620. AG Colomer has addressed the question of hierarchy within the Employment Equality Directive in *Maruko* – he stated that sexual orientation discrimination belonged to a different order than age discrimination. *Maruko* (Case C-267/06) [2008] ECR I-1757, Opinion of AG Ruiz-Jarabo Colomer, footnote 82.

[1000] *Maruko* (Case C-267/06) [2008] ECR I-1757. For a critical assessment on one of the Court's most famous judgments in this area see, e.g., Christa Tobler and Kees Waaldijk, 'Case C-276/06, Tadao Maruko v. Versorgungsanstalt der Deutschen Bühnen, Judgment of the Grand Chamber of the Court of Justice of 1 April 2008, not yet Reported' (2009) 46 Common Market Law Review 723.

[1001] 0048 #468}, footnote 82.

[1002] *Maruko* (Case C-267/06) [2008] ECR I-1757, Opinion of AG Ruiz-Jarabo Colomer, para 78.

[1003] Ibid, footnote 82.

Interestingly, he only mentions this in a footnote;[1004] nonetheless, this passage has received some attention. AG Sharpston might have significantly contributed to bringing this footnote to public attention by citing it in her opinion in *Bartsch*.[1005] When trying to assess the exact scope of the "principle of equality," she argued that whereas "age discrimination" had, in her opinion, always been excluded by the principle,[1006] this was not necessarily true for other grounds, such as "sexual orientation:"

> "Advocate General Ruiz-Jarabo Colomer has taken the view in *Maruko* that the 'essential character' of the right to non-discrimination on the ground of sexual orientation is of a different order to that which the Court attributed to the principle of non-discrimination based on age in *Mangold*." (*footnotes omitted*).[1007]

In *Römer*, however, the Court made a decisive determination on the issue: It explicitly included sexual orientation in the general principle of equality derived from common constitutional traditions.[1008] Indeed, the Court has since developed its efforts to ensure the enforcement of these principles. The general principle of equality, as well as Article 21 of the Charter of Fundamental Rights (since its adoption), usually informs the Court's approach in discrimination matters based on sexual orientation.[1009] In order to give adequate expressions to these principles, the Court has stated that the Employment Equality Directive[1010] should provide effective and substantive protection against discrimination, as opposed to constituting mere lip service.[1011]

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[1004] Ibid, footnote 82.

[1005] *Bartsch* (Case C-427/06) [2008] ECR I-7245.

[1006] *Bartsch* (Case C-427/06) [2008] ECR I-7245, Opinion of AG Sharpston, para 34.

[1007] Ibid, para 36.

[1008] *Römer* (Case C-147/08) [2011] ECR I-3591, paras 59-64. Albeit only since the Council had made use of its legislative powers and adopted the Employment Equality Directive.

[1009] Möschel, 'If and When Age and Sexual Orientation Discrimination Intersect: Parris. Case Note.', 1842.

[1010] As well as the Race Equality Directive (2000/43/EC) [2000] OJ L 180/22.

[1011] It has held so repeatedly in its adjudication on both the Race Equality Directive and the Employment Equality Directive, for instance, in *Mangold* (Case C-144/04) [2005] ECR I-9981; *Bartsch* (Case C-427/06) [2008] ECR I-7245; *Kücükdeveci* (Case C-555/07) [2010] ECR I-365; and others.

From the viewpoint of LGBT advocacy, this means that the CJEU is willing to emphasise effective rights protection in the area of anti-discrimination law. Moreover, this development hints to possible strategies regarding the framing of LGBT rights: Arguably, a focus on the fundamental rights dimension of a given anti-discrimination claim might prove fruitful – also considering the close watch the CJEU keeps on the ECtHR in this area.

### 12.1.1. Discrimination of Same-Sex Couples

This Section will outline the CJEU's treatment of same-sex couples in employment discrimination contexts.

In *D and Sweden v Council*,[1012] the Court had to compare the situation of a same-sex couple to that of a married couple. This case concerned a Swedish Council official who wanted to be treated equal to a married official for benefit purposes; thus, it was the Council's Staff Regulations[1013] that were a matter of contention, rather than the laws of a Member State or the behaviour of a (private) employer. The official in question was in a registered same-sex partnership.

The Court of First Instance had held that the Council did not have to treat registered same-sex partnerships like married couples in this regard.[1014] The case was reviewed by the ECJ. It had to decide whether same-sex couples in a registered partnership were in a comparable situation to married (different-sex) couples, and whether the official should therefore be afforded the same benefits as a married official in his position.

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[1012] Cases C-122/99 P & C-125/99 P, *D and Kingdom of Sweden v Council of the European Union* ECLI:EU:C:2001:304 [2001] ECR I-4319.

[1013] Precisely, Article 1(2) of Annex VII to the Staff Regulation. Regulation (EEC) No. 31 and (EAEC) No. 11, laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (Staff Regulations) [1962] OJ P 45/1385, as amended. It was subsequently amended in 2004, by Council Regulation (EC, Euratom) No. 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the Europan Communities and the Conditions of Employment and other servants of the European Communities [2004] OJ L 124/1.

[1014] Case T-264/97 *D v Council* ECLI:EU:T:1999:13, [1999] ECR-SC I-A-1 and II-1.

The Court, delivering again a quite formalistic ruling, largely followed its reasoning in *Grant*. It conducted a comparative research on the attitudes towards marriage among Member States, claiming they could not be construed as showing a trend towards providing same-sex partnerships with the same rights as marriages; nonetheless, the Court noted a "great diversity" of views,[1015] concluding that therefore, the situation of the couple at hand was not comparable to that of a married couple and no discrimination had taken place.[1016] It also observed, rather offhand, that the provision in question did not constitute an interference in private and family life under Article 8 of the European Convention of Human Rights (ECHR).[1017]

Interestingly, *D and Sweden* was decided after the Treaty of Amsterdam and the Employment Equality Directive had entered into force, and after the Charter of Fundamental Rights had been adopted (albeit not yet with full legal effect) – however, since the case concerned a Council official, the Directive did not apply in the context of the case. Nonetheless, the Court might have appraised the *existence* of the Directive – as well as Article 19 TFEU (then Article 13 EC) – as expressions of the "general principle of equality" which included "sexual orientation" as an objectionable reason for differential treatment. Instead, the Court held that the different treatment in this case did not arise from the claimant's sexual orientation, *but from the different status of marriages and registered partnerships*.[1018] Thus, *D and Sweden* was constructed as concerning the issue of (non)comparable relationship schemes rather than sexual orientation discrimination.[1019]

Particularly this last construction seemed to shed a dim light on the Court's willingness to be a partner in the struggle for LGB equality. Indeed, if the Court would continue to use "difference in status" to circumvent a finding of sexual orientation discrimination, this would arguably limit the Court's potential as an addressee for LGB cause lawyering. And indeed, while impact

[1015] *D and Sweden v Council* (Cases C-122/99 P & C-125/99 P) [2001] ECR I-4319, paras 34-36, 50.

[1016] Ibid, 51-52.

[1017] Ibid, para 60.

[1018] Ibid, para 37.

[1019] Jessica Guth, 'When is a Partner not a Partner? Conceptualisations of 'Family' in EU Free Movement Law' (2011) 33 Journal of Social Welfare and Family Law 193, 195.

litigation steadily increased at the European Court of Human Rights,[1020] the CJEU has been less popular in this regard.[1021]

However, the CJEU's jurisprudence regarding same-sex rights began to change with *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* in 2008.[1022] This case arose after the Employment Equality Directive had entered into force.[1023] Arguably, a less formalistic, and more purposive, spirit than before the introduction of the Directive guides the Court's case law under the Directive.[1024] *Maruko* was also a strategic litigation case – in fact, some of the experts I interviewed were participating in this case.[1025]

*Maruko* dealt with widower pensions (based on previous employment of the deceased partner) not granted to same-sex partners. The case arose in Germany, where same-sex couples were not allowed to marry; however, they could form civil unions, as Maruko and his partner had done. AG Ruiz-Jarabo Colomer started his opinion with the empathic statement that "[t]he case is ... part of the long process of accepting homosexuality, which is a vital step towards achieving equality and respect for all human beings."[1026] He criticised the Court's restrictive approach in

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[1020] Between 2001 and 2008, a number of applications with activist involvement were filed at the ECtHR, such as, *inter alia*, in *Fretté* App no 36515/97; *B & L v UK* App no 36536/02 (ECtHR, 13 December 2005); *Karner* App no 40016/98; and others.

[1021] This is arguably also due to other factors, such as the limited jurisdiction of the CJEU in family matters, or limited intervention possibilities before the CJEU that require a high level or transnational coordination (which is only just emerging within the LGBT movement), as well as the requirement of extensive expertise in both national and EU law. Adam Weiss, European Roma Rights Centre (ERRC) (2014); Robert Wintemute, King's College London (2014). For a general overview of factors influencing litigation behaviour of domestic interest groups, see Alter and Vargas, 'Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy'.

[1022] *Maruko* (Case C-267/06) [2008] ECR I-1757.

[1023] However, the Court had already decided a number of cases arising under the Race Equality Directive, which was adopted the same year as the Employment Equality Directive. Since many of the operative terms of the Directives (such as direct / indirect discrimination, positive action, burden of proof, etc.) are the same, the Court often cross-references its respective case law. Race Equality Directive (2000/43/EC) [2000] OJ L 180/22.

[1024] Bell, 'The Principle of Equal Treatment: Widening and Deepening', 632-634.

[1025] Such as Helmut Graupner and Robert Wintemute. Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014); Robert Wintemute, King's College London (2014).

[1026] *Maruko* (Case C-267/06) [2008] ECR I-1757, Opinion of AG Ruiz-Jarabo Colomer, para 2.

*Grant* as "surprising" and inconsistent in light of the Court's previous case law.[1027] He further argued that the different treatment of two different types of unions (same-sex civil partnership on one hand, and marriage on the other) amounted to *indirect discrimination*, since apparently neutral provisions put persons that had a homosexual orientation at disadvantage. In his opinion, access to marriage was *not* under review;[1028] instead, the Directive prohibited the differential treatment of civil unions and marriage (in countries who did not provide same-sex marriages).[1029]

The Court, however, took a different view, which is at the same time broader and narrower than the reading suggested by AG Ruiz-Jarabo Colomer. On one hand, it stated that where people were in a *comparable situation*, but *treated differently on grounds of their sexual orientation*, this was to be considered *direct discrimination* (instead of indirect discrimination).[1030] Importantly, it held that *comparable* situations did not mean *identical* situations.[1031] Therefore, a same-sex partnership might well be comparable to a marriage – in certain circumstances, which needed to be appraised by the referring court.[1032] This is indeed a noteworthy premise, which the Court has subsequently repeated in *Römer*[1033] and *Hay*.[1034]

Another interesting point consists in the conclusions Colomer drew from an *absence* of clear "European consensus" regarding treatment of same-sex couples, since it was "not for the Court to define emotional relationships between persons of the same sex."[1035] He noted that there was

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[1027] When contrasted, e.g., with discrimination based on maternity. Ibid, para 92.

[1028] Ibid, para 99.

[1029] Ibid, para 102.

[1030] *Maruko* (Case C-267/06) [2008] ECR I-1757, paras 71-73.

[1031] "[A] life partnership, while not identical to marriage, places persons of the same sex in a situation comparable to that of spouses so far as concerns the survivor's benefit at issue in the main proceedings." Ibid, para 69.

[1032] *Maruko* (Case C-267/06) [2008] ECR I-1757, Opinion of AG Ruiz-Jarabo Colomer, para 73.

[1033] *Römer* (Case C-147/08) [2011] ECR I-3591, paras 40-43.

[1034] *Hay* (Case C-267/12) [2013], paras 35-40.

[1035] *Maruko* (Case C-267/06) [2008] ECR I-1757, Opinion of AG Ruiz-Jarabo Colomer, para 98.

"fierce debate" on this subject;[1036] however, according to him, this was of no importance in the present case, since it was also not the task of the Court to "develop European matrimonial law."[1037] Rather, the present case was about *equal treatment* and *non-discrimination* (of same-sex registered unions versus marriages) regarding the *legal effects* of such unions.[1038]

The Court, however, rejected the AG's analysis that the case dealt with the question of whether civil unions were *generally* comparable to marriages and could thus not be treated differentially. Instead, it contended that it was up to the referring court to determine whether a surviving life partner was *in a comparable situation* to that of a spouse *for the purposes of survivor's benefits*.[1039] In other words, the CJEU politely declined the opportunity for a grand gesture which would have required Member States to provide civil unions with the same rights and benefits as marriages in one big sweep; instead, it relegated same-sex couples back to the courtroom for a tedious fight over each single right, leaving it up to national courts to assess whether in a particular situation, a same-sex partner was in a comparable position as a (different-sex) spouse.[1040] However, it might be a fight worthy to be fought.

Moreover, cases such as *Maruko* (and subsequent cases, such as *Römer*[1041] or *Hay*,[1042] in which the Court essentially followed this line of argumentation) can indeed develop a certain impact beyond the single issue they are dealing with; Member States, which are well aware of the CJEU's case law, may not want to risk a defeat before this Court and thus, adapt their respective civil union laws (if existent) in order to avoid litigation. The broad definition of direct discrimination can also prove quite fruitful for future same-sex rights advocacy endeavours.

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[1036] Ibid, para 98.

[1037] Ibid, para 98, citing his opinion in Case C-201/02, *K.B. v National Health Service Pensions Agency and Secretary of State for Health,* Opinion of AG Ruiz-Jarabo Colomer ECLI:EU:C:2003:332 [2004] ECR I-541, para 76.

[1038] *Maruko* (Case C-267/06) [2008] ECR I-1757, Opinion of AG Ruiz-Jarabo Colomer, paras 99, 100.

[1039] *Maruko* (Case C-267/06) [2008] ECR I-1757, paras 69, 73.

[1040] See, e.g., Tobler and Waaldijk, 'Case C-276/06, Tadao Maruko v. Versorgungsanstalt der Deutschen Bühnen, Judgment of the Grand Chamber of the Court of Justice of 1 April 2008, not yet Reported', 729.

[1041] *Römer* (Case C-147/08) [2011] ECR I-3591.

[1042] *Hay* (Case C-267/12) [2013].

In *Römer*, as mentioned above, the Court explicitly stated that discrimination based on "sexual orientation" fell within the scope of the general principle of equality. [1043] Advocate General Jääskinen went even further in his opinion, suggesting that if Member States did not provide for any kind of formalization for same-sex relationships, this might in itself be considered discrimination.[1044]

Furthermore, the AG questioned the causal connection between the protection of *marriage and family* and the denial of benefits tied to relationship status for same-sex couples.[1045] Here, the Court mostly followed his assessment, stating that the protection of (traditional) marriage could not be constructed as to allow sexual orientation discrimination, even if such provisions were part of a Member State's constitutional law.[1046]

In *Hay*,[1047] the Court also noted that in Member States that only allowed different-sex people to marry, restricting access to benefits in terms of conditions of pay and working conditions to married people gave rise to sexual orientation discrimination.[1048]

*Hay* is an interesting case because it slightly differs from *Maruko* and *Römer* in an important aspect. Whereas in the latter cases, civil unions were only open to same-sex couples (and thus, arguably, constituted a kind of substitute marriage for gays and lesbians), the French PACS[1049] is a form of civil union that is also open for heterosexual couples. Therefore, it is also an alternative partnership form for people who could, but choose not to, marry – a kind of "marriage light." The French Court of Appeal (Poiters) had claimed that a comparability of the

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[1043] *Römer* (Case C-147/08) [2011] ECR I-3591, para 59.

[1044] *Römer* (Case C-147/08) [2011] ECR I-3591, Opinion of AG Jääskinen, para 76.

[1045] Ibid, paras 109-110.

[1046] *Römer* (Case C-147/08) [2011] ECR I-3591, para 37, 51, 52.

[1047] *Hay* (Case C-267/12) [2013].

[1048] Ibid, para 41.

[1049] French Civil Solidarity Pact (*Pacte Civil de Solidarité), PACS*, Loi no 99-944 du 15 novembre 1999 relative au pacte civil de solidarité (1), JORF n°265 du 19 novembre 1999, p. 16959 (as amended) (France).

situation of a PACS-partner with a spouse was therefore precluded.[1050] However, the Court was not convinced by this argument, stating that the PACS was, after all, the only option available to same-sex couples who wanted to formalize their relationship.[1051] The Court, in order to establish whether there was differential treatment of same-sex PACS partners compared to married heterosexual partners which amounted to discrimination, conducted a comparison in a creative way that does justice to social realities. The Court defined the comparative groups as follows:

- (same-sex) couples *that cannot marry* form the outset and
- (different-sex) couples that *could* marry (and consequently, enjoy benefits tied to their marriage status).

Notably, it did not compare same-sex couples registered under the PACS with opposite-sex couples registered under the PACS. It declared that it was irrelevant that the PACS also allowed opposite-sex couples to register, since unlike them, same-sex couples *did not* have the legal choice to marry.[1052]

Interestingly, the Court basically turned its comparative analysis on the head by essentially suggesting that if same-sex couples were treated like opposite-couples under the PACS, this amounted to discrimination.

The effect of this judgment might have been quite curious; it could have potentially established a kind of *second class* PACS for heterosexual people (or, on the other hand, have forced the French government to take action to avoid such an odd consequence). However, this question was never addressed due to the adoption of same-sex marriages in France in 2013.

From an activist perspective, *Maruko, Römer* and *Hay* are remarkable on a number of issues.

[1050] *Hay* (Case C-267/12) [2013], para 18.

[1051] Ibid, paras 42-44.

[1052] Ibid, paras 36-44.

*First*, and most importantly, the case law development from *Grant* to *Hay* shows the importance of constructing an adequate comparable situation. The Court generally refuses to conduct a blanket comparison of same-sex partnerships and heterosexual marriages (as suggested by AG Colomer in *Maruko*),[1053] instead insisting that the position of a particular same-sex partner needed to be compared to that of a married partner in a given situation.

In *Grant*, the Court refused to find that the situation of the applicant is comparable to that of a heterosexual partner (unmarried or married); in *D and Sweden*, it did not accept the comparability of the position of a *registered* same-sex partner with that of a married different-sex partner. By putting sole emphasis on the special *status* of marriage, the Court *prima facie* precluded a finding of discrimination based on sexual orientation – whereas in *Grant*, it had implied (some would argue, more than implied)[1054] that denying benefits to a non-married person in a stable same-sex relationship would amount to discrimination based on sexual orientation.

In *Maruko* (and subsequently in *Römer* and *Hay*), the Court then made a 180° turn, claiming that the status of marriage alone could not *per se* justify disparate treatment, and that comparability required only similar, not identical situations.[1055] Indeed, as it went on to hold in *Hay*, the *legal impossibility* of marriage, taken together with benefits *tied* to marriage in employment and payment contexts, gave rise to direct sexual orientation discrimination.[1056]

*Second*, and tied to the above-mentioned point, is the question whether to allege that direct or indirect discrimination had taken place. Of course, a finding of direct discrimination is more favourable. And as we have seen, since *Maruko*, the Court has consistently held that treating registered same-sex couples differently from different-sex married couples in employment

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[1053] *Maruko* (Case C-267/06) [2008] ECR I-1757, Opinion of AG Ruiz-Jarabo Colomer, para 100.

[1054] Waaldijk and Bonini-Baraldi, *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive*, 21.

[1055] *Maruko* (Case C-267/06) [2008] ECR I-1757, para 69; *Römer* (Case C-147/08) [2011] ECR I-3591, para 42; *Hay* (Case C-267/12) [2013], para 33.

[1056] *Hay* (Case C-267/12) [2013], paras 42-44.

contexts (when no same-sex marriage is available in the Member State in question) would *prima facie* have to be considered direct discrimination based on sexual orientation. This, of course, makes the CJEU a very interesting avenue for same-sex rights advocates: The Court of Justice, as activists have noted, could be used to "repair" domestic partnership laws.[1057] Robert Wintemute, for instance, explained:

> "If a country decides voluntarily to have some kind of registered partnership law, and if the law puts the registered partners in a situation comparable with spouses, then EU law requires equal treatment."[1058]

*Third*, AG Colomer's criticism of *Grant* as being *inconsistent* in light of the Court's case law is interesting.[1059] In fact, as described above, the Court even seemed to display inconsistencies in its treatment of same-sex couples in *Grant* and *D and Sweden*,[1060] even though merely two years passed between the two cases. Recalling also that AG Elmer had actually suggested a very different approach in his opinion,[1061] that the Court decided not to follow, *Grant* can be seen as an example of *inconsistency and disagreement* within the Court's case law, hinting to the possibility of a more favourable decision – which indeed was delivered in *Maruko*.

Whereas it can be argued, of course, that the Treaty of Amsterdam (including Article 19 TFEU, then Article 13 EC), the Employment Equality Directive as well as the Charter of Fundamental Rights were adopted in the meantime, it seems that this alone cannot explain the turn in the Court's treatment of same-sex couples. After all, the Court decided *D and Sweden* after the adoption of all of these pieces of legislation – and came to an arguably even more restrictive conclusion than in *Grant*. Of course, the Employment Equality Directive was not directly

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[1057] Robert Wintemute, King's College London (2014); Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014). However, there are also limits to how far the Court will go; see the decision in *Parris* discussed *infra. Parris* (Case C-443/15) [2016].

[1058] Robert Wintemute, King's College London (2014).

[1059] *Maruko* (Case C-267/06) [2008] ECR I-1757, Opinion of AG Ruiz-Jarabo Colomer, para 92.

[1060] *D and Sweden* of course dealt with potential discrimination under the Staff Regulation of the Council, and *Grant* with potential discrimination under national law. However, this is irrelevant for the Court's assessment of comparability of same-sex and married couples. *D and Sweden v Council* (Cases C-122/99 P & C-125/99 P) [2001] ECR I-4319.

[1061] *Grant* (Case C-249/96) [1998] ECR I-621, Opinion of AG Elmer, paras 22-25.

applicable in the context of *D and Sweden*, but that is irrelevant for the Court's assessment of comparability. After all, the Court's assessment, both in *D and Sweden* and in *Maruko*, hinged mostly on the question of whether a married and a registered partner were in a *comparable situation* regarding particular rights.

*Fourth*, and connected to the third point, is the AG Colomer's treatment of *European consensus* within the Member States in *Maruko.* The Court had constructed an essentially inconclusive situation[1062] to mean that there was *no consensus* that "stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex,"[1063] which allowed Member States to treat same-sex couples differently from married different-sex couples in *Gran*t, and also in *D and Sweden* ("great diversity" of laws on same-sex relationships),[1064]

On one hand, AG Colomer seemed to suggest a different *type* of *consensus* – instead of examining national laws on marriage and partnership, he claimed that

> "moral prejudices and the social exclusion of groups with certain sexual identities have been overcome along the way. Although the struggle began in order to combat discrimination against women, subsequent efforts have been directed towards discrimination affecting homosexuals – including the first step towards decriminalising same-sex relationships – or transsexuals, as well as discrimination against bisexuals. ... the inclusion in the Treaty of the right to respect for sexual orientation becomes all the more important in the light of the fact that not all Member States had outlawed that type of discrimination and that the European Convention for the Protection of Human Rights and Fundamental Freedoms does not mention it either, although, as I have explained, the European Court of Human Rights has held that the right to respect for sexual orientation falls within the scope of Article 14 of the convention."[1065]

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[1062] *Grant* (Case C-249/96) [1998] ECR I-621, paras 32-37.

[1063] Ibid, para 35.

[1064] *D and Sweden v Council* (Cases C-122/99 P & C-125/99 P) [2001] ECR I-4319, paras 35-36, holding also that most Member States saw registered partnerships as distinct form marriage.

[1065] *Maruko* (Case C-267/06) [2008] ECR I-1757, Opinion of AG Ruiz-Jarabo Colomer, paras 84-86.

In other words – instead of focusing on the status of relationships and thus, running into problems with the limited jurisdiction of the EU on family and marriage issues – AG Colomer investigated whether there were laws against *discrimination* of sexual minority groups. Notably, he claimed that an inconclusive situation (an *absence* of a clear European consensus on this issue) did not automatically mean that the Court could not act, and that differential treatment based on sexual orientation was allowed – especially since the adoption of the Treaty of Amsterdam.[1066] Colomer thus both changes the subject of inquiry (discrimination laws instead of laws on relationship status), creating a clear link to EU law (and a fundamental principle at that) – and states consequently that the principle of equality, taken together with the inclusion of "the right to respect for sexual orientation" in the Treaty required the Court to act.

This seems to suggest that a) in certain cases which (might) fall under general principles of EU law such as the equality principle, consensus loses some of its normative impact; and 2), Colomer's interesting construction of *consensus* – namely agreeing that there was "fierce debate" on the issue of access to marriage and registered partnerships,[1067] but that *this particular construction* of consensus was actually irrelevant for the case at hand – illuminates the various ways in which "consensus" can be interpreted. Even though the Court did not advance a similarly intricate argumentation, and only in part followed Colomer's reasoning, it did hold that it was not necessary that a same-sex registered partner was in an identical situation to a (heterosexual) spouse – and that differential treatment for the purpose of employment benefits thus amounted to discrimination.[1068] Since this was the first finding of sexual orientation discrimination of the CJEU, this is no small feat – and possibly, Colomer's strong argument in favour of viewing the present case as a "discrimination" case, rather than a "relationship status" case, might have contributed to the decision. In any case, Colomer's construction of consensus is illuminating for LGBT rights activists.

*Fifth*, and connected to this: the case suggests that strategies which emphasize *concepts of EU law and the need to interpret them uniformly* – abstaining, on the other hand, from framing

[1066] Ibid, para 85.

[1067] Ibid, para 98.

[1068] *Maruko* (Case C-267/06) [2008] ECR I-1757, paras 69-73.

arguments in terms that might be construed as "family law" issues such as access to marriage – might be most successful. This was also confirmed by the activists I interviewed; since "family law" lay, in principle, outside of EU jurisdiction, the CJEU was perceived as being rather cautious when making evaluations about marriage and civil unions.[1069] A litigation strategy should thus operate with EU-law-specific legal concepts, such as discrimination in employment contexts, staff laws, mobility[1070] and/or claims regarding the importance of uniform EU law application.[1071]

Indeed, the latter type of claim seems to be especially promising, considering that the AG Jääskinen stated in *Römer* that protecting the institution of (traditional) marriage did not allow for disparate treatment of same-sex couples,[1072] nor could national constitutional law "constitute a restriction of the general principle of equality, as it exists in Union law."[1073] AG Jääskinen justified this statement, *inter alia*, with the "fundamental principle of Union law according to which rules of Community law must take precedence over any national provisions, irrespective of the level of the latter."[1074] The Court, albeit in a much less specific way, also held in answer to the question of whether "the protection of marriage" could justify direct discrimination on the ground of sexual orientation:[1075]

> "... it should be observed that, as European Union law stands at present, legislation on the marital status of persons falls within the competence of the Member States. However, in accordance with Article 1 thereof, the purpose of Directive 2000/78 is to combat, as regards employment and occupation, certain types of discrimination, including discrimination on the ground of sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment. Under Article 2 of the Directive, the

[1069] Robert Wintemute, King's College London (2014).

[1070] I will expand on this in the following Section.

[1071] Robert Wintemute, King's College London (2014); Matthew Evans, AIRE Centre, London, GB (2014); Adam Weiss, European Roma Rights Centre (ERRC) (2014).

[1072] *Römer* (Case C-147/08) [2011] ECR I-3591, Opinion of AG Jääskinen, para 110.

[1073] Ibid, para 169.

[1074] Ibid, para 165.

[1075] *Römer* (Case C-147/08) [2011] ECR I-3591, para 37.

> ‘principle of equal treatment’ is to mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of that directive.”[1076]

Lastly, the *sixth* observation ties to the fact that the Court opted for a case-by-case examination in the context of sexual orientation discrimination; this seems to suggest that an *incremental* litigation approach might be most promising, instead of making sweeping demands for justice.

After *Maruko*, *Römer* and *Hay*, the CJEU, however, dimmed hopes that it would always act as a reliable ally in same-sex rights efforts. *Parris*[1077] concerned the question of whether the same-sex partner of a retired university lecturer was entitled to survivor’s pension, which was denied by Parris’ former employer, Trinity College Dublin. Same-sex marriage was allowed in Ireland by the time the case was decided by the Court; however, according to the retirement scheme at hand, the partners would have had to have been married before the employee had turned 60. And in fact, at the time of Parris’ 60th birthday, same-sex marriages were still prohibited in Ireland, and civil unions did not yet exist.

AG Kokott claimed that the case constituted indirect discrimination, based on the disparate impact the birthday-rule had on the LGB population.[1078] Despite her strong opinion, however, the CJEU refused to find that discrimination based on sexual orientation – or age – had taken place.[1079] The Court argued that the retirement scheme in question did include same-sex married partners at the time of the judgment, and that Ireland was not required to

> “lay down transitional measures for same-sex couples in which the member of the scheme had already reached the age of 60 on the date of entry into force of the act.”[1080]

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[1076] Ibid, paras 38-39.

[1077] *Parris* (Case C-443/15) [2016].

[1078] *Parris* (Case C-443/15) [2016], Opinion of AG Kokott, paras 56-57.

[1079] *Parris* (Case C-443/15) [2016], paras 59-61. Here, the Court followed an assessment by the EU Commission. Möschel, 'If and When Age and Sexual Orientation Discrimination Intersect: Parris. Case Note.', 1844.

[1080] *Parris* (Case C-443/15) [2016], para 60.

*Parris* has been criticised on several levels.[1081] As Möschel points out, it seems *inconsistent* with the Court's previous case law, particularly with *Maruko,* which, after all, also dealt with pension schemes.[1082] Moreover, the discrepancy between the Court's assessment and AG Kokott's opinion points to the fact that *Parris* displays *inconsistency and disagreement*.

And indeed, this case should not be seen as an endpoint for activist efforts; if impact litigation is understood as a long-term strategy, cases such as *D and Sweden*[1083] or *Parris* should not serve as parameters for the potential of using the forum the CJEU provides for arguing in favour of LGBT rights.

In fact, the most recent developments allow cautious optimism.

## 12.2. Narrative Two: *ACCEPT* Case– Activism Encouraged!

An interesting judgment involving same-sex rights was delivered by the Court in the *ACCEPT* case.[1084] It is noteworthy that this case is an activist case; it was not initiated by an individual, but by the Romanian LGBT rights organisation ACCEPT[1085] – the same LGBT rights

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[1081] Möschel, 'If and When Age and Sexual Orientation Discrimination Intersect: Parris. Case Note.'; Robert Wintemute, 'Same-Sex Survivor Pensions in the CJEU (Parris) and the UKSC (Walker)' (*UK Human Rights Blog,* 9 January 2017) <https://ukhumanrightsblog.com/2017/01/09/professor-robert-wintemute-same-sex-survivor-pensions-in-the-cjeu-parris-and-the-uksc-walker/> accessed 24 January 2018; Alina Tryfonidou, 'Another Failed Opportunity for the Effective Protection of LGB Rights under EU law: Dr David. L. Parris v. Trinity College Dublin and Others ' (*EU Law Analysis,* 1 December 2016) <http://eulawanalysis.blogspot.co.at/2016/12/another-failed-opportunity-for.html> accessed 24 January 2018.

[1082] Möschel, 'If and When Age and Sexual Orientation Discrimination Intersect: Parris. Case Note.', 1842-1844.

[1083] *D and Sweden v Council* (Cases C-122/99 P & C-125/99 P) [2001] ECR I-4319.. *D and Sweden* has, in the meantime, been superseded by an adaption of the Staff Regulations, which now prohibit discrimination based on sexual orientation. Regulation (EEC) No. 31 and (EAEC) No. 11 (Staff Regulations) [1962] OJ P 45/1385, amended by Staff Regulation (EC, Euratom) No. 723/2004 [2004] OJ L 124/1.

[1084] *Asociaţia Accept* (Case C-81/12) [2013] IRLR 660.

[1085] ACCEPT Romania <http://www.acceptromania.ro> (accessed 31 January 2018).

organisation that is involved in the *Coman* case.[1086] The *ACCEPT* case illuminates some interesting aspects of the CJEU's suitability as a forum for strategic litigation.

Mr. Becali, the owner of a famous Romanian soccer club (FC Steaua) had publically made very derogatory remarks about gay players. Among other things, he said:

> "Not even if I had to close [FC Steaua] down would I accept a homosexual on the team. … There's no room for gays in my family and [FC Steaua] is my family. It would be better to play with a junior rather than someone who was gay. No one can force me to work with anyone. I have rights just as they do and I have the right to work with whomever I choose."[1087]

As shareholder, Becali did not actually have the legal capacity to hire soccer players. He was not even in the position to officially speak for the soccer club. Nonetheless, he was widely known by Romanian audiences, and perceived as being a stakeholder. Furthermore, FC Steaua did not officially distance itself from Becali's comments.

At the time Becali made his comments, FC Steaua had not been involved in any negotiation with a gay soccer player. Becali did insinuate that his words were targeted at a particular player; however, this player was a member of a different soccer club and had no intention to leave. Therefore, there was no individual victim harmed.

Nonetheless, the Romanian LGBT rights organisation ACCEPT filed a complaint with the National Anti-Discrimination Council (Romanian law enables civil rights organisations to bring forward abstract anti-discrimination claims).[1088] However, when the Council decided on the issue, more than six months had passed since the original event; after the lapse of this time period, the only possible sanction, according to Romanian law, was the issuance of a warning. Becali was thus warned.[1089]

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[1086] *Coman and Others* (Case C-673/16) [2018]. This case will be discussed in Section 12.3.

[1087] *Asociația Accept* (Case C-81/12) [2013] IRLR 660, para 35.

[1088] Ibid, para 19.

[1089] Ibid, para 29.

Claiming that a warning was not enough, ACCEPT filed an appeal to the Appeals Court of Bucharest. It also sued FC Steaua for not stepping up and condemning Becali's comments. The Appeals Court then referred the case to the CJEU, asking, among other things, a) whether Becali could be regarded as speaking for the soccer club; b) whether his words amounted to discrimination within the meaning of the Employment Equality Directive; c) whether the claim could be brought forward without an individual victim;[1090] and d) whether the sanction issued in this case was sufficient under the Employment Equality Directive.

The CJEU responded that whereas it was up to national courts to assess the facts that establish discrimination, it could (since asked) provide "guidance" regarding the interpretation of EU law that might be useful for the Appeals Court's decision.[1091] As a preliminary assessment, it stated that recruitment conditions were definitely included in the scope of the Directive; and since professional sport was an economic activity, the Directive was applicable to the case in question.[1092] It also confirms that discrimination can take place even in the absence of an individual victim in the context of discrimination based on sexual orientation.[1093]

Then, the Court turned to the referred questions. In answer to the first three issues, it held that whether or not Becali had a concrete legal capacity for hiring players was not relevant in this context; statements must not emanate directly from a defendant for a presumption of discrimination.[1094] The fact that the soccer club had not reacted to this incident could further be

[1090] The question particularly touched the issue of the *probatio diabolica* – in other words: How can someone defend himself against discrimination in the absence of concrete damage? Wouldn't this require an inquiry into the sexual orientation of the existing players (in order to spot a possibly gay player and question him about discriminatory events) and thus, infringe the privacy rights of these players? Ibid, para 35.

[1091] Ibid, paras 41-43.

[1092] Ibid, paras 44-45.

[1093] Here, the Court confirms its approach in F*eryn*, where it held – in the context of race discrimination – that in order to bring forward a discrimination claim, there didn't need to be an "identifiable complainant." ibid, para 36, citing *Feryn* (Case C-54/07) [2008] ECR I-5187, para 40.

[1094] *Asociaţia Accept* (Case C-81/12) [2013] IRLR 660, paras 47-49.

taken into account when establishing this presumption.[1095] In any case, the public perception was a relevant factor.[1096]

The Court went on to declare that specific negotiations with a particular player were also not necessary for the circumstances to amount to discrimination under the Directive.[1097] Neither was the existence of an individual victim, since the damage done was real, nonetheless; it might have the effect of preventing gay players from applying to the club. FC Steaua could have steered free of discriminatory behaviour by distancing itself from Becali's statements in a serious and timely manner.[1098] The Court also explained that sanctions had to be effective, proportionate and dissuasive (regardless of an identifiable victim).[1099] Purely symbolic sanctions would most likely not correlate with the seriousness of the offense.[1100]

In the *ACCEPT* case, the CJEU has accepted standing for a same-sex rights organisation even in the absence of a concrete victim. It thus supported civil rights organisations that enforced the implementation of EU anti-discrimination laws against their own governments. What is more, the CJEU interpreted the Employment Equality Directive as covering a situation where remarks by a person without legal capacity, but high public visibility, create a hostile and discriminatory environment. If an employer does not take appropriate measures to neutralize such hateful speech, they could become complicit in the discriminatory action. Indeed, this might open up quite interesting routes for follow-up litigation.

## 12.3. Narrative Three: Mobility – *Coman* and the Citizens' Rights Directive

The issue of mobility in relation to same-sex families has been receiving considerable attention,

[1095] Ibid, para 50.

[1096] Ibid, para 51.

[1097] Ibid, para 53.

[1098] Ibid, paras 58, 59.

[1099] Ibid, paras 61, 62.

[1100] Ibid, paras 63-70.

at least in the academic world;[1101] hence, this might be a fruitful area for future strategic litigation approaches. The recent *Coman* case (2018)[1102] is a great example of such litigation. In *Coman*, the CJEU had to decide, *inter alia*, whether the term "spouse" includes same-sex spouses in the ambit of free movement rights, as guaranteed by the Citizens' Rights Directive[1103] and Article 21 (1) TFEU.

First, it needs to be pointed out that *Coman* has been an activist case since its conception; Adrian Coman is an LGBT rights activist,[1104] and a number of LGBT and human rights groups have been participating in the case from the outset, such as ILGA-Europe, the Romanian LGBT-rights-organisation ACCEPT, the AIRE Centre, the European Commission on Sexual Orientation Law (ECSOL), and others.[1105] Consequently, the case garnered a lot of publicity from its very beginning.[1106] This is also due to the particular political environment regarding same-sex rights in Romania.

In Romania, marriages are defined as between a man and a woman (civil law);[1107] recognition of

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[1101] See *supra*, note 921.

[1102] *Coman and Others* (Case C-673/16) [2018].

[1103] Citizens' Rights Directive (2004/38/EC) [2004] OJ L 158/77.

[1104] Kit Gillet, 'Romania Gay Marriage Case Could Have Outsize Impact in Europe' (New York Times, 21 November 2017) <https://www.nytimes.com/2017/11/21/world/europe/romania-ecj-gay-marriage.html> (accessed 28 January 2018).

[1105] Written Submissions on behalf of the AIRE Centre (Advice on Individual Rights in Europe), the European Commission on Sexual Orientation Law (ECSOL), FIDH (Fédération Internationale des Ligues des Droits de l'Homme), ILGA-EUROPE (the European Region of the International Lesbian, Gay, Bisexual, Trans* and Intersex* Association) and the International Commission of Jurists (ICJ) (Interveners), before the Constitutional Court of Romania, Coman Relu Adrian, Hamilton Robert Clabourn and Association Accept v. General Inspectorate for Immigration and Ministry of Home Affairs (April 2016) (not yet reported). In the following: Third Party Submissions. *Coman* (Romanian Constitutional Court, 2016).

[1106] Kit Gillet, 'Romania Gay Marriage Case Could Have Outsize Impact in Europe' (*New York Times,* 21 November 2017) <https://www.nytimes.com/2017/11/21/world/europe/romania-ecj-gay-marriage.html> (accessed 28 January 2018); Harry Cooper, 'Romanian Court Refers Gay Marriage Case to ECJ' (*Politico*, 29 November 2016) <https://www.politico.eu/article/romanian-court-refers-gay-marriage-case-to-ecj/> (last accessed 28 January 2018); 'Constitutional Judges Postpone Until November 29 Ruling on Same-Sex Marriages' (*nineoclock.ro*, 27 October 2016) <http://www.nineoclock.ro/constitutional-judges-postpone-until-november-29-ruling-on-same-sex-marriages/> (accessed 28 January 2018).

[1107] Arts. 277 and 259 Romanian Civil Code (*Noul Cod Civil*), Legea 287/2009, Monitorul Oficial nr. 505/2011, (as amended) (Romania).

same-sex relationships is forbidden.[1108]

Coman, a Romanian national married in Belgium to a US citizen of the same sex, had lived in Belgium for some time and wanted to move back to Romania with his husband. After immigration authorities denied Coman's husband a residence permit as a spouse, the couple filed a lawsuit against the authorities in 2013, challenging, inter alia, the constitutionality of the respective provision in the Civil Code. The case eventually reached the Constitutional Court in 2016.[1109]

The proceedings before the Constitutional Court coincided with parliamentary electoral campaigns in Romania (elections took place on 11 December 2016).[1110] In fact, the issue of same-sex rights was a main point of contention in public debate. The conservative "Campaign for Family" – an interest group formed by a number of religious and anti-progressive NGOs – was lobbying for a constitutional amendment by popular referendum, which would entrench the notion of traditional marriage as between a man and a woman.[1111] In autumn of 2016, the amendment proposal reached parliament; shortly afterwards, the Constitutional Court decided to make a reference to the CJEU in the *Coman* case, following a proposal from the LGBT rights groups as third party interveners.[1112] It is noteworthy that this was the first time the Romanian

[1108] Constantin Cojocariu, 'Same-Sex Marriage Before the Courts and Before the People: The Story of a Tumultuous Year for LGBT Rights in Romania' (*Verfassungsblog.de,* 25 January 2017) <https://verfassungsblog.de/same-sex-marriage-before-the-courts-and-before-the-people-the-story-of-a-tumultuous-year-for-lgbt-rights-in-romania/> accessed 31 January 2018.

[1109] ACCEPT and ILGA-Europe, 'Briefing Note: Freedom of Movement and Same-Sex Couples in Romania. The Coman Case – A Briefing Note' (ilga-europe.org, 2017) <https://www.ilga-europe.org/sites/default/files/briefing_note_romania_final_accept_ie_-_final.pdf> (accessed 31 January 2018).

[1110] Cojocariu, 'Same-Sex Marriage Before the Courts and Before the People: The Story of a Tumultuous Year for LGBT Rights in Romania'.

[1111] Ibid.

[1112] Third Party Submissions*, Coman/Hamilton* (Romanian Constitutional Court, 2016). para 35.

Constitutional Court made a reference to Luxembourg.[1113] Both events fuelled the debate around same-sex rights, particularly against the backdrop of parliamentary elections.[1114]

In this sense, *Coman* can be described as strategic litigation. The claimant is an activist, joined by ACCEPT as applicant; his counsel, Iustina Ionescu, a known LGBT rights lawyer.[1115] It is safe to assume that this case was advanced *in order to get a ruling* by the CJEU – especially since the Romanian Constitutional Court made the reference pursuant to a thoroughly reasoned intervention by third LGBT rights groups as third party interveners, who urged the Constitutional Court to refer.[1116] While these groups didn't go on to submit separate written observations during the CJEU proceedings, it is reasonable to assume that they were in close contact with both Coman and his lawyer, Ionescu.

Indeed, the case became highly politicised, making it a kind of test case for the CJEU's stance on the divisive issue of LGBT relationship rights.[1117] Latvia, Hungary and Poland submitted observations on behalf of the Romanian government; the Netherlands, the EU Commission and the Romanian National Council for Combating Discrimination (CNCD) on behalf of the

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[1113] See Vită on why the Romanian Constitutional Court shies away from preliminary references: Viorica Vită, 'The Romanian Constitutional Court and the Principle of Primacy: To Refer or Not to Refer' (2015) 16 German Law Journal 1623. Șandru, Banu and Călin note that the Constitutional Court generally seems to display unease with EU law concepts, especially regarding the distinction between EU law and the ECHR: Daniel Mihail Șandru, Constantin Mihai Banu and Dragoș Alin Călin, 'Trends and Patterns in Preliminary References in Courts of Romania. Issues Related to the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights' (2016) 6 Union of Jurists of Romania Law Review 97, 123.

[1114] Cojocariu, 'Same-Sex Marriage Before the Courts and Before the People: The Story of a Tumultuous Year for LGBT Rights in Romania'.

[1115] AP, 'Romania Will Consult European Court About How To Recognize a Same-Sex Marriage' (*lgbtqnation.com*, 30 November 2016) <https://www.lgbtqnation.com/2016/11/romania-will-consult-european-court-recognize-sex-marriage/> (accessed 31 January 2018).

Ionescu had already successfully argued another CJEU LGBT rights case, *Asociația Accept* (Case C-81/12) [2013] IRLR 660.

[1116] Third Party Submissions, *Coman/Hamilton* (Romanian Constitutional Court, 2016), para 35.

[1117] Manon Beury, 'The CJEU's Judgment in Coman: A Small Step for the Recognition of Same-Sex Couples underlying European Divides over LGBT Rights' (*strasbourgobservers.com,* 2018) <https://strasbourgobservers.com/2018/07/24/the-cjeus-judgment-in-coman-a-small-step-for-the-recognition-of-same-sex-couples-underlying-european-divides-over-lgbt-rights/> accessed 19 September 2018.

applicant. Media attention was high by the time the case was referred – Coman and his husband gave a lot of interviews,[1118] LGBT rights groups issued accompanying press releases,[1119] and a number of institutions and academics (who can be described as LGBT-friendly) wrote about the case from the outset.[1120] Their opponents, however, also mobilized the press.[1121]

The questions referred to the Court in *Coman* regarded, *inter alia*, the interpretation of "spouse" in Article 2(2)(a) of the Citizens' Rights Directive (DIR 2004/38)[1122] in the context of a same-sex marriage, entered into abroad.[1123] In case the CJEU would find that Romanian law could legitimately preclude the definition of a durable same-sex partner as "spouse" under the

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[1118] E.g., 'Coman-Hamilton. Meeting with the Couple That Might Put an End to Discrimination Against Same-Sex Couples Under the Freedom of Movements' (*L'Association Européenne pour la défense des Droits de l'Homme/AEDH*, 2017) <http://www.aedh.eu/wp-content/uploads/2017/12/interview_AEDH_with_Clai_Hamilton-Adrian_Coman_EN.pdf?x51973> (accessed 28 January 2018).

[1119] 'Coman Case Referred to the Court of Justice of the European Union' (acceptromania.ro, 2016) <http://coman.acceptromania.ro/cazul-coman-va-ajunge-la-curtea-de-justitie-a-uniunii-europene/?lang=en> (accessed 31 January 2018); 'ILGA meets... Adrian Coman and Clai Hamilton' (*ilga.org*, 18 September 2016) <http://ilga.org/ilga-meets-adrian-coman-clai-hamilton-romania> (accessed 31 January 2018).

[1120] For instance, Alina Tryfonidou, who focuses in her work on the intersection of LGBT rights and European law. Interestingly, Tryfonidou mentions a number of scholarly articles on the issue, some of which were cited by AG Wathelet in his opinion. Alina Tryfonidou, 'Awaiting the ECJ Judgment in Coman: Towards the Cross-Border Legal Recognition of Same-Sex Marriages in the EU? ' (*EU Law Analysis,* 5 March 2017) <http://eulawanalysis.blogspot.co.at/2017/03/awaiting-ecj-judgment-in-coman-towards.html> accessed 31 January 2018. *Coman and Others* (Case C-673/16) [2018], Opinion of AG Wathelet, para 80. Constantin Cojocariu, a Romanian lawyer working, inter alia, on LGBT rights: Cojocariu, 'Same-Sex Marriage Before the Courts and Before the People: The Story of a Tumultuous Year for LGBT Rights in Romania'. Jackie Jones, president of the European Women Lawyers Association: Jackie Jones, 'Opening Marriage to Same-Sex Couples in the European Union' (*legal dialogue,* January 2017) <http://legal-dialogue.org/opening-marriage-sex-couples-european-union> accessed 31 January 2018. Notably, the OHCHR also issued a statement in support of Coman: UNHCR, 'Same-Sex Partnership Recognition Case Reaches European Union Court' (*UNHCR*, 2017) <http://europe.ohchr.org/EN/Pages/EuropeanUnionCourt.aspx> (accessed 31 January 2018). Full statement available at: <http://www.europe.ohchr.org/Documents/FinalOUTSameSexPartnershipEquality.pdf> (accessed 31 January 2018).

[1121] ADF International, 'Redefining Marriage? EU Court to Rule on National Marriage Laws' (*adfinternational.org,* 24 April 2017) <https://adfinternational.org/detailspages/press-release-details/redefining-marriage-eu-court-to-rule-on-national-marriage-laws> (accessed 31 January 2018).

[1122] Citizens' Rights Directive (2004/38/EC) [2004] OJ L 158/77.

[1123] If the Court would answer the first question in the affirmative, the Romanian Constitutional Court wanted to know whether Articles 3(1) and 7([2]) (3) of the Directive then required host Member States to grant the right to residence for longer then three months. Ibid.

Directive, the Romanian Constitutional Court wanted to know whether a same-sex partner could then fall under the definition of "any other family member" of Article 3(2)(a) of the Directive, or qualify as "partner with whom the Union citizen has a durable relationship, duly attested" under Article 3(2)(b).[1124] Moreover, the governments who submitted observations on behalf of Romania wanted to know whether a restriction of Article 21 TFEU (which includes free movement rights) was justifiable on grounds of public policy and national identity, given the fundamental nature of the institution of marriage, and the fact that some Member States intended to maintain a conception of marriage as a union between a man and a woman.[1125]

AG Wathelet delivered a highly interesting opinion, which deserves closer attention. He conceded that civil status issues rests within the competence of the Member States.[1126] Nonetheless, the present case did not deal with the question of whether Member States had to *grant access* to marriage, but with the question of whether Member States had to recognise marriages entered into in another Member State.[1127] He pointed to the principle of *uniform application of EU law*[1128] in the realm of the *principle of non-discrimination*,[1129] and noted "[m]atters relating to the marital status of persons do not derogate from that rule."[1130] Wathelet also mentions the fundamental rights attached to family life and marriage, extensively citing ECtHR jurisprudence, and holding that the Directive must be interpreted in light of the Charter of Fundamental Rights and the ECHR.[1131] He observes that the ECtHR applies a narrow margin of appreciation in instances concerning sexual orientation discrimination: "It even seems that the ECtHR is inclined to consider that a difference in treatment based solely – *or decisively* – on considerations regarding the applicant's sexual orientation are quite simply unacceptable under

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[1124] If the question was answered affirmatively, the Romanian Constitutional Court asked whether Articles 3(2) and 7(2) of the Directive then required host Member States to grant the right to residence for longer then three months. Ibid. *Coman and Others* (Case C-673/16) [2018], para 17.

[1125] *Coman and Others* (Case C-673/16) [2018], para 42.

[1126] *Coman and Others* (Case C-673/16) [2018], Opinion of AG Wathelet, para 36.

[1127] Ibid, para 38.

[1128] Ibid, para 34.

[1129] Ibid, para 37.

[1130] Ibid, para 37.

[1131] Ibid, paras 59-67.

the ECHR."[1132] Taking a closer look at the terms "spouse" and "marriage," Wathelet examined the drafting history of the Directive, observing that originally, the term "spouse" had been chosen for its neutrality regarding gender.[1133] After controversial discussions in the Parliament and the Council regarding the precise meaning of "spouse," the Commission had preferred to "restrict [its] proposal to the concept of spouse as meaning in principle spouse of a different sex, *unless there are subsequent developments*."[1134] *(emphasis added)* Wathelet took this to mean that the wording of Article 2(2)(a) was neutral and allowed (or even required)[1135] a dynamic, contextual interpretation,[1136] taking the "modern reality" of the Union into account.[1137] He conducted a thorough examination of *European consensus*[1138] and expressly stated that the view the Court had taken in *D and Sweden* regarding the comparability of a same-sex and a married (different-sex) couple seemed to him outdated.[1139] Interestingly, while barely half of the Union's Member States allowed same-sex marriage – which might be construed as an "inconclusive situation" and thus, as an *absence of consensus* on the issue of same-sex marriage – Wathelet claimed that there was a general societal trend towards the recognition of marriage:

> "[L]egal recognition of same-sex marriage ... reflect[s] a general development in society ... Statistical investigations confirm it ... While different perspectives on the matter still remain, including within the Union, the development nonetheless forms part of a general movement. In fact, this kind of marriage is now recognised in all continents." (*citations*

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[1132] Ibid, para 65.

[1133] Ibid, para 51.

[1134] Ibid, para 51, citing Amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (presented by the Commission pursuant to Article 250 (2) of the EC-Treaty) COM [2003] 199 final, 11.

[1135] "[L]aw 'cannot cut itself off from society as it actually is, and must not fail to adjust to it as quickly as possible. Otherwise it would run the risk of imposing outdated views and taking on a static role. That without doubt is particularly so in matters affecting society. ...'" *Coman and Others* (Case C-673/16) [2018], Opinion of AG Wathelet, para 56, citing, inter *alia*, Case C-413/99, *Baumbast and R v Secretary of State for the Home Department,* Opinion of AG Geelhoed ECLI:EU:C:2001:385 [2001] ECR I-7091, para 20.

[1136] *Coman and Others* (Case C-673/16) [2018], Opinion of AG Wathelet, paras 52-53.

[1137] Ibid, para 56.

[1138] Ibid, paras 54-58.

[1139] Ibid, para 57.

*omitted*)[1140]

Addressing the question that Member States intervening for Romania had asked – namely, whether upholding (traditional) marriage might justify a restriction of free movement rights with regard to the Citizens' Rights Directive – Wathelet added

> "[i]n fact, if it were to be considered that the concept of marriage relates to national identity in certain Member States ... the obligation to respect that identity, which is set out in Article 4(2) TEU, cannot be construed independently of the obligation of sincere cooperation set out in Article 4(3) TEU."[1141]

He consequently opines that the Directive may not be interpreted restrictively, so as not to deprive it of its effectiveness; after all, free movement of citizens was "one of the foundations of the European Union."[1142] He finally stated,

> "the obligation to facilitate the entry and residence of the national of a third State of the same sex as the citizen of the European Union to whom he or she is married *is greater*, and the discretion *narrower,* when the Member State *does not allow marriage* between persons of the same sex and *does not afford homosexual couples the possibility of entering into a registered partnership*."[1143]

While AG Wathelet deemed it unnecessary to address the third and fourth reference questions in full (can a same-sex partner considered a "family member") in light of his previous observations,[1144] he nonetheless provided a short answer. In order to do so, he turned to the Charter of Fundamental Rights, holding that "it is artificial nowadays to consider that a homosexual couple cannot have a family life within the meaning of Article 7 of the Charter."[1145] He also mentioned the ECtHR's treatment of the "traditional family" rationale,[1146]

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[1140] Ibid, para 58.

[1141] Ibid, para 40.

[1142] Ibid, para 73.

[1143] Ibid, para 99. Here, Wathelet mirrors the ECtHR's reasoning in *Taddeucci. Taddeucci* App no 51362/09.

[1144] *Coman and Others* (Case C-673/16) [2018], Opinion of AG Wathelet, para 90.

[1145] Ibid, para 92.

noting that

> "the [European] Court [of Human Rights] considers that, regarding the matter in question here – *granting a residence permit for family reasons to a homosexual foreign partner* – it cannot amount to a 'particularly convincing and weighty' reason capable of justifying, in the circumstances of the present case, discrimination on grounds of sexual orientation'."[1147]

The Court largely followed AG Wathelet's reasoning; it briefly held that "the term 'spouse' within the meaning of Directive 2004/38 is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned."[1148] Interestingly, it observed that the Directive in Article 2 (2)(b) (definition of status of family member) referred to the conditions laid down in the host State – but that Article 2 (2)(a) lacked such a reference. *E contrario*, it held that the host Member State could not "rely on its national law as justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage ... with a Union citizen of the same sex" concluded in another Member State.[1149]

Furthermore, while the Court conceded that it was up to Member States to regulate family law issues, it held that this competence was not boundless, since "it is well established case-law that, in exercising that competence, Member States must comply with EU law, in particular the Treaty provisions on the freedom [of movement] ... "[1150] Not allowing a (same-sex) spouse to enter (and reside in) a Member State could interfere with the free movement right of the Union citizen,[1151] and such a restriction would only be justified if it was "based on objective public-interest considerations and if it is proportionate to a legitimate objective pursued by national law ... "[1152]

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[1146] I will expand on this in the context of the ECtHR's adjudication on same-sex family rights, Chapter 5, Section 15.2.

[1147] *Coman and Others* (Case C-673/16) [2018], Opinion of AG Wathelet, para 98.

[1148] *Coman and Others* (Case C-673/16) [2018], para 35.

[1149] Ibid, para 36.

[1150] Ibid, para 38.

[1151] Ibid, para 40.

[1152] Ibid, para 41.

However, since such a restriction concerned a fundamental freedom (free movement), the concept of "public policy as justification" had to be interpreted strictly. It could not be determined "unilaterally by Member State without any control by EU institutions." Here, the Court seems to allude to the necessity to interpret EU law uniformly. A justification for a restriction hence required a "genuine and sufficiently serious threat to a fundamental interest of society ..." [1153] Similar to the AG, the Court reached the conclusion that "the obligation for a Member State to recognise a marriage between persons of the same sex concluded in another Member State in accordance with the law of that state, for the sole purpose of granting a derived right of residence to a third-country national, does not undermine the institution of marriage ... "[1154] and accordingly, "does not undermine the national identity or pose a threat to the public policy of a Member State concerned."[1155]

The Court also referred to the European Convention of Human Rights (ECHR) – interestingly, to answer the first reference question (*meaning of spouse*), not the third one (*meaning of family member*) – claiming that the rights guaranteed by Article 7 of the European Charter of Fundamental Rights had *the same meaning and the same scope* as Article 8 ECHR (protection of private and family life).[1156] And according to the Court, it was apparent from ECtHR case law[1157] that the relationship of a homosexual couple might fall within the notion of private and/or family life, in the same way as a heterosexual couple in the same situation.[1158] Finally, it reaches the conclusion that not recognising a same-sex spouse *in the context of the Citizens' Rights Directive* violated the free movement rights of the Union citizen,[1159] finding it unnecessary to examine the third and fourth reference question.

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[1153] Ibid, para 44.

[1154] Ibid, para 45.

[1155] Ibid, para 46.

[1156] Ibid, para 49.

[1157] Here, the Court cited *Vallianatos* App nos. 29381/09 and 32684/09, para 73; and *Orlandi & Others v Italy* App nos 26431/12; 26742/12; 44057/12 and 60088/12 (ECtHR, 14 December 2017), para 143.

[1158] *Coman and Others* (Case C-673/16) [2018], para 50.

[1159] Ibid, para 51.

From a strategic litigation perspective, this case contains several interesting elements.

*First*, it is remarkable that AG Wathelet's opinion corresponds, in many points, with the assessment of the LGBT rights groups, as expressed in their submissions to the Romanian Constitutional Court.[1160] This is recognisable, for instance, in the choice and in-depth analysis of particular ECtHR case law. Especially the LGBT group's interpretation of *Pajić* (regarding differential treatment of homosexual and heterosexual couples with regard to, *inter alia*, residence)[1161] is substantively mirrored in Wathelet's opinion.[1162] This means that to a certain degree, Wathelet might have drawn from their *expertise*. And while the Court did not expressly mention discrimination in its judgment, it does follow Wathelet's opinion in great part; thus, the expertise of LGBT rights activists might indirectly also have found entry into the Court's reasoning.

*Second*, the Court did discuss whether a homosexual couples' family and private life was protected by the Charter, claiming that this was the case.[1163] Hence, the Court expressly included same-sex couples in the scope of Article 7 of the Charter. This assessment might well develop consequences for anti-discrimination cases along the way.

And importantly, the Court held that Article 8 ECHR and Article 7 of the Charter had the same meaning and scope; this must mean that ECtHR jurisprudence regarding Article 8 will develop consequences for CJEU case law on issues touching LGBT rights, as well. Thus, this case *is secondly* is a prime example of the CJEU's strong reliance on ECtHR jurisprudence in the area of same-sex rights. It is interesting that Wathelet also notes the ECtHR's case law development regarding the legitimacy of the "traditional family protection" rationale.

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[1160] Third Party Submissions, *Coman/Hamilton* (Romanian Constitutional Court, 2016).

[1161] The case dealt with a residence permit, which was denied to the same-sex partner of a Croatian woman. The ECtHR found that there had been a violation of Article 14 taken together with Article 8 ECHR (discrimination based on sexual orientation). *Pajić* App no 47082/12.

[1162] Third Party Submissions, *Coman/Hamilton* (Romanian Constitutional Court, 2016), paras 44-46; *Coman and Others* (Case C-673/16) [2018], Opinion of AG Wathelet, paras 65, 98, citing *Pajić* in the footnotes. *Pajić* App no 47082/12.

[1163] *Coman and Others* (Case C-673/16) [2018], para 50.

*Third*, and connected to the above point, AG Wathelet's treatment of "European consensus" is noteworthy. While AG Colomer had already stated in *Maruko* that "fierce debate" on an issue could not simply be construed in a disadvantageous way for sexual minorities,[1164] AG Wathelet went so far as to recognise a *trend towards the recognition* of same-sex marriage.[1165] This is a very favourable development for same-sex rights. Here, Wathelet conducted comparative research not only into the laws of Member States (which would be inconclusive, since hardly half of the Member States had laws allowing same-sex marriage at that point, while a number of other States actually had constitutional bans on such marriages); he rather observed a societal and legal trend, observing that "statistics" confirmed this development. This shows a) the flexible and dynamic way in which *European consensus* can be construed, and means b) that same-sex rights activists can contribute to a favourable definition of *consensus* by advancing – in their role as *experts* – statistics and other materials to support their argument.

*Fourth*, activists have – in their submissions – heavily relied on the importance of a "*uniform application of EU law*" in the area of free movement. This is in accordance with statements by activists I interviewed, who suspected that this line of argumentation would elicit response from the Court.[1166] And indeed, this was confirmed by *Coman*.

*Fifth*, and remarkably, the approach the Court took in *D and Sweden*[1167] (regarding the comparability of registered same-sex and married different-sex couples) – a case that displayed, as I have argued, *inconsistencies* in light of the CJEU's case law at the time[1168] – was expressly condemned by AG Wathelet – on the basis that it was outdated.[1169] On this issue, the Court remained silent.

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[1164] *Maruko* (Case C-267/06) [2008] ECR I-1757, Opinion of AG Ruiz-Jarabo Colomer, para 98.

[1165] *Coman and Others* (Case C-673/16) [2018], Opinion of AG Wathelet, para 58.

[1166] Robert Wintemute, King's College London (2014); Adam Weiss, European Roma Rights Centre (ERRC) (2014).

[1167] *D and Sweden v Council* (Cases C-122/99 P & C-125/99 P) [2001] ECR I-4319.

[1168] See discussion in Section 12.1.1.

[1169] *Coman and Others* (Case C-673/16) [2018], Opinion of AG Wathelet, para 57.

The concrete scope of this judgment is arguably limited; while it does hold that "spouse" is gender-neutral and applies also to same-sex couples, this only applies to the Citizens' Rights Directive. Moreover, the Court did not address the issue of registered partners. However, its *e contrario* argument regarding the Directive's different approach towards family members (where reference to the host country's laws was made), and spouses (where such reference was absent),[1170] might actually disadvantage registered partners in this regard.

Be that as it may – *Coman* is thus far an insightful case study into LGBT impact litigation before the CJEU; it confirms once again that LGBT rights groups have indeed discovered the CJEU for cause lawyering.[1171]

It remains to be seen what this means for non-married same-sex couples. Waaldijk notes that EU legislation does not, in principle, differentiate between same-sex and different-sex non-marital relationships.[1172] But on the question of how to treat same-sex couples that have not been able to marry, the Court has recently displayed *inconsistencies* (as described above, it has advanced a strong form of protection in *Maruko*, *Römer* and *Hay*, and somewhat diverged from this approach in *Parris* – against a strong opinion of AG Kokott).[1173] This is, however, a sign that the last word in this regard is not yet spoken.

[1170] See discussion *supra*, note 1149.

[1171] When I interviewed European LGBT rights activists in 2014, many of them actually pointed to the area of free movement and same-sex family rights as a fruitful area for activism. Adam Weiss, European Roma Rights Centre (ERRC) (2014); Robert Wintemute, King's College London (2014); Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014).

[1172] Waaldijk, 'Great Diversity and Some Equality: Non-Marital Legal Family Formats for Same-Sex Couples in Europe', 231.

[1173] See discussion of *Parris supra,* note 1077.

## 13. Conclusions to Chapter 4

EU law contains provisions that can be construed as protecting LGBT rights. Therefore, this Chapter has firstly provided an answer to a part of the preliminary investigation of subset 3.1. of the third inquiry,[1174] outlining the EU law provisions protecting LGBT rights.[1175]

As we have seen, the CJEU has considerably expanded its case law in the area of same-sex rights and EU equality law in general in recent years. Particularly the adoptions of the Treaty of Amsterdam and the Employment Equality Directive[1176] have propelled this development. Particularly, the CJEU's view that material discrimination of same-sex registered partners in comparison to married spouses can amount to "direct discrimination" (as opposed to: "indirect discrimination") provides a rich basis for strategic litigation. Additionally, the area of free movement might hold interesting opportunities for further activist intervention.[1177]

The three narratives I have presented aimed to provide an activist reading of the Court's case law by applying the "strategic litigation opportunities" framework as an analytical matrix. As pointed out before, this reading differs from traditional accounts since it reveals indicators for activist interventions, rather than merely relating the development of the case law, or evaluating it based on what the CJEU "could do" or "should have done." Rather than focusing on the Court, it takes an activist view on the case law, asking what insights the case law holds for strategic litigation. This is meant to re-conceptualise the Court's jurisprudence as a playing field for LGBT rights activism.[1178] Litigants (both applicants and third party interveners, as well as LGBT organisations in general) thus are perceived as active participants in the process of adjudication. This is especially illustrated by the *ACCEPT*[1179] and *Coman* cases.[1180]

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[1174] See *supra*, at 17.

[1175] See Section 11.

[1176] Employment Equality Directive (2000/78/EC) [2000] OJ L 303/16.

[1177] Already in the 90s, activists and academics have started to explore this area in the context of LGBT rights. See, e.g., d'Oliveira, 'Lesbians and Gays and the Freedom of Movement of Persons'.

[1178] See also Chapter 3, and discussion in Chapter 1, Section 4.1.

[1179] *Asociația Accept* (Case C-81/12) [2013] IRLR 660.

[1180] *Pajić* App no 47082/12.

Hence, this kind of analysis is meant to contribute to answering subsets 3.2. and 3.3. of the third inquiry of my research question, namely: *Can the respective case law of the Courts be analysed in an actor-centred way – and does it provide room for activist intervention?* and *How could an activist reading of the European Courts' LGBT rights case law look like?*

I believe that the presentation of strategic litigation opportunities within the four case law narratives, as well as the considerations on strategy, have shown how the case law of the CJEU can be constructed in an actor-centred way, and that it indeed provides room for activist intervention. In the following, I will summarize my findings.

## 13.1. Indicators for Strategic Litigation

### 13.1.1. Vague and ambiguous terms

Vague and ambiguous terms play a considerable role in the Court's reasoning. Such concepts are *prima facie* empty; they require interpretation in order to be filled with meaning.[1181] This is true for both terms contingent on societal understanding (such as "family" or "spouse"), but also for mainly legal terms, such as "discrimination."

The first category is arguably heavily informed by social realities. *Vague and ambiguous terms* such as "spouse" or "family" have not only a legal, but also a social meaning; they are subject to societal developments. These terms are important (*inter alia*) in the area of free movement rights, which was made apparent in the *Coman* case. This case shows the different approaches that can be taken to fill a concept like "spouse" with meaning. In his opinion, AG Wathelet conducted, *inter alia*, a historical interpretation by looking into the drafting history of the Citizens' Rights Directive.[1182] Notably, he took the "modern reality" of the Union into account,[1183] especially when construction an evaluation of "European consensus" as research

[1181] De Witte, 'From a "Common Principle of Equality" to "European Antidiscrimination Law"', 1717.

[1182] *Coman and Others* (Case C-673/16) [2018], Opinion of AG Wathelet, para 51.

[1183] Ibid, [2018] para 56.

into societal developments.[1184] And the Court, ultimately, held that same-sex couples enjoyed the protection of Article 7 of the Charter of Fundamental Rights.[1185]

However, the latter category of *vague and ambiguous terms* is also not fixed, but rather fluid;[1186] mainly legal terms can change their meaning over time, too. While the influence of social reality on their construction might not be as apparent, one of the lessons of critical legal theory is that social reality *always* affects law. After all, law needs to be interpreted in order to develop meaning.[1187] And appliers of law (such as judges) will invariably be influenced evolving social concepts, [1188] including notions of justice or sameness, which are important when deciding, for instance, whether disparate treatment of same-sex couples is justified or not. As Kevin Cathcart, a US LGBT rights activist, put it: judges are influenced by the world they live in.[1189] This gives activists the chance to contribute advantageous constructions.

An example of a *vague and ambiguous* term in this sense is "discrimination." It was not clear whether same-sex couples were included in the term "sex discrimination," and different opinions on this issue existed (especially before the adoption of the Treaty of Amsterdam).[1190] In *Grant*, AG Elmer argued that the disparate treatment of a same-sex partner in the context of employment benefits amounted to "sex discrimination,"[1191] but the Court did not agree.[1192]

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[1184] See discussion *supra*, note 1165.

[1185] See discussion *supra*, note 1158.

[1186] This was extensively discussed in Chapter 1, Section 3.2.

[1187] Kelsen already held that "[e]very legal act implementing a norm ... is determined only in part by this norm and remains indeterminate for the rest," recognising the (partial) indeterminacy of legal rules. See *supra*, note 300. See also discussion in Chapter 1, Section 3.1.

[1188] This has been a major recognition of legal realism, picked up by critical legal studies. See Chapter 1, Section 3.2.

[1189] Kevin Cathcart, Lambda Legal – Defense and Education Fund USA (2014).

[1190] See discussion in Section 12.1.

[1191] *Grant* (Case C-249/96) [1998] ECR I-621, Opinion of AG Elmer, paras 23-25.

[1192] *Grant* (Case C-249/96) [1998] ECR I-621, para 47.

Likewise, "direct" or "indirect" discrimination are also terms that have been discussed contentiously in the case law samples.[1193] In *Maruko*, AG Colomer suggested that in countries that prohibited same-sex marriage, differential treatment of marriages and registered partnerships regarding pension benefits amounted to *indirect* discrimination[1194] under the Employment Equality Directive[1195] (since on the face neutral provisions had adverse effects on homosexual people). The Court, however, advanced a different interpretation – it held that if the national court estimated that a registered couple was *in a comparable situation* to a married (heterosexual) couple, such differential treatment of marriage and registered partnerships amounted to *direct* discrimination.[1196] Hence, it held that it was up to the national court to decide whether a same-sex registered partner was in the same position as a (heterosexual) spouse in a given situation.[1197]

The Court further developed its concept of "discrimination" in *Hay*, claiming that if same-sex couples did not have access to marriage, and thus, were denied employment benefits *tied* to marriage, this was a case of *direct* sexual orientation discrimination (since they had no legal possibility to ever qualify for these benefits).[1198] These examples demonstrate the many ways in which "discrimination" can be interpreted.

Another interesting observation regards the development of the Court's jurisprudence with regard to the general principle of equality. While in *Grant*, the Court examined whether "equal treatment" included the prohibition of sexual orientation discrimination, it ultimately came to the conclusion that it did not.[1199] It took thirteen years until the Court explicitly stated in *Römer* that the equality principle also protected sexual orientation.[1200] Arguably, the Treaty of Amsterdam,

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[1193] See discussion in Section 12.1.

[1194] *Maruko* (Case C-267/06) [2008] ECR I-1757, Opinion of AG Ruiz-Jarabo Colomer, para 102.

[1195] Employment Equality Directive (2000/78/EC) [2000] OJ L 303/16.

[1196] *Maruko* (Case C-267/06) [2008] ECR I-1757, para 73.

[1197] See discussion *supra*, note 1040.

[1198] *Hay* (Case C-267/12) [2013], 42.

[1199] *Grant* (Case C-249/96) [1998] ECR I-621, para 45.

[1200] *Römer* (Case C-147/08) [2011] ECR I-3591, paras 59-64. Albeit only since the Council made use of its legislative powers and adopted the Employment Equality Directive.

as well as the Employment Equality Directive had been adopted in the meantime; however, this alone seems not to have been enough to sway the Court, since it still did not include the prohibition of "sexual orientation discrimination" in the ambit of the "equality principle" in *D and Sweden*, a case decided after these laws had entered into force.[1201] That the Directive is not applicable to this case is beyond the point, since the Court could nonetheless have inferred from the *mere existence* of the Treaty of Amsterdam and the Directive that the equality principle should include the protection of sexual orientation minorities – and the principle would, then, of course, have been relevant to *D and Sweden*.[1202] These developments thus exemplify the vagueness of the concept of "equality."

*Vague and ambiguous terms* – especially taken together with the fact that the CJEU interprets Union law in a dynamic way[1203] – can provide LGBT rights advocates room to advance progressive suggestions on the construction of such terms ("interpretative interventions").

### 13.1.2. European Consensus

As mentioned, *European consensus* tends to play an important role when the Court tries to evaluate which level of protection to afford to LGB persons, particularly in the context of *vague and ambiguous* terms.

The case law samples have shed light on the many ways in which *consensus* can be construed and used – particularly regarding the *subject* on which consensus is researched. For instance, both *Grant*[1204] and *Maruko*[1205] dealt with certain employment benefits tied to relationship status – travel concessions for the partner of an employee in *Grant*, and survivor's pension for a partner of an employee in *Maruko*. In *Grant*, those benefits were only granted to opposite-sex

[1201] *D and Sweden v Council* (Cases C-122/99 P & C-125/99 P) [2001] ECR I-4319.

[1202] See discussion of *D and Sweden supra*, at 222.

[1203] Giulio Itzcovich, 'The Interpretation of Community Law by the European Court of Justice' (2009) 10 German Law Journal 537, 549.

[1204] *Grant* (Case C-249/96) [1998] ECR I-621.

[1205] *Maruko* (Case C-267/06) [2008] ECR I-1757.

partners, in *Maruko*, only to married partners (but same-sex couples did not have the legal possibility to marry).

In *Grant*, the Court examined the laws of Member States regarding the recognition of same-sex couples,[1206] concluding that same-sex relationships were not regarded as equivalent to marriages or stable relationships between heterosexual couples – instead of, for instance, looking at laws regarding sexual orientation discrimination, which might have been more favourable for the applicants.[1207]

AG Colomer on the other hand declared that an absence of *consensus* regarding the treatment of same-sex couples was *irrelevant* in *Maruko*, claiming that the case dealt with discrimination in the context of employment benefits, and not the "development of European matrimonial law."[1208] The Court in *Maruko* did not conduct a research of consensus – which makes sense, considering that it classified the case as a discrimination case (as Colomer had done, albeit in a different construction)[1209] and left it to the national court to determine whether a registered same-sex partner in a *particular given situation* was in a position comparable to that of a spouse.[1210] Here, the Court in essence gives great weight to the national legal regime, instead of looking at European consensus.

Advocate General Wathelet's treatment of *consensus* in *Coman* is particularly interesting. Building on the fact that EU law required "interpretation in the light of present day circumstances"[1211] (dynamic interpretation), he looked at *legal developments* (recognising a trend towards the recognition of same-sex marriages), relying, *inter alia*, on social scientific

[1206] *Grant* (Case C-249/96) [1998] ECR I-621, paras 35-36.

[1207] Bell, 'Shifting Conceptions of Sexual Discrimination at the Court of Justice: From P v S to Grant v SWT', 72.

[1208] *Maruko* (Case C-267/06) [2008] ECR I-1757, Opinion of AG Ruiz-Jarabo Colomer, para 98, citing his opinion in *K.B.* (Case C-201/02) [2004] ECR I-541, Opinion of AG Ruiz-Jarabo Colomer, para 76.

[1209] See discussion *supra*, at 226.

[1210] *Maruko* (Case C-267/06) [2008] ECR I-1757, para 73.

[1211] *Maruko* (Case C-267/06) [2008] ECR I-1757, Opinion of AG Ruiz-Jarabo Colomer, para 56.

research such as statistics.[1212] Moreover, he held that it is a "requirement of the *uniform application of EU law* and of the *principle of equal treatment*"[1213] that it should not be left to Member States to autonomously interpret a provision of EU law. This seems to question the permissibility of a *status-quo*-consensus examination (as opposed to a *developing-trends*-consensus examination) *per se* in matters relating to equal treatment.

Interestingly, the Advocates General, as well as the CJEU, have also referred to the ECHR and the ECtHR case law when examining *consensus*[1214] – a practice that is not without contention, especially since the Council of Europe (CoE) has more Member States than the EU, especially Member States with arguably more conservative views on LGBT rights, such as Russia or Turkey.[1215] However, activists might still contribute to favourable constructions of *consensus* by accentuating certain ECtHR cases that they consider relevant; and indeed, this strategy might at times be successful, as shown by the fact that in his *Coman* opinion, AG Wathelet's interpretation of the *Pajić*[1216] decision by the ECtHR mirrored the assessment of interveners (which they had advanced at the Romanian Constitutional Court level).[1217]

Moreover, framing an LGBT rights claim *also* in a fundamental rights language might prove fruitful. Activists could also try to suggest what the adequate *subject* of such an examination should be (i.e., laws or legal trends, the development of social views, marriage laws or anti-

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[1212] *Coman and Others* (Case C-673/16) [2018], Opinion of AG Wathelet, para 58.

[1213] *Maruko* (Case C-267/06) [2008] ECR I-1757, Opinion of AG Ruiz-Jarabo Colomer, para 78 (*emphasis added*).

[1214] For instance, in Grant, establishing that differential treatment of homosexual and heterosexual couples was still widespread in Europe: *Grant* (Case C-249/96) [1998] ECR I-621, paras 32-35, citing, *inter alia*, *Kerkhoeven* App no 15666/89; *X & Y v UK* App no 9369/81; in *D and Sweden v Council* (Cases C-122/99 P & C-125/99 P) [2001] ECR I-4319, para 60, the Court referred to Article 8 ECHR. Cases were ECtHR case law was cited with a more LGBT-friendly result: *Coman and Others* (Case C-673/16) [2018], Opinion of AG Wathelet, para 65, citing *Pajić* App no 47082/12, paras 59, 84; and *Taddeucci* App no 51362/09, para 89. See the Court's assessment in the same case: *Coman and Others* (Case C-673/16) [2018], para 49, citing *Vallianatos* App nos. 29381/09 and 32684/09, para 73; and *Orlandi* App nos 26431/12; 26742/12; 44057/12 and 60088/12, para 143.

[1215] See discussion *supra,* at 214.

[1216] *Pajić* App no 47082/12.

[1217] *Coman and Others* (Case C-673/16) [2018], Opinion of AG Wathelet, paras 65, 98, citing *Pajić* in the footnotes*. Pajić* App no 47082/12. See also discussion in Section 12.3.

discrimination legislation), and finally contribute materials (such as statistics) regarding the existence of *legal trends* or *developments in society*.[1218] The latter strategy is particularly interesting since the CJEU is committed to a dynamic interpretation of EU law in the light of present day circumstances.

### 13.1.3. Inconsistency, Hesitation and Disagreement

The Court's case law shows signs of *inconsistency, hesitation and disagreement*. Its formalistic *Grant* decision was described by AG Colomer as *inconsistent* in light of the Court's previous case law.[1219] The *D and Sweden*[1220] and *Parris*[1221] decisions also stand out as *inconsistent* with the Court's incrementally more progressive protection for same-sex unions from discrimination.[1222] These decisions were unfavourable and might *prima facie* challenge the CJEU's suitability as an ally in same-sex rights protection efforts; however, they also display – apart from *inconsistency* – instances of *hesitation and disagreement*, which are strong indicators that the Court's approach might change, and that thus, it should not be disregarded as a forum for strategic litigation.

Pointing out these *inconsistencies* and holding the Court to its own standards can thus be a powerful argument in the hands of same-sex rights advocates – particularly when the *uniformity of EU law* is at stake. This was also the impression of some of the activists I interviewed.[1223]

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[1218] AG Wathelet writes in *Coman*: "[L]egal recognition of same-sex marriage does no more than reflect a general development in society with regard to the question. Statistical investigations confirm it ... " *Coman and Others* (Case C-673/16) [2018], Opinion of AG Wathelet, para 58.

[1219] *Maruko* (Case C-267/06) [2008] ECR I-1757, Opinion of AG Ruiz-Jarabo Colomer, para 92.

[1220] *D and Sweden v Council* (Cases C-122/99 P & C-125/99 P) [2001] ECR I-4319.

[1221] *Parris* (Case C-443/15) [2016].

[1222] Möschel also points to the Court's inconsistency in *Parris*. Möschel, 'If and When Age and Sexual Orientation Discrimination Intersect: Parris. Case Note.'.

[1223] Adam Weiss, European Roma Rights Centre (ERRC) (2014); Robert Wintemute, King's College London (2014).

Particularly short and formalistic decisions of the Court – such *Grant*[1224] – can be an indicator of *hesitation* on how to deal with a certain issue; in this case, the discrimination of a same-sex partner. Moreover, the Treaty of Amsterdam was not yet adopted at the time of the decision, which might also have contributed to the Court's *hesitation*.

The Court also displayed *hesitation* regarding the question of whether to include sexual orientation discrimination in the ambit of the "equality" principle.[1225] It took 13 years to decisively answer this question in *Römer*.[1226]

*Hesitation* is a strong indicator for a strategic litigation opportunity; if the Court is not sure where it is supposed to be going, it might be more perceptive towards convincing arguments advanced by litigants.

Furthermore, diverging opinions of Advocate Generals can hold interesting arguments for different constructions of a particular issue. For instance, AG Kokott's divergent opinion in *Parris* can be read as a sign of disagreement.[1227] It is indeed notable that in *Grant* as well as in *Parris*, the Court deviated from the approaches suggested by the Advocates General, and that even its decision in *D and Sweden* has been criticised (albeit considerably later) by an Advocate General.[1228]

While negative decisions thus *prima facie* seem to challenge the suitability of the CJEU as a forum to push for LGBT rights, this picture changes if strategic litigation is understood as a long-term endeavour. Losses will be part of the struggle for same-sex equality;[1229] however, they can also contain interesting indicators for future litigation opportunities.

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[1224] *Grant* (Case C-249/96) [1998] ECR I-621.

[1225] See discussion in Sections 12.1. and 12.1.1.

[1226] *Römer* (Case C-147/08) [2011] ECR I-3591, paras 59-64.

[1227] *Parris* (Case C-443/15) [2016], Opinion of AG Kokott.

[1228] *Coman and Others* (Case C-673/16) [2018], Opinion of AG Wathelet, para 57.

[1229] As in *Parris* (Case C-443/15) [2016].

*Inconsistencies, hesitation and disagreement* can be indicators that the Court, in the future, might reconsider its approach. This is illuminated, for example, by the Court's development of the principle of equal treatment.[1230]

## 13.1.4. Uniform Interpretation of EU Law

Another opportunity can be found in the CJEU's principle of *uniform application of EU law*; this was used by applicants in *Coman* to suggest that "spouse" should be interpreted harmoniously throughout the Union.[1231] This particular aspect was also mentioned by some of the activists I interviewed, who confirmed it might be a promising strategy to point out that an (unfavourable) national construction of a term would endanger the *uniformity of EU law*.[1232]

The case law samples suggest that especially in the ambit of the principle of equal treatment, *uniformity of EU law application* might open interesting litigation opportunities. For instance, AG Jääskinen stated in *Römer* that not even national constitutional laws (such as bans on same-sex marriage) should compromise the enforcement of the equality principle.[1233] The Court in *Coman* held that a Member State's interest to protect (traditional) marriage as a public policy justification to restrict a fundamental freedom (such as free movement) could not lead to the result that its scope was "determined unilaterally by each Member State without any control by the EU institutions."[1234]

Thus, it might make sense for activist lawyers to frame LGBT issues in EU law terms and stress the need of *uniform interpretation of EU law* where Member States have rather conservative (constitutional) laws, especially if it is possible to construct a connection to a fundamental principle, such as free movement or equality.

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[1230] See Section 12.

[1231] Third Party Submissions, *Coman/Hamilton* (Romanian Constitutional Court, 2016), paras 26-28.

[1232] See, e.g., Adam Weiss, European Roma Rights Centre (ERRC) (2014).

[1233] *Römer* (Case C-147/08) [2011] ECR I-3591, Opinion of AG Jääskinen, para 165.

[1234] *Coman and Others* (Case C-673/16) [2018], para 44.

### 13.1.5. Recognition of NGOs as experts

Advocates General have made use of the input provided by LGBT or other human rights groups. This became salient, e.g., in AG Wathelet's opinion in *Coman*, where the AG seems to have relied on the *expertise* of NGOs.[1235] While the Court itself has not referred directly to the submission of LGBT rights groups – at least in the samples provided here – the mere fact that the Court increasingly accepts third party submissions by NGOs in preliminary reference procedures[1236] is an argument in favour of the point that the Court, in fact, appreciates the information provided by activists. Furthermore, as van der Vleuten has pointed out, the fact that the judges and Advocates General deciding LGBT cases can change from one case to the next means that their familiarity with LGBT issues varies widely.[1237] Thus, once an LGBT organisation or activist has a proven track-record of expertise, their input might be perceived as helpful by the judges.[1238]

## 13.2. Strategic Litigation Activities

The case law samples I have provided have contained an array of indicators for strategic litigation opportunities, and suggested a host of feasible activist interventions.

### 13.2.1. Interpretative Interventions

Re-interpreting legal terms in a progressive way is one of the main methods of activist intervention, and will be most successful when applied to *vague and ambiguous* concepts (as

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[1235] Third Party Submissions*, Coman/Hamilton* (Romanian Constitutional Court, 2016), paras 44-46; *Coman and Others* (Case C-673/16) [2018], Opinion of AG Wathelet, paras 65, 98, citing *Pajić* in the footnotes*. Pajić* App no 47082/12.

[1236] Almqvist, 'The Accessibility of European Integration Courts from an NGO Perspective', 277. See also discussion in Chapter 2, Section 5.2.2.1.

[1237] van der Vleuten, 'Transnational LGBTI Activism and the European Courts: Constructing the Idea of Europe', 125.

[1238] See also: Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014).

indicated above). This is in line with critical theory accounts on law.[1239] If law is fluid and requires interpretation,[1240] then LGBT rights activists can participate in legal meaning forming by advancing favourable interpretations. The case law of the CJEU holds examples where advantageous constructions of a term have led to positive outcomes for LGBT people, such as the inclusion of a personal human right of non-discrimination under the general principle of equal treatment,[1241] and the subsequent expansion of the principle to encompass sexual orientation discrimination a few years later.[1242]

### 13.2.2. Choosing the right comparator

In the context of discrimination, the question of *the right comparator* is paramount. A precondition of a finding of "direct discrimination" by the CJEU is the establishment of a "comparable situation." Complainants have to establish that they were treated unfavourably in comparison with someone (the comparator) in a comparable situation, based on a specific discrimination ground (such as sexual orientation).[1243]

In *Maruko*, the Court held that a *comparable situation* was not to be understood as meaning an *identical situation*.[1244] This fact has made it easier to litigate sexual orientation discrimination cases; however, the Court has also held that it was up to the national court to decide

[1239] See discussion in Chapter 1, Section 3.2.

[1240] Hutton, *Language, Meaning and the Law*, 12.

[1241] Bell, 'The Principle of Equal Treatment: Widening and Deepening', 611.

[1242] *Römer* (Case C-147/08) [2011] ECR I-3591, paras 59-64. Albeit only since the Council made use of its legislative powers and adopted the Employment Equality Directive.

[1243] Merel Jonker, 'Comparators in Multiple Discrimination Cases: A Real Problem or just a Theory?' in Marjolein van den Brink, Susanne Burri and Jenny Goldschmidt (eds), *Equality and Human Rights: Nothing but Trouble?* (Netherlands Institute of Human Rights 2015), 212. For a finding of "indirect discrimination," complainants need to show that an on the face neutral provision puts a particular group of persons at a disadvantage, compared to another group. However, the sample of cases I have provided dealt with instances of direct discrimination (even though in *Grant*, AG Elmer argued for a finding of indirect discrimination). *Grant* (Case C-249/96) [1998] ECR I-621, Opinion of AG Elmer.

[1244] *Maruko* (Case C-267/06) [2008] ECR I-1757, para 69.

"comparability" in a specific case, thus basically delegating this question back to the national level.[1245]

A finding of discriminatory treatment thus often hinges on the question of who is compared with whom, as example of *Grant* demonstrates: Here, the Court examined whether "sex discrimination" had taken place. In order to do so, it compared female same-sex partners to male same-sex partners, holding that both groups were excluded from receiving employment benefits tied to marriage status and thus, there was no discrimination.[1246] Instead, it could have compared Grant's female partner to a male partner (entitled to the benefits in question) – and this comparison could have produced a finding of sex discrimination.[1247] Here, an inadequate choice of comparator marred the analysis.

In *Hay*, the Court claimed that where (registered) same-sex couples were *prevented* from marrying, denying a (registered) same-sex partner benefits in employment and payment contexts could amount to direct sexual orientation discrimination.[1248] Interestingly, it constructed the comparative groups in this case based on the availability of the legal choice to marry. While opposite-couples registered under the PACS had that choice, same-sex couples did not. The fact that a heterosexual person could *also* enter into a registered partnership under the PACS was irrelevant.[1249] Here, the choice of comparative groups is of the essence. It went on to hold that therefore, with regard to the employment benefits in question,[1250] a same-sex registered partner was in a *comparable situation* to an opposite-sex spouse.

These examples indicate that litigants are well advised to choose wisely which comparator to choose when litigating at the CJEU, especially in cases of discrimination. Especially in

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[1245] See, e.g., Tobler and Waaldijk, 'Case C-276/06, Tadao Maruko v. Versorgungsanstalt der Deutschen Bühnen, Judgment of the Grand Chamber of the Court of Justice of 1 April 2008, not yet Reported', 729.

[1246] *Grant* (Case C-249/96) [1998] ECR I-621, paras 26, 27.

[1247] See discussion *supra,* at 210.

[1248] *Hay* (Case C-267/12) [2013], para 42. See also discussion *supra,* at 228.

[1249] Ibid, para 43.

[1250] Ibid, paras 36-44.

situations where registered same-sex couples are denied the possibility to marry, it has proved worthwhile to establish married couples as comparators for the purpose of specific material benefits in employment contexts.[1251] In this regard, the litigation before the CJEU allows for a different choice of comparator than the ECtHR, who has been less willing than the CJEU to accept "comparability of situations" of registered same-sex partnerships with marriages, as Waaldijk also points out.[1252] This will be discussed in the next Chapter.[1253]

### 13.2.3. Providing expertise

Providing expertise – be it in the form of statistics, scientific research, academic literature or suggestions of the construction of *European consensus* or *comparable situations* – might be one of the strongest tools for strategic litigation.[1254]

Moreover, the Court maintains a close observation of the ECtHR's case law in the area of same-sex rights.[1255] Thus, presenting a favourable construction of the ECtHR's jurisprudence might be a worthwhile exercise for LGBT rights activists.

### 13.2.4. Using an Incremental Approach

Lastly, the case law samples show that the Court is cautious in matters connected to "marriage" or "family," since it does not have jurisdiction in family law matters.[1256] Thus, activist lawyers might be well advised to avoid these issues (such as access to marriage) and rather follow a piece meal approach, pushing for one improvement at a time.

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[1251] See also, to that effect, Waaldijk, 'Great Diversity and Some Equality: Non-Marital Legal Family Formats for Same-Sex Couples in Europe', 56.

[1252] See also, to that effect, ibid, 56.

[1253] Particularly in Sections 15.3.4. and 16.2.2.

[1254] See *supra*, note 1214.

[1255] E.g., in *Maruko* (Case C-267/06) [2008] ECR I-1757.

[1256] Titshaw, 'Same-Sex Spouses Lost in Translation? How to Interpret "Spouse" in the E.U. Family Migration Directives', 51-55.

## 13.3. Concluding Observations to Section 13

Applying an activist reading to the CJEU's case law by analysing it under a "strategic litigation opportunities" reveals indicators for "litigation opportunities." The emerging patterns also suggest options for strategic interventions, and allow observations regarding the construction of a strategy (e.g., using incremental approaches rather than making broad-brush demands, or carefully selecting the comparator in discrimination cases).

Moreover, cases such as *ACCEPT*[1257] and *Coman*[1258] exemplify the ways in which LGBT rights groups are already using the opportunities provided by the CJEU to fight for same-sex rights. Waaldijk has pointed to the fact that the CJEU is a particularly promising forum when trying to challenge material discriminations of same-sex couples (e.g., in civil unions) in comparison to married different-sex couples.[1259]

Even if the outcome of a case is negative, this is not the end of the road; indeed, Anna van der Vleuten has pointed out that despite its unfavourable ruling, *Grant* mobilized LGBT organisations to increase their lobbying efforts before European institutions in the advent of the Amsterdam Treaty, which eventually led to the inclusion of sexual orientation in the revised Treaty.[1260] In fact, the case law of the Court can be read as an activist "work in progress" – with setbacks suggesting that a particular strategy might have to be adapted, or tried again later.

Given the above observations, this Chapter has answered subsets 3.2. and 3.3. of the third inquiry of my research question, namely: *Can the respective case law of the Courts be analysed in an actor-centred way – and does it provide room for activist intervention?* and *How could an*

[1257] *Asociaţia Accept* (Case C-81/12) [2013] IRLR 660.

[1258] *Coman and Others* (Case C-673/16) [2018], Opinion of AG Wathelet.

[1259] Waaldijk, 'Great Diversity and Some Equality: Non-Marital Legal Family Formats for Same-Sex Couples in Europe', 56.

[1260] van der Vleuten, 'Transnational LGBTI Activism and the European Courts: Constructing the Idea of Europe', 140.

*activist reading of the European Courts' LGBT rights case law look like?* in the context of the CJEU.

# CHAPTER 5

## THE ECtHR AND SAME-SEX RIGHTS

In this section, I will present parts of the LGBT rights law of the European Court of Human Rights, focusing – as before – on LGB rights. In recent decades, the ECtHR has been dealing with a high number of issues that are relevant in the struggle for gay rights; among them family-related rights such as marriage or parental rights;[1261] a wide range of anti-discrimination cases, often connected to family status (partnership) and benefits flowing from that status;[1262] freedom of expression;[1263] freedom of assembly and association;[1264] hate speech, violence and ill treatment;[1265] criminalization of sexual orientation;[1266] and lately, matters relating to asylum[1267] and the intersection of religious freedom and sexual orientation.[1268]

However, the ECtHR has dealt most comprehensively with same-sex family rights. Therefore, this chapter will focus on the question of family recognition under the European Convention of Human Rights.

I will start by relating the most important Articles of the ECHR with regards to same-sex rights. Then, I will provide a sample of the ECtHR's respective case law, organized into two distinct narratives.

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[1261] *Fretté* App no 36515/97; *EB* App no 43546/02; *Schalk & Kopf* App no 30141/04; *Gas & Dubois* App no 25951/07; *X & Others* App no 19010/07; *Vallianatos* App nos. 29381/09 and 32684/09; and others.

[1262] *Kozak* App no 13102/02; *PB & JS* App no 18984/02; *Karner* App no 40016/98; and others.

[1263] *Vejdeland & Others v Sweden* App no 1813/07 (ECtHR, 9 February 2012); *Bayev & Others v Russia* Apps nos. 67667/09, 44092/12 and 56717/12 (ECtHR, 20 June 2017); and others.

[1264] *Baczkowski & Others v Poland* App no 1543/06 (ECtHR, 3 May 2007); and others.

[1265] *X v Turkey* App no 24626/09 (ECtHR, 9 October 2012); and others.

[1266] *Dudgeon* App no 7525/76; and others.

[1267] *IIN v the Netherlands* App no 2035/04 (ECtHR, 9 December 2004); *MKN v Sweden App no 72413/10* App no 72413/10 (ECtHR, 27 June 2013); *ME v Sweden* App no 71398/12 (ECtHR, 8 April 2015); and others.

[1268] *Eweida & Others v UK* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).

My *first* narrative will trace the shift in the definition of the term "family" within the context of same-sex rights, including adoption rights. Whereas the Court started from a rather traditional conception which expressly excluded homosexual couples and their children from protection of family life under Article 8,[1269] it gradually changed its view by both broadening the understanding of "family" and simultaneously narrowing the margin of appreciation afforded to States in this respect. Hence, it developed a construction of the ECHR that was at the same time more inclusive in terms of same-sex rights, and more binding on Member States. Throughout this development, I will indicate respective litigation opportunities which activists could have encountered, and analyse their significance with regard to the direction that the Court's case law ultimately has taken.

My *second* narrative will deal with the right of gays and lesbians to marry under Article 12. The fight for marriage equality under the Convention is a relatively new phenomenon. However, it is a particularly interesting narrative since, in contrast to the first narrative, it is a story that currently seems to have entered a phase of a certain *backlash*. In fact, the arc of the same-sex marriage tale looks more like a mountain road than a highway, and currently, advocates find themselves in a valley. While the Court has initially refused to compare same-sex couples to married different-sex couples, it has opened the door towards progressive interpretations of "marriage" which might eventually include same-sex couples[1270] – and then, closed this door again.[1271] This zigzagging has led to some spectacular inconsistencies in the Court's case law, as I will show. Nonetheless, this narrative also illuminates that cause lawyering will be most successful if it is conceptualised it as a long-term endeavour.[1272] Single setbacks cannot,

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[1269] The ECtHR merely granted protection of private life under Article 8 to same-sex couples. I will explain this more in detail below.

[1270] E.g., *Schalk & Kopf* App no 30141/04, para 61. The Court held that it would "no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article 12 is inapplicable to the applicants' complaint. However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State."

[1271] E.g., in *Charpentier* App no 39651/11, paras 48-52; *Hämäläinen (GC)* App no 37359/09 , para 96.

[1272] This is a lesson that can also be learned from the U.S. LGBT movement's experience, for instance, regarding the abolishment of sodomy laws; after a discouraging decision in *Bowers*, the Supreme Court eventually held that sodomy laws were unconstitutional in *Lawrence*. *Bowers v Hardwick,* 478 U.S. 186 (1986) (USA); *Lawrence v Texas,* 539 U.S. 558 (2003) (USA). See also discussion in Chapter 6.

ultimately, determine the long-term outcome of cause lawyering; they can lead (and have led) however, to an adaptation of litigation strategies.[1273]

Within both narratives, I will point out indicators for "strategic litigation opportunities," such as the Court's use of *vague and ambiguous terms* (including "family," "marriage" or "tradition"), or the Court's construction of "European consensus." I will argue that advocates can advance progressive *interpretations* with regard to these concepts. Moreover, I will trace *inconsistencies*, as well as instances of *hesitation* and *disagreement* in the development of the case law, and point out examples where the Court actively engages advocacy groups in the judicial discourse by way of referring to their *expertise*. The emerging patterns will draw up a rich repository of examples demonstrating how, time and again, the Court's reasoning has opened up "litigation opportunities" for same-sex rights litigation. In this context, I will also point to possible strategic choices for LGBT rights activists, such as *providing expertise* or *using an incremental approach*.

This activist-centred reading should provide a more complex understanding of the genesis of respective successes and setbacks, which in turn can transform into prospects for advocacy.

*Lastly,* I will draw a number of lessons from the case law sample provided.

[1273] As exercised by the U.S. LGBT movement. See Chapter 6, Section 18.5.

## 14. Same-Sex Rights in the European Convention on Human Rights

Two Articles of the European Convention of Human Rights (ECHR)[1274] are particularly interesting for same-sex rights: Article 8 (containing privacy rights as well as the protection of families) and Article 14 (containing a broad-brush prohibition of discrimination). Article 12 (containing the right to marry) has so far never been successfully invoked for the protection of same-sex partnerships (even though the Court has begun to question its previous construction in its *Schalk & Kopf* judgment;[1275] Article 12 has furthermore played a role in cases dealing with transgender* rights).[1276]

The basis for the protection of families under the European Convention of Human Rights is Article 8. It reads:

> **"**1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[1277]

The Court has found already in the 1980s that same-sex orientation fell under the scope of *private life* in Article 8, defining an individual's sexual behaviour as an intimate part of that individual's private life.[1278]

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[1274] Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention on Human Rights, as amended) (ECHR).

[1275] *Schalk & Kopf* App no 30141/04, para 61.

[1276] See, e.g., *Goodwin* App no 28957/95.

[1277] Art 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

[1278] Most famously in the *Dudgeon* case: *Dudgeon* App no 7525/76, para 52. Bamforth, 'Families but not (yet) Marriages? Same-Sex Partners and the Developing European Convention 'Margin of Appreciation'', 131.

However, it took several more decades for the Court to decisively state that same-sex couples could also enjoy the protection of their *family life*.[1279] Angioletta Sperti contends that the Court's choice to focus on the privacy limb of Article 8 in its early cases followed the "logic of the closet" by hiding gay and lesbian individuals "as couples, depriving them of their visibility, pushing the social dimension of their relationships into the background. At the same time, same-sex couples were not recognised as holders of 'collective rights' or 'group rights' or 'associative rights'."[1280] However, the Court to date has not advanced a coherent theory of which rights exactly are included by the protection of same-sex families under Article 8,[1281] even though it has stressed repeatedly that stable same-sex couples have similar needs to stable different-sex couples.[1282] Indeed, in the past few years, the Court has been inconsistent in its approach, confirming in *Vallianatos* and *Oliari* that same-sex families deserve a certain kind of legal protection (in the context of civil unions),[1283] but refusing to grant particular rights – for instance, survivor's pension – based on the existence of "family life" in *Aldeguer.*[1284] Moreover, whenever "marriage" is involved, the Court becomes especially cautious, as demonstrated by the latter case.

The second paragraph of Article 8 deals with the question of legitimate state interference into the rights protected by this Article. Member States enjoy a certain "margin of appreciation" when applying the Convention. George Letsas points out that the ECtHR uses this doctrine in two

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[1279] *Schalk & Kopf* App no 30141/04, para 95.

[1280] Angioletta Sperti, *Constitutional Courts, Gay Rights and Sexual Orientation Equality* (Hart Publishing 2017), 64. See also: Robert Wintemute, 'From 'Sex Rights' to 'Love Rights': Partnership Rights as Human Rights' in Nicholas Bamforth (ed), *Sex Rights The Oxford Amnesty Lectures 2002* (Oxford University Press 2002), 191 (*citations omitted*).

[1281] The fact that the Court, in *Schalk & Kopf*, recognised that same-sex couples could fall under "family life" of Article 8, but refused to draw inferences from that recognition was noted by the dissenting judges in this opinion. Joint dissenting opinion by Judges Rozakis, Spielmann and Jebens, *Schalk & Kopf* App no 30141/04, para 4.

[1282] On this issues, see Waaldijk, 'Great Diversity and Some Equality: Non-Marital Legal Family Formats for Same-Sex Couples in Europe', 55.

[1283] *Vallianatos* App nos. 29381/09 and 32684/09, paras 81, 92; *Oliari* App nos 18766/11 and 36030/11, para 185.

[1284] *Aldeguer Tomás v Spain* App no 35214/09 (ECtHR, 14 June 2016), paras 88-91.

different sets of circumstances (but without drawing a clear and principled distinction between the two):

> "The first one is in cases where the Court has to decide whether a particular interference with a Convention freedom is justified. In answering that question, the Court often uses the label 'margin of appreciation' without drawing on a substantive theory of rights that can justify the conclusion reached. The second use appears in cases where the Court refrains explicitly from employing a substantive test of human rights review on the basis that there is no consensus among Contracting States on the legal issue before it."[1285]

The "margin of appreciation" describes the level of discretion the Court awards to national authorities in their fulfilment of Convention obligations.[1286] It is particularly relevant when assessing whether a state interference in a Convention right is legitimate.[1287] This is especially relevant in the context of same-sex rights. Article 8 ECHR, protecting the right to private and family life, lists in paragraph 2 a number of instances in which an interference is legitimate:

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

Many elements are to be considered here, such as proportionality tests (and the level of scrutiny applied), and the principle of "legality"[1288] or the question of what constitutes "interference."[1289]

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[1285] George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) Oxford Journal of Legal Studies 705, 705.

[1286] Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law',115.

[1287] If the treatment is not legitimate, it can amount to discrimination under Article 14 ECHR. Here, the scope of the margin of appreciation is often a matter of contention, which is usually connected to the level of scrutiny that the Court decides to apply. See below.

[1288] Greer, *The Interpretation of the European Convention on Human Rights: Universal Principle or Margin or Appreciation*,15. For a more comprehensive discussion of "consensus," see Section 8.2.2.

The prohibition of "interference" can also establish a positive obligation of the State to protect individuals against the actions of its authorities.[1290]

While the Court has not advanced a comprehensive account on the use of this doctrine, it often conducts a an examination of *European consensus* to determine the width of the margin it affords to Member States, examining whether there is "a presence or absence of a consensus, in 'the law' of the 'member states'..."[1291] Brauch argues that the existence of a *European Consensus* has indeed become the most important factor in determining the width of the margin of appreciation.[1292]

However, the consensus evaluation of the Court is rather incoherent. Sometimes it considers the legal *status quo*,[1293] and other times, it observes *trends* of legal developments and/or social

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[1289] In the area of same-sex rights, see, for instance, the question whether an "indirect interference" is also covered by Article 14: "Firstly, in as much as Article 14 has no independent existence, its application does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention, just as it does not presuppose a direct interference by the national authorities with the rights guaranteed by such a provision." Joint Partly Dissenting Opinion by Judges Bratza, Fuhrmann and Tulkens, *Fretté* App no 36515/97, para 1.

[1290] The Court writes in *Kerkhoeven* (in the context of family life according to Article 8): "Its object is, according to the Court, 'essentially' that of protecting the individual against arbitrary interference by the public authorities. Nevertheless, the Article does not merely compel the State to abstain from such interference. In addition to this primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for family life (loc. cit.)." *Kerkhoeven* App no 15666/89. See also its respective deliberations in *Kroon*: "The Court reiterates that the essential object of Article 8 (art. 8) is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective 'respect' for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation ... According to the principles set out by the Court in its case-law, where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible as from the moment of birth or as soon as practicable thereafter the child's integration in his family ..." *Kroon & Others v the Netherlands* App no 18535/91 (ECtHR, 27 October 1994), paras 31-32.

[1291] Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights', 241, 284.

[1292] Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law', 128.

[1293] For instance, in *Hämäläinen (GC)* App no 37359/09 , paras 30-33, 73-74.

attitudes.[1294] In this investigation, it sometimes includes references to EU materials.[1295]

Article 14 ECHR is a broad-brush prohibition of discrimination.[1296] It states:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."[1297]

Discrimination occurs where someone is treated differently in comparison to someone else in a relevantly similar situation, and this treatment does not have an objective and reasonable justification.[1298] Hence, the establishment of a *comparable situation* is important in the ambit of Article 14. To establish such a situation, a comparator is needed: in other words, "a person in materially similar circumstances, with the main difference between the two persons being the 'protected ground'."[1299] The Court has defined "protected ground" as an "identifiable, objective or personal characteristic or 'status' by which persons or groups of persons are distinguishable from one another."[1300] Sexual orientation has expressly been included as a protected

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[1294] For instance, in *Schalk & Kopf* App no 30141/04, paras 26-34, 109.

[1295] For instance, in ibid, paras 24-26.

[1296] The ECtHR interprets the reach of Article 14 rather extensively, particularly in connection with Article 8.

Niels Petersen, 'The Principle of Non-Discrimination in the European Convention of Human Rights and in EU Fundamental Rights Law' in Yumiko Nakanishi (ed), *Contemporary Issues in Human Rights Law Europe and Asia* (Springer 2018), 132.

[1297] Art 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

[1298] *Boeckel & Gessner-Boeckel v Germany* App no 8017/11 (ECtHR, 7 May 2013), para 28. European Union Agency for Fundamental Rights (ed), *Handbook on European Non-Discrimination Law* (Publications Office of the European Union 2011), 23.

[1299] Rights (ed), *Handbook on European Non-Discrimination Law*, 23.

[1300] *Clift v UK* App No 7205/07 (ECtHR, 13 July 2010), para 55.

category.[1301] Since *Karner*, the Court usually grants states a narrow margin of appreciation when assessing disparate treatment in the context of sexual orientation.[1302]

Article 14 is regularly invoked in conjunction with Article 8 when determining whether certain rights (such as adoption rights or tenancy privileges, which are often linked to the recognition as "family") are to be granted to same-sex partners, or whether a difference in treatment of same-sex couples compared to opposite-sex couples is justified.[1303] However, the comparator requirement of Article 14 can be problematic, especially since the ECtHR's examination of this requirement is sometimes not outlined very clearly in its opinion.[1304] Moreover, it often tends to conflate its assessment of "comparable situation" with its analysis of whether there is a "justification" of disparate treatment.[1305]

Finally, Article 12 defines the right to marry and to found a family. It states:

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

The right to marry is subject to national legislation, and Member States are usually free to regulate the conditions and formalities to enter and dissolve a marriage. They cannot, however, arbitrarily restrict access to marriage.[1306] Especially in the context of transgender rights, the Court has held that the states are not allowed to interfere with the *essence* of the right by making

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[1301] *Salguiero Silva da Mouta* App no 33290/96.

[1302] *Karner* App no 40016/98, para 37. The margin has varied, however, depending on the issue at hand. For instance, the Court still applies a wider margin when it comes to issues connected to marriage – *Gas & Dubois* App no 25951/07, para 66.

[1303] Greer, *The Interpretation of the European Convention on Human Rights: Universal Principle or Margin or Appreciation*, 11.

[1304] Rory O'Connell, 'Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECtHR' (2009) 29 Legal Studies 211, 219-220. See also: Sandra Fredman, *Introduction to Discrimination Law* (2002), 8-10.

[1305] O'Connell, 'Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECtHR', 220-221.

[1306] Graupner, 'Sexuality and Human Rights: A Global Overview', 120.

it impossible for a person to marry under any circumstances.[1307] Nonetheless, to date, the Court has not accepted that a ban for same-sex marriages affects the essence of this right in an equally problematic way.

In the following part, I will present two samples of the ECtHR's case law on LGBT rights. The first one of these samples will contains an activism-centred narrative of the Court's case law on same-sex families. The second sample deals with the Court's same-sex marriage case law, again narrated from an activist point of view. Here, I will also include jurisprudence on marriage in the context of transgender* rights, since it might provide valuable insights and strategic litigation opportunity indicators for same-sex marriage litigation, as well.

Some of the earlier cases were decided by the European Commission of Human Rights. Apart from these cases, I will generally refer to the "Court" or to the "ECtHR" and indicate, only if expedient, in which constellation the Court heard a case (Chamber or Grand Chamber).

I will start with a short examination of the ECtHR's first landmark case on LGBT rights: Its *Dudgeon* decision.[1308]

[1307] Ibid. See also: *Goodwin* App no 28957/95, para 103.

[1308] *Dudgeon* App no 7525/76.

## 15. Case Law Narratives

### 15.1. Introduction: Emergence of the ECtHR's Same-Sex Jurisprudence in the 80s

Even though the often-cited case *Dudgeon v UK*[1309] dealt with the criminalization of homosexuality and did not explicitly touch on the subject of same-sex families or marriage, it is a good point to start my assessment, due to its character as the first landmark case in the area of same-sex rights. Moreover, it is the first example of successful strategic LGB rights litigation at the ECtHR.[1310]

Jeffrey Dudgeon, the applicant, was a gay rights activist who led a local campaign to overturn sodomy laws in Northern Ireland.[1311] He got together with barrister and University lecturer Kevin Boyle and considered the possibility of going to Strasbourg in order to get the sodomy laws abolished. A year later, Dudgeon was held up during a police raid and charged under Northern Ireland's sodomy laws, which eventually led to the *Dudgeon* case.[1312]

In *Dudgeon*, the ECtHR famously stated:

> "[T]he very existence of [the legislation criminalizing homosexual acts] continuously and directly affects [the applicant's] private life…: either he respects the law and refrains from engaging – even in private with consenting male partners – in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution."[1313]

Hence, the Court established that homosexual acts fall within the protection of private life according to Article 8 ECHR.

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[1309] Ibid.

[1310] Johnson, *Going to Strasbourg. An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights*, 77.

[1311] Ibid, 77.

[1312] Ibid, 78-82.

[1313] *Dudgeon* App no 7525/76, para 41.

This judgement is noteworthy in some other ways, as well. The Court admitted that government interference in this area could be justified if the interference was "necessary in a democratic society."[1314] It went on to discuss this idea at length, claiming, among other things, that "tolerance" and "broadmindedness" were hallmarks of a democratic society.[1315]

It is interesting that the Court came to the conclusion that moral feelings of a majority could not warrant applying penal sanctions on an act where two consenting adults were involved. It stated:

> "Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved."[1316]

The Court did not dispute that a certain margin of appreciation was left to the states in this area;[1317] it held, however, that sexual acts were "a most intimate aspect of private life. Accordingly, there must exist *particularly serious reasons* before interferences on the part of the public authorities can be legitimate…"[1318] Thus, the Court significantly reduced the margin of appreciation that it had conceded before in issues concerning public morality.[1319]

This assessment is quite remarkable. While admitting that a society's moral system deserves consideration, and that States enjoy a certain autonomy in this regard, the Court also defined the

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[1314] Ibid, para 43.

[1315] Ibid, para 53.

[1316] Ibid, para 60.

[1317] Ibid, para 52.

[1318] Ibid, para 52 (*emphasis added*). The test the Court applied here – difference in treatment based exclusively on the ground of sex, only for particularly serious reasons, and necessity of the means chosen – was repeated and developed in subsequent cases, such as *Smith & Grady* Apps no 33985/96 and 33986/96, paras 87-110; *SL v Austria* App no 45330/99 (ECtHR, 9 January 2003), paras 27-45; and others.

[1319] For instance, in its *Handyside* (1976) judgment, a freedom of expression case dealing with a section on sexual education in schoolbooks, which was prohibited in the UK for reasons of public morality. The ECtHR had ruled that the margin of appreciation was to be interpreted widely where the protection of morals were in issue. *Handyside v UK* App no 37359/09 (ECtHR, 7 December 1976), paras 49-50.

*limits* of such consideration. In later judgments, the Court has repeatedly applied a strict scrutiny test (weighty reasons for government interference and necessity of the means applied), especially in the area of criminalization of homosexuality,[1320] but also, for instance, in cases where sexual orientation led to the dismissal of employees.[1321] However, up until 2002,[1322] it had been somewhat reluctant to assume a narrow margin of appreciation when it comes to family matters and same-sex relationships (which go beyond merely having sex), such as stable partnerships or parental rights.[1323]

The *Dudgeon* case and its successors are important cornerstones for the struggle for same-sex rights of any kind. It has repeatedly been cited, by the Court as well as by activist lawyers, especially in cases where an individual's *identity* is at stake.

## 15.2. Narrative One: From the Traditional Family to the *De Facto* Family

The question of whether or not same-sex couples (with or without children) could constitute a "family" according to Article 8 ECHR took a third of a century to answer. This development is not a linear one; indeed, there have been plenty of detours and setbacks.

### 15.2.1. Early Cases

Early cases regarding the question of whether Article 8 protected the rights of same-sex couples were linked to immigration issues (e.g., dealing with the question of whether a same-sex partnership provided an entitlement for a residence permit).[1324] The European Commission of Human Rights (and later the ECtHR) stated that although a same-sex relationship could not

[1320] *SL v Austria* App no 45330/99, paras 36-37.

[1321] *Smith & Grady* Apps no 33985/96 and 33986/96, paras 87-89.

[1322] In 2002, the ECtHR started to assume a narrow margin of appreciation in its *Karner* decision. *Karner* App no 40016/98, para 37.

[1323] Advocacy groups as well as scholars have pointed out the ECtHR's inconsistency in its sexual rights case law. See, e.g., Graupner, 'Sexuality and Human Rights in Europe', 121.

[1324] *X & Y v UK* App no 9369/81; *WJ & DP v UK* App no 12513/86 (EComHR, 13 July 1987); *C & LM v UK* App no 14753/89 (EComHR, 9 October 1989).

classify as "family life" under to Article 8, it could enjoy protection under the scope of private life.[1325]

In *Kerkhoeven & Others v the Netherlands*,[1326] the ECtHR rejected the notion that two female partners who had a child (by ways of sperm donation) during their relationship could enjoy the protection of "family" under Article 8 ECHR. For heterosexual couples, however, the Court conceded in *Johnston v Ireland* in 1986[1327] that non-married partners with a child *could* constitute a family according to Article 8 ECHR. In *Johnston*, the Court discussed the issue in the context of illegitimacy – it emphasised that "Article 8 … applies to the 'family life' of the 'illegitimate' family as well as to that of the 'legitimate' family ...",[1328] as established in *Marckx v. Belgium* a few years earlier.[1329] The different result for same-sex couples might, at least in part, be due to the fact that the child in Johnston was biologically related to both parents. In *Kroon & Others v the Netherlands*,[1330] the ECtHR also recognised the existence of *de facto* family ties of an unmarried heterosexual couple and their child. It declared that substantive elements such as cohabitation might trigger the protection of "family life" of Article 8.[1331] However, it did not use the same kind of functional analysis in same-sex parenting contexts.

It is noteworthy that the Court did not see it fit to apply its illegitimacy jurisprudence to same-sex couples that raise children together.

These developments set the stage for the struggle for same-sex family rights.

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[1325] Here, the Commission relied heavily on *Dudgeon – Dudgeon* App no 7525/76.

[1326] *Kerkhoeven* App no 15666/89.

[1327] *Johnston v Ireland* App no 9697/82 (ECtHR, 18 December 1986).

[1328] Ibid, para 55.

[1329] *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979), para 31.

[1330] *Kroon & Others* App no 18535/91.

[1331] Ibid, paras 30, 36, 40.

## 15.2.2. Protection of the "Traditional Family:" Inconsistencies in the Construction of "Family"

Same-sex rights advocates have of course not been the only ones who have tried to advance their own concepts of what a family should look like in the realm of ECHR protection. Member States have regularly invoked the "protection of the traditional family" in order to vindicate legislation that disadvantages homosexual couples, claiming that the conservation of the (nuclear) family was a legitimate aim under Article 8 (2) ECHR. This justification has not only been advanced in homosexual, but also in strictly heterosexual contexts, e.g., to differentiate between married and unmarried partners (especially in Article 14 cases).[1332] The Court has often accepted this rationale; however, its case law in this regard has been quite inconsistent and even contradictory.

In 1999, the Court suggested in *Saucedo Gómez v Spain* that it was relatively easy for the State to justify difference in treatment of unmarried and married heterosexual couples – the State merely had to show that it was pursuing a *legitimate* aim (such as the protection of the traditional family) and that the means chosen were *proportionate*.[1333]

The case concerned a couple that had cohabitated for 18 years without marrying. After their separation, the applicant lodged an application in which she asked the judge to declare her separated from her partner and to grant her the use of the family home and pecuniary provision. The Court gave great weight to the fact that the couple *could* have married (after the introduction of divorce laws in 1981, since the applicant's partner had previously been married) – but *chose* not to. Notably, the Court did not mention the couple's child when assessing their status as a family, but instead zoomed in on the *nature of the relationship* between the applicant and her former partner. Ultimately, it found that the application was inadmissible.[1334]

Even though *Saucedo* is merely an admissibility decision arising in a heterosexual context, it is

[1332] *Saucedo Gómez v Spain* App no 37784/97 (ECtHR, 26 January 1999).

[1333] Ibid.

[1334] Ibid.

worthwhile to take a closer look at it.[1335] Depending on the particular focus, this case could have been received as either advantageous or disadvantageous by LGBT rights activists of the time: On one hand, the Court granted a wide margin of appreciation to Member States that wanted to protect traditional marriage. On the other hand, the Court suggested that this margin might only apply to situations where the institution of marriage was in principle *available* for the couple in question. Since same-sex relationships often do not have this option, the Court's emphasis on the applicant's choice might actually serve as an argument in favour of same-sex rights.[1336]

Indeed, the Court's focus on the existence of a "choice" to marry might indicate an interesting (yet implicit) use of a *comparator* in the ambit of "disparate treatment" – reminiscent, to a certain degree, of the CJEU's comparison in *Hay*.[1337] The ECtHR *de facto* defined the comparative groups as a) stable couples that *could* marry, but *chose* not to; and b) a *hypothetical* group of couples that *could not* marry from the outset, implying that if the applicants had belonged to the *latter* group, the Court *might have* found discrimination.[1338] Since, however, they *had the choice* to marry – the disparate treatment of the State with regard to certain benefits (tied to the status of marriage) was justified and within its margin of appreciation. Of course, the Court did not make this comparison explicit, but instead mixed it into its examination of whether the government's disparate treatment was "justified."

In 2001, the Court reiterated its view that the protection of traditional family models was a legitimate reason for states to discriminate between homosexual couples (who were not allowed

[1335] After all, the Court examined the rights and benefits of non-married couples in relation to the rights and benefits afforded to married couples, at a time when same-sex couples did not have access to marriage nor civil unions in Spain. In fact, the Court had to decide in a similar LGBT rights case two years later, in *Mata Estevez v Spain* App no 56501/00 (ECtHR, 5 May 2001) – and applied a different logic.

[1336] Indeed, the applicant in *MW v UK* raised exactly these claims in relation with bereavement payments. *MW v UK* App no 11313/02 (ECtHR, 23 June 2009). See also *infra,* note 1340.

[1337] *Hay* (Case C-267/12) [2013]paras 42-44. In this case, the CJEU put emphasis on the fact that same-sex couples registered under the PACS (as opposed to opposite-sex couples registered under the PACS) *did not have the legal choice* to marry. Thus, a same-sex registered partner was in a comparable situation to a spouse, rather than a registered opposite-sex partner for the purpose of the employment benefits at hand.

[1338] It needs to be pointed out that the Court does not make this comparison explicit – but it is, in my opinion, the obvious consequence from the Court's argumentation.

to formalize their relationship) and married partners. The applicant in *Mata Estevez v Spain*[1339] had lived in a long-term homosexual relationship when his partner died. The applicant was not entitled to receive a survivor's pension due to the fact that Spanish law excluded homosexual couples – as well as unmarried heterosexual partners, who were not allowed to remarry before divorce laws were introduced in 1981 – from eligibility. He claimed a violation of Article 14 in conjunction with Article 8 (family life).

The Court established that while the applicant certainly enjoyed the protection of private life according to Article 8, his relationship could not be considered to constitute a family in the sense of Article 8. The Court indicated that its assessment might have turned out differently if the applicant's partner would have been of the opposite sex. The application was deemed inadmissible.[1340]

Here, the Court basically reinforced two notions: First, the suggestion that unmarried *heterosexual* couples (without children, in this case) might enjoy the protection of family life under Article 8 ECHR. Second, it confirmed the wide margin of appreciation that states could rely on when treating homosexual couples different from (married) heterosexual couples; a legitimate reason and proportionate means of achieving this aim were all they had to show.

This line of argumentation could be viewed as somewhat logically *inconsistent*: Since the Court

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[1339] *Mata Estevez* App no 56501/00.

[1340] A very similar case reached the Court a year later, in *MW v UK*. The applicant had lived in a stable homosexual relationship. At the time of his application, same-sex partnerships were not formally recognised by the UK. Bereavement payments were only available to partners who had been married to the deceased. The applicant claimed that this was discriminatory according to Article 14 in conjunction with Article 8 ECHR, among others. In 2009 – seven years after the filing of the application – the Court decided on the admissibility of the application. It circumvented a substantial assessment of the question whether same-sex partners without the possibility to marry must be treated differently to unmarried heterosexual partners by pointing to the fact that the UK had, in the meantime, introduced legislation that made it possible for same-sex couples to formalize their relationship (the Civil Partnership Act), which also expanded the eligibility criteria for bereavement payments to same-sex relationships. The Court remarked that the government could not be scolded for not introducing the Act at an earlier date, and thus declared the application manifestly ill founded and inadmissible. *MW v UK* App no 11313/02. A year later, the Court addressed the question of discrimination against unmarried same-sex couples more at length, in *Kozak* App no 13102/02; *Schalk & Kopf* App no 30141/04; and *PB & JS* App no 18984/02.

generally accepted the protection of traditional families as a legitimate aim, it is not quite explicable why this aim would somehow be more convincing when applied to unmarried same-sex couples, and might not be equally convincing when used against unmarried different-sex couples. After all, cohabitation without marriage cannot really be qualified as "traditional" in many societies, even if the couple is heterosexual. The concept of a "traditional family" is in itself *defined by law*; in a country without divorce laws until 1981, divorce and subsequent remarriage can certainly *not* be deemed traditional. The very non-existence of divorce laws points to the fact that traditional families in such a society can only be formed by a man and a woman who marry *once* – a view that was successfully upheld by Spain and accepted by the Court in *Saucedo Gómez* only two years earlier.[1341] If the protection of the traditional family is a valid rationale, it certainly must also apply to heterosexual adulterers in a society where divorce is not part of the legal history.

Moreover, the Court constructed the importance of personal choice in an *inconsistent* way, especially considering the importance it had afforded to the possibility of personal choice in *Saucedo Gómez*. The absence of divorce laws – preventing re-marriage – can easily be compared to the absence of laws that recognise same-sex relationships, effectively preventing homosexual couples from *making the choice* to formalize their status. Hence, there is a point to be made that the Court displayed *inconsistencies* in its case law.

The inadmissibility decision in *Mata Estevez* was not the end of the road for gay couples, but rather raised a number of new questions and possible counter-arguments.

### 15.2.3. Same-Sex Parenthood – When Children are Involved

In the late 1990s and early 2000s, the Court still seemed unsure of where it was going. In 1999, it found in *Salguiero da Silva Mouta* (1999)[1342] that the applicant's sexual orientation was not a legitimate reason to withhold visitation and custody rights. The Court reiterated that Article 14

[1341] *Saucedo Gómez* App no 37784/97.

[1342] *Salguiero Silva da Mouta* App no 33290/96.

afforded protection against differential treatment without an objective and reasonable justification to persons in similar situations. This justification required a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[1343] This was absent in the present case; hence, the Court found that the differential treatment based on sexual orientation by Portuguese authorities amounted to sexual orientation discrimination under Article 8 taken in conjunction with Article 14.[1344]

However, the Court showed three years later in in *Fretté v France*[1345] that it still held a somewhat ambiguous position with regards to LGBT rights. In *Fretté*, a gay man was prevented from adopting a child based on his sexual orientation, and claimed that this was a discriminatory violation of his right to family life. The Court, in assessing whether discrimination according to Article 14 in conjunction with Article 8 had taken place, felt the need to ponder on the breadth of the margin of appreciation that Member States enjoyed in this respect[1346] – a sign that it slowly started to question the wide margin of appreciation that it had assumed in previous cases.

In *Fretté,* the Court relied heavily on the concept of *consensus* among its Member States for defining the width of the margin of appreciation. Indeed, the construction of *consensus* in this case is particularly interesting. The French government held that there was no *consensus* among the Member States on the issue of same-sex adoption – neither legally (since only the Netherlands had recently adopted legislation on same-sex adoption), nor scientifically, since the scientific community was divided concerning possible detrimental ramifications for children raised by same-sex parents.[1347]

The applicant also referred to *consensus* – in a very different interpretation. He claimed that there was no *consensus* among democratic societies that homosexuals should *be barred* to adopt at all. Similarly, he argued that negative long-term consequences for a child in a gay household

[1343] Ibid, paras 26, 29.

[1344] Ibid, para 36.

[1345] *Fretté* App no 36515/97.

[1346] Ibid, para 40.

[1347] Ibid, para 36.

were not a scientific fact, but rather, a matter of contentious discourse that was informed by homophobic prejudice.[1348]

The Court interpreted the Member States' silence on this issue as an argument in favour of the *status quo*. Even though most States did not expressly prohibit homosexual individuals from adopting if single different-sex persons were *also* allowed to adopt, the Court reached the conclusion that that same-sex adoption was *not expressly permitted* in many countries, and that therefore, it would accept France's position.[1349] It also weighed the disagreement in the scientific community in the government's favour. Thus, the Court held that France enjoyed a wide margin of appreciation, which meant that France only needed to advance "objective and reasonable grounds"[1350] for making a distinction based on homosexuality. The Court indeed limited its scrutiny test to its analysis of "consensus," thus making the *existence of consensus* into the *benchmark* for the justification for disparate treatment.

Judges Bratza, Fuhrmann and Tulkens criticised the majority's reliance on consensus in their partly dissenting opinion. They questioned the high priority given to consensus in situations where discrimination was involved, since this

> "paves the way for States to be given total discretion, … [which is] at variance with the Court's case law relating to Article 14 of the Convention, and, [which is], when couched in such general terms, liable to take the protection of fundamental rights backwards."[1351]

In any case, the Court also issued a warning regarding the margin of appreciation it had afforded:

> "This margin of appreciation should not, however, be interpreted as granting the State arbitrary power, and the authorities' decision remains subject to review by the Court for conformity with the requirements of Article 14 of the Convention."[1352]

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[1348] Ibid, para 35.

[1349] Ibid, paras 41-43.

[1350] Ibid, para 43.

[1351] Joint Partly Dissenting Opinion by Judges Bratza, Fuhrmann and Tulkens, *Fretté* App no 36515/97, para 2(c).

[1352] *Fretté* App no 36515/97, para 41.

Even though it thus remained quite vague, it kept a door open to revisit this issue later.

Another interesting observation is made by Judges Costa, Jungwiert and Traja in their partly concurring opinion. They reflected on why they thought that in the context of sexual orientation, the Court required weighty reasons for justification for certain types of interferences in Article 8, such as in cases like *Dudgeon* (a case dealing with the criminalization of sexual acts between two men) – but was satisfied with a legitimate aim and proportionate measures on other occasions, such as in the present case.[1353] In the first set of cases, according to the Judges, there had been an interference in the applicants' private lives. In the case at hand, however, there was no such interference, because the applicant *had not formed a family yet* – and the right to *form* a family was not protected by Article 8 ECHR, according to the Judges. A similar point was also made by the Court in the majority opinion.[1354] However, the Court did not take into consideration that the French law's blanket prohibition of adoption for homosexual people not only prevented *the formation* of a family, but also made it impossible to legitimize pre-existing *de facto* family ties (albeit this was not the concrete issue in the present case). In any case, the Court accepted the government's claim that denying the applicant's adoption followed the legitimate aim of protecting the traditional family.

Nonetheless, this line of argumentation is illuminating in terms of future litigation opportunities:

*First*, the Court's display of increasing *hesitation* as to the width of the margin of appreciation afforded to States in the area of sexual orientation is noteworthy, claiming that the wide margin of appreciation it had afforded in the present case remained "subject to review by the Court."[1355] In fact, *Fretté* seems to reflect general perplexity and *hesitation* regarding same-sex rights. Even though the majority opinion ultimately reached the conclusion that there was no violation of

[1353] Joint Partly Concurring Opinion by Judge Costa, joined by Judges Jungwiert and Traja, *Fretté* App no 36515/97, para 1.

[1354] *Fretté* App no 36515/97, para 42.

[1355] Ibid, para 41.

Article 14 in conjunction with Article 8 ECHR,[1356] a lot of question marks remained, as put into words by the partly concurring opinion of Judge Costa joined by Judges Jungwiert and Traja:

> "Might it legitimately be said that the very reasons for the negative response constituted an interference in his private life in that they stigmatised a certain choice of lifestyle? There may be some hesitation on this point but ultimately I do not believe it can be true …."[1357]

*Second*, this decision displays *inconsistency.* As the partly dissenting opinion pointed out, the best interest of the child should have been included in the examination of the facts at hand – but the Court had not yet found a consistent way to deal with gay parenthood. Although it upheld the "best interest of the child" as one of its most important doctrines in other cases, it seemed to consider it less of an imperative in cases involving sexual orientation,[1358] without providing reasons for this *inconsistency* (even though it did mention shortly – without dwelling on the issue – that the scientific community was divided on the "possible consequences of a child being adopted by one or more homosexual parents").[1359]

*Third*, this case is interesting in terms of the Court's reliance on *consensus* among its Member States. Unsure of how to react to a new, but increasingly common phenomenon – same-sex parenting – it examined "common ground" among the Member States and came to the conclusion that there wasn't any. Interestingly, the Court accepted the government's suggestion on how to construct "consensus," instead of following the more progressive suggestion by the applicant or the third party interveners.

This situation points to important issues regarding *consensus*: Both the applicant and the

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[1356] Ibid, para 43.

[1357] Joint Partly Concurring Opinion by Judge Costa, joined by Judges Jungwiert and Traja, *Fretté* App no 36515/97, para 1.

[1358] Consequently, Judges Bratza, Fuhrmann and Tulkens mentioned in their partly dissenting opinion that the assessment of the best interest of the child had been somewhat neglected by focusing too much on the State's discretion. Joint Partly Dissenting Opinion by Judges Bratza, Fuhrmann and Tulkens, *Fretté* App no 36515/97, para 2(c).

[1359] *Fretté* App no 36515/97, para 42.

government alluded to the legal situation; whereas France held that there was no consensus regarding legislation *allowing* same-sex adoption, the applicant argued that there was no consensus regarding legislation *prohibiting* same-sex adoption. Both the applicant and the government also contended that scientists were divided on this issue (but gave different reasons for this division). This begs the question: How is *consensus* constructed in situations where the community is *divided*? And who *benefits* from uncertainties regarding the prevalent *consensus* – the Member State or the applicant?[1360] In this case, however, the Court sided with the government.[1361]

Indeed, the mere use of the concept of *consensus* in this case is not without contention, as the opinion of the partly dissenting judges demonstrates.[1362] Overly relying on consensus in discrimination cases would in essence pervert the idea of safeguarding fundamental rights (which often do not follow the logic of the majority), as the judges pointed out.

This case also illuminates how activists have actively tried to find LGBT-friendly constructions of *consensus* – albeit, this time, without success.

*Fourth*, the high level of *disagreement* in this case – three judges were partly dissenting and three judges partly concurring, but insisting to deliver their own opinion – implies that the Court was far from sure that what it was claiming here was carved in stone; it seemed to literally invite suggestions to help it conceptualise a more coherent approach – a perfect opportunity for resourceful activists to step in and make a convincing case.

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[1360] Greer writes that in the context of cases under Article 8 to 11: "…it must be shown that the interference in question was necessary in a democratic society for one or more of these exceptions. It is not, however, clear when defendant states have the responsibility to prove that this was the case, or litigants to show that it was not." Greer, *The Interpretation of the European Convention on Human Rights: Universal Principle or Margin or Appreciation*, 9.

[1361] *Fretté* App no 36515/97, paras 41-43.

[1362] Joint Partly Dissenting Opinion by Judges Bratza, Fuhrmann and Tulkens, *Fretté* App no 36515/97, para 2(c).

The U.S. Supreme Court, for example, has stated in its seminal decision *Palmore v Sidoti* that views existent in a social reality which amount to prejudice may not be regarded as relevant in its jurisprudence. *Palmore v Sidoti,* 466 U.S. 429 (1984) (USA), para 433.

And, as we shall see, they have succeeded in later judgments.

### 15.2.4. Narrowing the Margin of Appreciation and Accepting Activists as Experts

In *Karner v Austria* (2003),[1363] the (male) applicant had lived in a stable relationship with another man; after the death of his partner, he faced eviction from the shared residence, since his partner had been the only legal tenant. In Austria, family members had a right to succeed to a tenancy; the applicant claimed that his eviction therefore would amount to a violation of Article 14 in conjunction with Article 8 ECHR. The Court found that there had indeed been a violation of Article 14 in conjunction with Article 8.[1364]

In *Karner,* the readiness of the Court to accept the "traditional family protection" rationale started to diminish. While the Court still accepted the protection of the "traditional family" as a potentially legitimate reason for interference,[1365] it stated that

> "*very weighty reasons* would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention … Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification ... ."[1366] (*emphasis added*)

It also promoted its "proportionality" test to a "necessity" test – and, according to the Court, Austria had failed to convincingly show why the exclusion of homosexual people was *necessary*

[1363] *Karner* App no 40016/98.

[1364] In *Kozak v Poland*, a similarly situated case, the Court also reiterates its view that homosexual partners could not be *prima facie* excluded from the succession to tenancy rights. It also didn't accept the "protection of the traditional family" rationale. *Kozak* App no 13102/02.

[1365] *Karner* App no 40016/98, para 40.

[1366] Ibid, para 37.

to protect the traditional family.[1367]

The Court was aware that *Karner* was, to a certain degree, a game-changer. It was also conscious of its policy making responsibility:

> "The Court has repeatedly stated that its 'judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention …' … . Although the primary purpose of the Convention system is to provide individual relief, *its mission is also to determine issues on public-policy grounds in the common interest*, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States." (*citations omitted*) (*emphasis added*)[1368]

In *Karner*, advocacy groups have effectively been able to engage in an exchange of ideas with the Court, which ultimately led to a reconsideration of the Court's previous case law. Robert Wintemute, submitting written comments on behalf of ILGA-Europe, Liberty and Stonewall,[1369] outlined some points (which the Court explicitly referred to later in its judgment) as reasons to rethink the width of the margin of appreciation afforded to states. Wintemute argued that this margin should (always) be narrow when it comes to sexual orientation; and he succeeded. In its judgement, the Court explicitly referred to the *written comments* and effectively followed their reasoning.[1370] It also relied on the *expertise* and evaluation of advocacy groups when

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[1367] "The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people ... The Court cannot see that the Government have advanced any arguments that would allow such a conclusion. ... Accordingly, the Court finds that the Government have not offered convincing and weighty reasons justifying the narrow interpretation of section 14(3) of the Rent Act that prevented a surviving partner of a couple of the same sex from relying on that provision." Ibid, para 41.

[1368] Ibid, para 26.

[1369] Joint Written Comments of ILGA-Europe, Liberty and Stonewall (submitted 12 March 2002) to *Karner v Austria* App no 40016/98 (ECtHR, 24 July 2003).

[1370] *Karner* App no 40016/98, paras 36, 37.

determining the scope and nature of a changed social reality,[1371] expressly mentioning the interventions of several LGBT rights groups:

> The Court considers that the subject matter of the present application – the difference in treatment of homosexuals as regards succession to tenancies under Austrian law – involves an important question of general interest not only for Austria but also for other States Parties to the Convention. *In this connection the Court refers to the submissions made by ILGA-Europe, Liberty and Stonewall, whose intervention in the proceedings as third parties was authorised as it highlights the general importance of the issue.* Thus, the continued examination of the present application would contribute to elucidate, safeguard and develop the standards of protection under the Convention."[1372] (*emphasis added*)

Remarkably, the Court not only processed the expertise and opinions of advocacy groups whilst deliberating; it included their intervention explicitly *in the judgement itself,* thus clearly making their reasoning part of the judicial discourse.[1373]

*Karner* marked the beginning of an upward trend in same-sex rights litigation before the ECtHR, a groundbreaking departure from the Court's previous decisions in similar matters.

*First*, the Court changed the margin of appreciation assessment, thus creating a stricter standard for discrimination based on sexual orientation under Article 14. Therefore, it diminished its previous *inconsistency* regarding the breadth of the margin of appreciation in sexual orientation claims under Article 8, which had varied in cases such as *Dudgeon* and *Fretté*.

*Second*, *Karner* shows that activists are recognised as *experts* by the Court. This is an invaluable advantage, since it equips their arguments with additional weight; an assessment confirmed by

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[1371] Ibid, para 36.

[1372] Ibid, paras 26, 27.

[1373] By including their arguments in the judgement, the Court made their reasoning part of the judicial discourse. An optimistic view might take this as proof that civil society can, effectively, participate in judicial decision making by raising good points. See also, in this respect, Robertson, *The Judge as Political Theorist. Contemporary Constitutional Review*, 36.

activists.[1374]

And *third*, this case indicates that the Court was starting to question the "traditional family rationale," a first important step on the way towards a reconstruction of the term "family" under the ECHR that would allow for the inclusion of same-sex families. However, at this stage, the Court left the question of whether homosexual couples could form a "family" according to Article 8 explicitly open.[1375]

This development reshaped the basis that activist lawyers could now argue from.

### 15.2.5. We Are Family: Including Changing Realities in the Court's Adjudication

The year 2008 marked an upward trend for same-sex families in Strasbourg. In *EB v France*,[1376] the Court examined a case that was similarly situated as *Fretté* a few years earlier. A lesbian woman wanted to adopt a child as a single parent. Her petition was rejected. The official reason given was that the child would lack a father figure in its life, and that thus, the adoption was not in the child's best interest.

It is noteworthy that the French government did not try to argue that it was possibly not in the best interest of a child to be raised by a same-sex parent, as it still had done six years earlier in *Fretté*.[1377] Instead, it denied that the sexual orientation of the applicant had even figured into the outcome of her adoption petition.[1378] French authorities had, however, referred to EB's lifestyle repeatedly and implied that her relationship (with another woman) would provide an unstable environment for a child, since it was not clear whether EB's partner would stick around or not

[1374] Matthew Evans, AIRE Centre, London, GB (2014); Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014); Robert Wintemute, King's College London (2014).

[1375] *Karner* App no 40016/98, para 33.

[1376] *EB* App no 43546/02.

[1377] *Fretté* App no 36515/97, para 36.

[1378] *EB* App no 43546/02, para 39.

(even though the two women had lived in a durable relationship for many years).[1379] Notwithstanding the fact that the French government refrained from expressly mentioning "traditional families," it seems likely that the core of the "lack of paternal referent" argument basically carried the same conviction: the traditional family is the best place for a child.

This line of reasoning was rejected by the Court, mostly due to the fact that French legislation did allow for adoption by single parents.[1380] After all, if a single heterosexual woman adopted a child, the lack of a father figure would be just as blatant. The Court went to great lengths to show that the *actual* reason for the authorities' refusal to let the applicant adopt was her sexual orientation; having established this, it reiterated, with newly found consistency, that "[w]here sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment... ."[1381] Ultimately, the Court found that there had been a violation of Article 14 taken in conjunction with Article 8. Hence, *EB* implicitly overruled *Fretté*.[1382]

A very interesting aspect of this case concerns the construction of *consensus*, and the strategic choices of activist lawyers in this regard, as illustrated in the joint submissions by a number of LGBT and human rights groups[1383] and written by Professor Robert Wintemute, who had also participated in *Fretté*. Wintemute explained:

> "The easiest way to show a change in European consensus is when you have a majority of negative laws that are gradually repealed and become a minority. Or, conversely, if you have a majority [of countries] with *no* laws – no laws recognising same-sex couples – and gradually, that becomes a minority with no laws [as in *Oliari*].[1384] ... What is less

[1379] *Fretté* App no 36515/97, paras 10, 24, 25, 85.

[1380] *EB* App no 43546/02, paras 86, 87, 94.

[1381] Ibid, para 91.

[1382] Robert Wintemute, 'Sexual Orientation and Gender Identity Discrimination: The Case Law of the European Court of Human Rights and the European Court of Justice' (2008), Summary prepared for ILGA-Europe to submit to Mr. Thomas Hammarberg, Commissioner for Human Rights, Council of Europe, 5.

[1383] Written Comments of FIDH, ILGA-EUROPE, BAAF & APG, submitted on 3 June 2005 to *EB v France* App no 43546/02 (ECtHR, 22 January 2008).

[1384] *Oliari* App nos 18766/11 and 36030/11.

persuasive is silence from the legislature, because it's ambiguous."[1385]

Taking this in mind, interveners changed their approach in *EB*. The *subject* of the proposed *consensus* examination was *not* the legal treatment of same-sex parenting by the Member States, since most Member States' legislations were silent on the matter – a fact that had led to a disadvantageous interpretation of consensus by the Court in *Fretté*.[1386] Rather, third party interveners – quite smartly – turned the examination around and argued that most countries that had single-parent adoption *also potentially allowed* same-sex individuals to adopt (even though in practice, the adoption practice might not be entirely equal). In France, the highest administrative Court had repeatedly upheld the authorities' practice of refusing adoption rights to homosexual individuals – which in essence amounted to a discriminatory exclusion of homosexual individuals *solely* based on their sexual orientation.[1387]

In case the Court might think that the absence of *explicit* legislation on single-parent adoption by homosexual individuals meant that there was no conclusive *consensus* on the matter, interveners offered additional evidence. They argued that there was a growing trend of recognising *even the more controversial joint and second-parent* adoptions by same-sex couples. This indicated that even if Member States *did not pass concrete legislation* allowing single-parent adoption by gay persons, this did not automatically mean that they *objected* it. Although these countries remained silent on this *particular* issue, this silence could not be interpreted as a rejection of same-sex single parenting – on the contrary. After all, "national legislatures and courts ha[d] been 'forced to speak' in matters of second-parent and joint adoptions."[1388] *Argumentum a mairori ad minus*, this meant that since there was a trend of accepting *even* two-parent same-sex adoptions, there certainly was consensus on the permissibility of one-parent adoptions by homosexual individuals – *if* the States allowed single-parent adoptions in general.

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[1385] Robert Wintemute, King's College London (2014).

[1386] *Fretté* App no 36515/97, paras 41-43.

[1387] Written Comments of FIDH, ILGA-EUROPE, BAAF & APG, submitted on 3 June 2005 to *EB* App no 43546/02, paras 7-9.

[1388] Ibid, paras 10-13.

In other words: While in *Fretté,* the strategy had been to construct consensus based on the lack of adoption bans (i.e., the silence on this issue in Member States), in *EB*, interveners tried to show that a) the present case focused on *single parent* adoptions (as opposed to same-sex parenting in general), and b) that there was a *trend* even towards the acceptance of the more controversial joint adoption by same-sex parents.[1389] Both things together pointed to the fact that if States permitted single-parent adoptions, there was a *consensus* that homosexual individuals were included.

This strategy proved more successful than the one adopted in *Fretté*. Even though the Court did not conduct an explicit consensus examination in *EB*, it mentioned the arguments on consensus brought forward by both the government[1390] and the applicant.[1391] It also explicitly stated that the Convention was a living instrument, to be interpreted in the light of present-day conditions.[1392] Ultimately, the Court found that in a context that allowed individual adoption, distinguishing potential adoptive parents solely based on sexual orientation amounted to discrimination.[1393]

The *choice of comparator* was a very important strategic decision by the interveners in this case. As mentioned, they did not insist on the comparability of same-sex parents to different-sex parents, but focused on the rights afforded to a homosexual individual im comparison to a heterosexual individual. Since heterosexual individuals were allowed to adopt – and homosexual individuals weren't – the only distinction, it was argued, was their sexual orientation. And this kind of disparate treatment amounted to discrimination.[1394] The Court agreed.

Four years later, the Court expressly included same-sex constellations in the protection of "family" under Article 8. In *Schalk & Kopf v Austria*,[1395] the ECtHR recognised for the first time

[1389] Robert Wintemute, King's College London (2014).

[1390] *EB* App no 43546/02, para 65.

[1391] Ibid, paras 60, 61.

[1392] Ibid, para 92.

[1393] Ibid, paras 93, 94, 96.

[1394] Robert Wintemute, King's College London (2014).

[1395] *Schalk & Kopf* App no 30141/04.

that homosexual partners could form a *de facto* family.

In order to support its decision, the Court again examined *consensus*. It referred to a *trend* among the legal situations within its Member States (noting that there was an emerging European consensus toward recognition of same-sex couples),[1396] and also to "social attitudes" more generally.[1397] Moreover, it held that "[c]ertain provisions of European Union law also reflect a *growing tendency* to include same-sex couples in the notion of family."[1398]

This judgment once again illuminates the importance of *consensus*, especially in cases that mark a transition in the Court's case law towards more inclusive approaches, fuelled by activist input.[1399] It is notable that this time, the ECtHR applied a particularly vague definition for consensus (evolution of social attitudes), and especially that it also looks at EU law for guidance when establishing consensus.

Ultimately, the ECtHR recognised a "rapid evolution of social attitudes towards same-sex couples,"[1400] which led the Court to its most important finding:

> "In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would. … The Court therefore concludes that the facts of the present case fall within the notion of

[1396] Ibid, para 105.

[1397] Ibid, para 93.

[1398] Ibid, para 93, citing para 26, broadly referring to the Charter of Fundamental Rights of the EU, as well as the Family Reunification Directive and the Citizens' Rights Directive. Interestingly, the ECtHR seems to deduce that these materials might include same-sex families – years before *Coman* was decided. *Coman and Others* (Case C-673/16) [2018]. See discussion of *Coman i*n Section 12.3.

[1399] Robert Wintemute, King's College London (2014); Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014); Matthew Evans, AIRE Centre, London, GB (2014).

[1400] *Schalk & Kopf* App no 30141/04, para 93.

'private life' as well as 'family life' within the meaning of Article 8… .“[1401]

However, given that Austria had in the meantime introduced the Registered Partnership Act, which provided certain rights to stable homosexual relationships (with regard to, e.g., tenancy, inheritance and other associated rights), the Court ultimately saw no violation of Article 8 in conjunction with Article 14.[1402]

Nonetheless, *Schalk & Kopf* was a huge step towards the recognition of same-sex families. A victory, however, to be celebrated with caution; the Court did not go so far as to present any kind of comprehensive theory of what the term “family” actually encompassed, under which conditions a family was created, or which features it displayed. Therefore, the Court’s statement that same-sex couples could also enjoy “family life” remained a somewhat vacant declaration. The joint dissent by Judges Rozakis, Spielmann and Jebens addressed this shortfall:

> “Having decided … that ‘the relationship of the applicants falls within the notion of ‘family life’, the Court should have drawn inferences from this finding. However … the Court at the same time endorses the legal vacuum at stake, without imposing on the respondent State any positive obligation to provide a satisfactory framework, offering the applicants, at least to a certain extent, the protection any family should enjoy.”[1403]

Even though the concrete meaning of “*de facto* families” remained *vague and ambiguous*, this judgment opened up numerous roads of argumentation for advocacy groups – especially regarding issues which still warrant a clear policy, such as, *inter alia*, artificial insemination, or the uncertainty whether and how fast states have to provide for legal recognition of gay partnerships. These questions were explicitly left unanswered by the Court in this judgement.[1404]

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[1401] Ibid, paras 94, 95.

[1402] Ibid, para 110. The applicants had also claimed a violation of Article 12 (right to marry). I will discuss this part of the judgment in Section 15.3.3.

[1403] Joint dissenting opinion by Judges Rozakis, Spielmann and Jebens, *Schalk & Kopf* App no 30141/04, para 4.

[1404] *Schalk & Kopf* App no 30141/04, paras 105, 109.

## 15.2.6. Zigzagging and Fall-Backs – New Inconsistencies in the Treatment of Same-Sex Families

While *EB* and *Schalk & Kopf* might be seen as victories in the struggle for LGBT rights, the story of the judicial acceptance of same-sex families is not linear. The Court continued to display *inconsistencies* in its construction of "family protection" under Article 8, as the cases *Gas & Dubois v France*[1405] and *X & Others v Austria*[1406] demonstrate.

Both cases dealt with the so-called "step parent adoption," meaning that the (same-sex) partner of a biological parent wanted to adopt their partner's child. The Court reached very different conclusions, even though these cases were decided less than a year apart – while it chose to use a highly formalistic line of argumentation to deny adoption rights to the applicant in *Gas and Dubois*, it went into a detailed and substantive examination in *X & Others*, ultimately deciding that Austria had erred to deny adoption.

The ECtHR decided *Gas and Dubois v France* in 2012. A French woman wanted to adopt the child of her female partner – the two women and the child had lived in the same household for many years, and the partners shared parental tasks. This would have been a perfect opportunity to put the concept of "*de facto* families" to use, more so since the two women had entered a civil partnership (PACS) and had both cared for the child from the moment of its birth. However, it did not occur to the Court to examine whether this constellation could enjoy the protection of "family life." Instead, it applied a rigid formalistic approach: it noted that "simple adoption" according to the French Civil Code provided for the transferral of custody rights from the original parent to the adoptive parent. The only way for someone to adopt her partner's child while her partner *maintained* custody was that the couple was married. Thus, in the present case, simple adoption was the only possible choice: this meant that the biological mother would lose custody, should her partner succeed with her adoption petition.[1407] These laws applied to unmarried homosexual and heterosexual couples alike; hence, the ECtHR found that there was

[1405] *Gas & Dubois* App no 25951/07.

[1406] *X & Others* App no 19010/07.

[1407] *Gas & Dubois* App no 25951/07, para 62.

no discrimination. The Court also observed that the two women were not allowed to marry in France, but held that this was legitimate, since the ECHR did not protect the *right to marry* of homosexual couples.[1408]

Analytically splitting the circumstances of the case into two separate legal questions to be examined – *first*, whether the French Code Civil made a difference between unmarried heterosexual and homosexual couples (it didn't), and *second*, whether gay couples had the right to marry under the Convention (they hadn't) – distorts the reality of the situation and is in stark contrast to the Court's previous case law.[1409] The Court did not question whether the respective provisions in the French Civil Code were problematic (since their construction obviously rendered joint gay parentage absolutely legally impossible, even though they did not *expressly* mention sexual orientation as an obstacle to adoption),[1410] nor did the Court consider the interest of the child or any functional tasks or emotional bonds which might have existed.

It was not unreasonable to expect that the ECtHR would draw the obvious parallel to its illegitimacy jurisprudence and examine the situation by at least taking into account the interest of the child (as the dissenting Judge Villiger points out).[1411] In cases such as *Marckx v Belgium*, the Court had established that Article 8 protected *de facto* families, irrespective of their legal status, claiming that the best interest of the child demanded respect for existing family ties.[1412] In later decisions, the Court repeatedly upheld this line of argumentation.[1413] In *Gas and Dubois*,

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[1408] Ibid, paras 66-68, 71.

[1409] In *EB v France*, for instance, the Court refused the formalistic argumentation of the French government and found that discrimination had taken place. *EB* App no 43546/02, para 91.

[1410] Which has repeatedly been recognised by the Court, e.g., in *Opuz v Turkey* App no 33401/02 (ECtHR, 9 June 2009), para 183; *Zarb Adami v Malta* App no 17209/02 (ECtHR, 20 June 2006), para 80; among others.

[1411] Dissenting Opinion by Judge Villiger, *Gas & Dubois* App no 25951/07.

[1412] *Marckx* App no 6833/74, para 31.

[1413] "According to the principles set out by the Court in its case-law, where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be created that render possible as from the moment of birth the child's integration in his family…" *Keegan v Ireland* App no 16969/90 (ECtHR, 26 May 1994), para 50.

however, it did not draw the obvious parallel.

This jurisprudence seemed to suggest, even to demand, a different outcome in *Gas and Dubois*. By its own standards, the Court was misguided to treat the issue at hand as a mere question of marital status (or the legitimacy of an absence thereof). It did not consider in any way whatsoever that the child was *born* into an existing family that, by its own definition, enjoyed the protection of family life under Article 8.[1414] After all, both women had served as mothers from the very beginning. Hence, recognising the applicant as a legal mother would merely have given legal legitimacy to an already existing situation.

The striking *inconsistency* and misplaced formalism that the Court applied here might be caused by various reasons, such as *hesitation* due to political pressure, or judicial restraint. However, it suffices to note that this decision is assailable on a theoretical as well as a casuistic level (for instance, by pointing out a myriad of different precedents that the Court could have drawn analogies to when deciding this case).[1415] Therefore, the disappointing outcome in *Gas and Dubois* should not discourage advocates from using the concept of *de facto* families to their advantage; and in fact, it didn't.

*Gas and Dubois* might have turned out differently if there was a transparent and systemically sound interpretation of what a *de facto* family actually was; then, the Court might not have gotten around examining whether the couple at hand and their child enjoyed the protection of

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"According to the principles set out by the Court in its case-law, where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible as from the moment of birth or as soon as practicable thereafter the child's integration in his family…", *Kroon & Others* App no 18535/91, para 32; and many more.

[1414] *Schalk & Kopf* App no 30141/04, paras 91, 95.

[1415] In this regard, Cass Sunstein's account on incompletely theorized judgments is noteworthy. Sunstein, *Legal Reasoning and Political Conflict*, 6-12.

"family life" under Article 8.[1416] The Court's unstructured and arbitrary use (or neglect of use) of the concept of *de facto* families was a disadvantage, but one which same-sex rights advocates might turn into an opportunity.

Indeed, just one year later, a very similar case was decided – with a significantly different outcome. In *X & Others v Austria*,[1417] the ECtHR had to deal with the case of a woman who wanted to adopt the (biological) child of her partner who had been raised by both partners since it was five years old. One of the women was its biological mother, whereas the other was the mother's long-term life partner. The father had recognised paternity, but the (biological) mother held sole custody. The Austrian authorities, while not questioning the love and support that the woman seeking to adopt had shown the child, found that Austrian law excluded the possibility of lesbian stepchild adoption.[1418] The case was examined by the Austrian Supreme Court (Oberster Gerichtshof) in 2006, which rejected the appeal as inadmissible.[1419] Among other things, it was of the opinion that an adoptive family should resemble the "natural family" (*natürliche Familie*), since only this would serve the best interest of the child.[1420] The argumentation of the Supreme Court reflects an invocation of the "traditional family protection" rationale, albeit in a biologist manifestation. It is interesting, however, that, in the proceedings before the ECtHR, the Austrian government did not raise the "traditional family rationale" as a main issue, but rather, as a side note.[1421] Arguably, the case law of the ECtHR in this matter had evolved enough to make the

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[1416] There is a point to be made that, when there are many possible ways to interpret a legislative provision, judges should favour the interpretation which best fits into the inherent systemic structure of the respective body of law. Dworkin, for instance, suggests that a judge faced with competing interpretations should seek to adopt the alternative which shows the law as a coherent whole – he calls this the principle of "adjudicative integrity." Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).

[1417] *X & Others* App no 19010/07.

[1418] § 182 (2) Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) 1.1.1812 JGS Nr. 946/1811 (ABGB) (as amended).

[1419] OGH 27.9.2006, 9Ob 62/06t (AUT).

[1420] The Supreme Court holds: "… the main purpose of an adoption shall be the furtherance of the interest of the … child (doctrine of protection). … However, this purpose can only be achieved if by the adoption, the situation of a natural family is recreated as much as possible." *("… Hauptzweck der Kindesannahme [soll] die Förderung des Wohles des … Kindes sein (Schutzprinzip). … Dieser Zweck könne aber nur dann erreicht werden, wenn durch die Kindesannahme die Verhältnisse in der natürlichen Familie möglichst nachgebildet werden.")* In my own translation. OGH 27.9.2006, 9Ob 62/06t (AUT).

[1421] *X & Others* App no 19010/07, para 76.

government realize the futility of such an endeavour. It was, however, of the opinion that governments enjoyed a wide margin of appreciation in the issue of second-parent adoption by same-sex partners.[1422]

The Austrian government's argumentation is a prime example of distorting the circumstances by juggling with legal technicalities.[1423] First, it discussed a formality – the fact that the biological father had not given his consent to the adoption – which was dismissed by the ECtHR based on the fact that there had not even been an evaluation of whether his consent could have been replaced, an option provided for by Austrian law.[1424] The government also failed to advance more principled arguments – for instance, discussing what would have happened if the consent *would* have been given. In any case, the Austrian Civil Code prohibited *in principle* the adoption of a child by a man, as long as the (legal) ties to the biological father were not severed, or by a woman, as long as the (legal) ties to the biological mother still existed,[1425] which rendered same-sex step parent adoptions legally impossible: In other words, if the biological parent of a child (in this case, the mother) did not want to give up her parental rights, there was no legal option to add a second parent of the same sex (in this case, another mother).[1426]

Nonetheless, the government stated that this did not amount to difference in treatment based on sexual orientation, because same-sex partners were not the only ones prevented from adopting a child while there was still an existing relationship with a parent of the same sex. The same would have applied, for instance, to an aunt who wished to adopt her nephew, as long as the mother still

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[1422] Ibid, para 77.

[1423] Ibid, paras 70-77.

[1424] Ibid, paras 114-125.

[1425] § 182 (2) Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) 1.1.1812 JGS Nr. 946/1811 (ABGB) (as amended).

[1426] It should be mentioned at this point that at the time of this decision, the Austrian Partnership Act ("*Eingetragene Partnerschafts-Gesetz*"), which regulates the relations between same-sex couples was not yet in force. *Eingetragene Partnerschafts-Gesetz (EPG)*, FamRÄG 2009, BGBl I 2009/135. However, this law wouldn't have changed the legal situation for same-sex stepparent adoption – on the contrary, it reinforced the prohibition of same-sex stepparent adoption: In § 8(4), the EPG explicitly stated that same-sex partners are not allowed to adopt the child of their partner. This prohibition was eventually voided by the Austrian Constitutional Court, VfGH 21.01.2015, BGBl. I Nr. 25/2015 (AUT).

held legal custody of the child.[1427] Generally, the government concluded, it was appropriate to use the law to avoid a situation where a child had two mothers or two fathers – and this didn't amount to discrimination, based on the fact that it applied to everybody, disregarding their sexual orientation.

*X & Others* also is interesting in terms of the government's and the applicants' *choice of comparator*. While the Austrian government compared the situation of the applicants to that of any two women (such as cousins) who wished to adopt a child together, the applicants unsurprisingly chose a different comparator. They established the similarity of the situation of the applicants with the situation of *unmarried* heterosexual couples, pointing out that in the latter case, Austrian authorities would have carried out a detailed examination of whether the consent of the biological father could be replaced, in which case they would have granted adoption.[1428] Therefore, the difference in treatment was not based on the fact that the applicants weren't married – but on the fact of their sexual orientation alone. Thus, the adequate case to consider was *EB v France*.[1429] The submissions of third parties made the same point. [1430]

The ECtHR found that the fact that Austrian law allowed stepparent adoption for *unmarried* heterosexual couples was crucial in this case (and an essential difference to *Gas & Dubois*).[1431] Unmarried heterosexual couples did *not* enjoy any particular legal status; thus, the comparison of unmarried heterosexual and unmarried homosexual couples was legitimate. While the Court conceded that the relevant provision of the Austrian Civil Code was neutral at first glance, the provision did, *de facto*, exclude same-sex couples from stepparent adoption.[1432]

After a lengthy assessment of the facts and arguments at hand the Court made sure to assert once

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[1427] *X & Others* App no 19010/07, para 75.

[1428] Ibid, para 65.

[1429] Ibid, paras 65, 66.

[1430] Joint Written Comments of FIDH, ICJ, ILGA-Europe, BAAF, NELFA and ECSOL (submitted 1 August 2012) to *X & Others* App no 19010/07, para 3; *X & Others* App no 19010/07, para 78.

[1431] *X & Others* App no 19010/07, para 64.

[1432] Ibid, paras 114-116.

again that the case could not be compared to *Gas & Dubois*.[1433] Hence, it had no problems stating that a same-sex couple and their child enjoyed the protection of "family life" according to Article 8[1434] (referring explicitly to the importance of *de facto* family ties and the best interest of the child),[1435] and holding that despite the government's assertion to the contrary, there had been a difference in treatment linked to the applicants' sexual orientation.[1436] It reiterated that the margin of appreciation afforded to states was narrow when it came to sexual orientation discrimination – also in the area of family rights.[1437] Therefore, the Court placed the burden of proof on the government to show that the traditional family was, in fact, endangered by letting same-sex couples adopt the child of their partners.[1438] Thus, the Court refused to follow the government's argument that same-sex families somehow would undermine traditional families without further proof. Rather than accepting the common dichotomy between the traditional family (which, in the understanding of the Austrian government, was tantamount to the interest of the child) on one side, and the protection of same-sex families on the other, the Court's reasoning indeed seemed to suggest that this distinction was artificial at best. Particularly the use of the term "best interest of the child" supports this view: the government assumed it to be an argument in its favour, whereas the ECtHR clearly weighed it in favour of the applicants.[1439] However, without the "best interest of the child" giving force to the "traditional family" rationale – what is actually left worth protecting by this doctrine? In this sense, after *X & Others*, it might again be worthwhile to contrast future cases arising in this context with the ECtHR's jurisprudence on illegitimacy.[1440]

Regarding the choice of comparators, the strategy followed by the applicants in this case, when set against the bolder strategy in *Gas & Dubois*, is an example of how a more cautious approach

[1433] Ibid, para 131.

[1434] Ibid, paras 95-97.

[1435] Ibid, paras 145, 146.

[1436] Ibid, para 130.

[1437] Ibid, para 140.

[1438] Ibid, para 141.

[1439] Ibid, para 146.

[1440] E.g., *Marckx* App no 6833/74. Villiger's dissent in *Gas and Dubois* makes a similar point. Dissenting Opinion by Judge Villiger, *Gas & Dubois* App no 25951/07.

has led to success.[1441] Whereas in *Gas & Dubois*, the applicants tried to establish (indirect) discrimination with regard to married couples – and failed, due to the ECtHR's reluctance to examine indirect discrimination in connection with marriage status – the applicants in *X & Others* had more modest goals.[1442] They did not aim higher than at the equal treatment of non-married gay and straight couples in second parent adoptions. Indeed, after the ECtHR's landmark decision *EB v France*, the ECtHR arguably had not much choice but to recognise the parallels to the present case; after all, in the absence of a special status (such as marriage) it was hard to explain what a distinction was based on, if not sexual orientation itself.[1443]

Read together, *Gas & Dubois* and *X & Others* are highly illustrative cases when viewed under the lenses of a "litigation opportunities framework" since they *firstly* shed light on the restrictive approach of the Court when the status of "marriage" is involved, and thus, hint to possible strategic argumentation choices for advocates who promote same-sex families. A piece-meal approach that does not conflate the fight for marriage equality with the fight for adoption and other family rights might be indicated. Indeed, after the outcome in *Gas & Dubois*, activists had adapted their argumentation strategy[1444] – with success, as *X & Others* shows.

This assessment is shared by activists. Matthew Evans (AIRE Centre) explained, "one thing you don't want to do – you know, there's this phrase about 'startling the horses,' and actually, the ECtHR is a very conservative organisation. ... So yes, I think that [changes] are incremental."[1445]

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[1441] Indeed, the ECtHR insists that the issue it decides upon is very narrow, namely, the discrimination of unmarried heterosexual and homosexual couples with regard to stepparent adoption. *X & Others* App no 19010/07, para 134.

[1442] Indeed, the applicants changed their submission in this regard after the *Gas & Dubois* judgment, indicating a change in strategy. Concurring Opinion of Judge Spielmann, *X & Others* App no 19010/07, para 3.

[1443] As the Court has noted: "…in contrast to the comparison with a married couple, it has not been argued that a special legal status exists which would distinguish an unmarried heterosexual couple from a same-sex couple." *X & Others* App no 19010/07, para 112.

[1444] Interesting in this regard is also the concurring opinion of Justice Spielmann. He hinted that the present case didn't give rise to the necessity of examining the question of a comparison of married straight couples and same-sex couples, according to the applicants' submission (indeed, they changed their submission in this regard after the *Gas & Dubois* judgment). Concurring Opinion of Judge Spielmann, *X & Others* App no 19010/07, paras 1-3.

[1445] Matthew Evans, AIRE Centre, London, GB (2014).

The *second* point regards the way in which the Court dealt with *European consensus*.[1446] As in *Schalk & Kopf*,[1447] the Court asked whether there was a relevant European consensus regarding changing family notions and same-sex adoption. It came to the conclusion that there was none – however, in a surprising turn, it claimed this did not matter in this case. Instead, it redefined the subject of inquiry, explaining that the relevant question to ask was whether countries, allowing for second parent adoption of different-sex *unmarried* couples, would also allow second parent adoption by same-sex *unmarried* couples.[1448] Given this highly specific context matter, the Court stated that the sample was too small to provide any insights. Interestingly, it then turned to examine relevant international instruments, particularly the 2008 Convention on the Adoption of Children.[1449] It noted that Austria was a party to this convention, and also remarked that this Convention protected stable relationships between parents and children regardless of the parents' sexual orientation.

Moreover, the fact that the Court chose a particular query with very limited scope, concluding that the inquiry was inconclusive in this regard – *and interpreting this fact in favour of the applicant* (as opposed to *Fretté*)[1450] – indicates that it used "consensus" as an argument to support its reasoning, rather than as a source of knowledge in this instance. Here, it followed the suggestion of third party interveners.[1451] Had it chosen another subject – e.g., whether most Member States allowed step-parent adoptions by unmarried couples (including same-sex unmarried couples) – it might have reached a different result, as dissenting judges Casadevall,

[1446] *X & Others* App no 19010/07, para 139.

[1447] *Schalk & Kopf* App no 30141/04, para 93.

[1448] *X & Others* App no 19010/07, para 149.

[1449] Ibid, para 150.

[1450] See *supra*, at 285.

[1451] Joint Written Comments of FIDH, ICJ, ILGA-Europe, BAAF, NELFA and ECSOL (submitted 1 August 2012) to *X & Others* App no 19010/07, paras 16-19.

Ziemele, Kovler, Jočienė, Šikuta, de Gaetano and Sicilianos argued.[1452] Apart from once again showing the Court's *disagreement* regarding the construction of *consensus*, this case also reinforces the importance of *activist intervention* and the Court's occasional reliance on the arguments forwarded by activist lawyers.

Connected to this, *X & Others* and *Gas & Dubois thirdly* pose the question of the strategic choice regarding the right comparator in anti-discrimination cases. Who should a same-sex couple claiming discriminatory treatment be compared to – a married couple in the same position? An unmarried heterosexual couple? Should the children in such a constellation be compared to illegitimate children of heterosexual parents?

*Fourthly*, these cases are prime examples of continuing *inconsistencies* in the Court's construction of "family." Even though it had recognised *de facto* same-sex families, this does not mean that the Court always sticks to its own case law. Not only did the Court abandon a chance to apply its newly found expansion of the concept of *de facto* families in *Gas & Dubois* – it also showed complete disregard for its illegitimacy jurisprudence in this context, as the strong dissent in *Gas & Dubois* rightly pointed out. However, as seen above, this *inconsistency* can be interpreted as a an strategic litigation opportunity for future cases, since it might indicate that *Gas & Dubois* could henceforth be read as an exception, rather than a rule.

And *fifthly*, both cases illuminate the importance of filling the concept of "*de facto* families" with meaning – a task to which same-sex activists have contributed and continue to contribute by ways of offering expertise and interpretative guidelines. In fact, in *X & Others*, the Court, following the arguments of the applicants, seemed to not only abandon the "traditional family" argument when it came to same-sex partners and their children – it indeed appeared to deconstruct it, thus accepting the fluidity of the concept of "family" and dissolving the dichotomy between same-sex and different-sex families.

[1452] The joint partly dissenting opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, De Gaetano and Sicilianos points to this issue, stating that the methodology in the Court's assessment of consensus was lacking. Joint partly dissenting opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, De Gaetano and Sicilianos, *X & Others* App no 19010/07, paras 12-15.

## 15.2.7. Developing Same-Sex Families

*X & Others* can be read as a decisive commitment of the ECtHR to protect *de facto* same-sex families. In *Vallianatos & Others v Greece*,[1453] the Court continued along this line. It held that Greek legislation introducing registered partnerships for heterosexual couples *only* violated the Convention. Interestingly, the government reasoned that it had adopted registered partnerships to provide that children, born out of wedlock, would have some kind of legal protection, because the availability of registered partnerships made it easier for heterosexual couples who had conceived a child to formalize their union – even if they did not intend to marry. Since homosexual couples could not naturally conceive, they did not need to be included. At the same time, not allowing same-sex couples to register was presented as necessary to preserve the traditional family.[1454]

The absurdity of this argument reveals an underlying biologist bias[1455] – the Greek government considerably stretched the concept of "traditional" by missing the fact that "registered partnerships" are historically a rather recent development. Moreover, while claiming to protect the interests of children, it seemed to think that children of "natural" families deserved more protection than children growing up in same-sex families. The Court accordingly was not convinced.[1456]

In this case, both sides had relied on *European consensus*. The Court eventually chose to follow the view of the applicants and the third party interveners on the side of the applicants, referring to a "currently emerging" trend "with regard to the introduction of forms of legal recognition of same-sex relationships." Most importantly, it held that "out of nineteen States which authorise

[1453] *Vallianatos* App nos. 29381/09 and 32684/09.

[1454] Ibid; paras 62-63, 67.

[1455] Historians have time and again shown the historical contingency of concepts such as "natural family" or "natural parenthood." Especially in the context of gender, nature is often evoked to justify prevalent moral beliefs of a given time. For a comprehensive account of this, see Donna J. Haraway, *Simians, Cyborgs, and Women. The Reinvention of Nature* (Routledge 1991).

[1456] *Vallianatos* App nos. 29381/09 and 32684/09, paras 88-90.

some form of registered partnership other than marriage, Lithuania and Greece are the only ones to reserve it exclusively to different-sex couples."[1457] This was indeed exactly the approach that third party interveners had suggested.[1458] Robert Wintemute recalls,

> "The Greek government argued that the majority of countries in Europe did not have any law recognising same-sex couples. ... We argued well, that's not the relevant question. The question is: When a country decides to create an alternative to marriage, is it available at least to same-sex couples? And the answer was [yes], in all but two cases."[1459]

The Court again relied on a trend among Council of Europe states towards the legal recognition of same-sex partnerships in its *Oliari* decision.[1460] To establish *consensus*, third party interveners for the applicants provided a large comparative sample of national laws regarding civil unions and same-sex marriage, also including non-European countries.[1461] They contended that even if the Convention did not (yet) require access to marriage, not providing any kind of legal protection amounted to discrimination.[1462]

The Court first assessed the margin of appreciation in the present case, stating "[i]n the context of 'private life' the Court has considered that where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted."[1463] However, it also noted that the margin of appreciation was wider where no

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[1457] Ibid, para 91.

[1458] Written Comments of FIDH, ICJ, AIRE CENTRE and ILGA-EUROPE, submitted on 20 June 2011, *Vallianatos* App nos. 29381/09 and 32684/09, paras 2, 3, 5, appendix.

[1459] Robert Wintemute, King's College London (2014).

[1460] *Oliari* App nos 18766/11 and 36030/11, para 178.

[1461] Written Comments by Robert Wintemute on behalf of the non-governmental organisations FIDH (Fédération Internationale des Ligues de Droit de l'Homme), AIRE Centre (Advice on Individual Rights in Europe), ILGA-Europe (European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association), ECSOL (European Commission on Sexual Orientation Law), UFTDU (Unione forense per la tutela dei diritti umani) and LIDU (Lega Italiana dei Diritti dell'Uomo), *Oliari & Others v Italy* App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015).

[1462] *Oliari* App nos 18766/11 and 36030/11, paras 140-143.

[1463] Ibid, para 162.

consensus existed, especially if sensitive moral or ethical issues were concerned.[1464] But since the Italian legal system provided very little security for stable same-sex couples – here the Court pointed to statistics provided by the Italian human rights organisation Associazione Radicale Certi Diritti (ARCD)[1465] – and the movement towards recognition of same-sex couples had developed rapidly since its *Schalk & Kopf* judgement,[1466] the Court ultimately concluded that the Italian government had overstepped its margin of appreciation. Thus, there was a violation of Article 8 (it did not consider it necessary to go into an examination of Article 14).[1467]

The Court's opinion also dealt with the importance of *consensus* in the matter at hand. In fact, it seemed to view a heavy reliance on consensus with ambiguity, stating

> "[w]hile the Court can accept that the subject matter of the present case may be linked to sensitive moral or ethical issues which allow for a wider margin of appreciation in the absence of consensus among member States, it notes that the instant case is not concerned with certain specific "supplementary" (as opposed to core) rights which may or may not arise from such a union and which may be subject to fierce controversy in the light of their sensitive dimension. ... Indeed, the instant case concerns solely the general need for legal recognition and the core protection of the applicants as same-sex couples. The Court considers the latter to be facets of an individual's existence and identity to which the relevant margin should apply."[1468]

Many aspects are striking in this judgment.

*First*, the Court seemed to accept that a *same-sex relationship* – as opposed to only the *sexual orientation of an individual*[1469] – deserved protection as part of an individual's identity. It stated:

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[1464] Ibid, para 162.

[1465] Ibid, paras 171, 173; Associazione Radicale Certi Diritti <http://www.certidiritti.org/> (accessed 31 January 2018).

[1466] Ibid, para 178.

[1467] Ibid, paras 186, 187.

[1468] Ibid, para 177.

[1469] This was already established in *Dudgeon*. *Dudgeon* App no 7525/76, para 41.

> "Indeed, the instant case concerns solely the general need for legal recognition and the core protection of the applicants as same-sex couples. The Court considers the latter to be facets of an individual's existence and identity to which the relevant margin should apply." [1470]

*Oliari* might be the missing link between *Dudgeon*[1471] (sexual orientation is protected as part of an individual's identity) and *Schalk & Kopf*, where the Court had held that same-sex couples enjoyed family life, but hesitated drawing inferences from this judgment, as dissenting judges Rozakis, Spielmann and Jebens had pointed out.[1472] Consequently, the Court in *Oliari* mended an *inconsistency* in its *Schalk & Kopf* decision, which had already been recognised by the dissenters in *Schalk & Kopf*– or possibly a *hesitation*, as the Court itself held in *Oliari* (almost apologetically) that at the time of *Schalk & Kopf*,

> "the Court considered the area in question to be one of evolving rights with no established consensus, where States enjoyed a margin of appreciation in the timing of the introduction of legislative changes ... . Thus, the Court concluded that, though not in the vanguard, the Austrian legislator could not be reproached for not having introduced the Registered Partnership Act any earlier than 2010 ... ."[1473]

It becomes clear in the light of *Oliari* that the Court's refusal to go one step further in *Schalk & Kopf* was indeed an instance of *inconsistency and/or hesitation and disagreement*. As mentioned in the beginning, the distinction between these particular features is not always clear, and they often overlap; however, the result is the same: they present indicators that the Court might eventually change its mind.

*Secondly*, the Court's ambiguity towards *consensus* is interesting. While it admitted that it usually assumed a wide margin of appreciation when dealing with sensitive issues on which

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[1470] *Oliari* App nos 18766/11 and 36030/11, para 177.

[1471] *Dudgeon* App no 7525/76.

[1472] Joint dissenting opinion by Judges Rozakis, Spielmann and Jebens, *Schalk & Kopf* App no 30141/04, para 4.

[1473] *Oliari* App nos 18766/11 and 36030/11, para 163.

there was no *European consensus*, it seemed to suggest that core rights (as opposed to "supplementary" rights), arising from same-sex unions, could not be denied simply because there was "fierce discussion" on an issue.[1474] The need for legal recognition and core protection of same sex couples was such a right, touching on the individual identity of an person's existence. While the formulation in the Court's opinion is a bit laborious, it seemed to suggest nonetheless that at least where minimum standards of protection for same-sex couples were involved, a lack of *consensus* did not matter (as much). The Court undoubtedly referred to *consensus* anyway, claiming that there was a movement towards legal recognition of same-sex couples in Europe.[1475]

Connected to this is the *third* point: The Court, once again, referred to interveners' *expertise* – this time, for instance, regarding the statistics provided by ARCD.[1476]

And, *fourthly*, interveners chose a cautious, *incremental* strategy by focusing on registered partnership, instead of same-sex marriage.[1477] This apparently paid off; in the matter of marriage, which was also considered in the merits, the Court remained immovable.[1478]

## 15.2.8. Recent Developments: The Court's Ambiguity When Conceptualising New Forms of Family

In 2016 and 2017, the European Court of Human Rights decided a couple of cases on the issue of residence permits denied to stable same-sex partners of EU citizens, namely *Pajić v Croatia*[1479] and *Taddeucci and McCall v Italy*.[1480]

[1474] Ibid, para 177.

[1475] Ibid, para 178.

[1476] Ibid, paras 171, 173.

[1477] Ibid, para 189.

[1478] Ibid, paras 189-194.

[1479] *Pajić* App no 47082/12.

[1480] *Taddeucci* App no 51362/09.

In *Pajić*, the ECtHR found that treating a same-sex relationship differently than a heterosexual relationship amounted to discrimination based on sexual orientation and was thus a violation of Article 14 taken together with Article 8 (respect of private and family life) of the European Convention on Human Rights. Interestingly, the ECtHR found in *Taddeucci* that since the same-sex couple in question was not allowed to marry (nor enter any form of registered partnership) under Italian law, it was *not* in a *comparable situation* to an unmarried heterosexual couple with regards to residency rights (who, after all, *could* marry and thus obtain residency rights). And the fact that same-sex couples were treated *the same* as unmarried opposite-sex couples was – according to the ECtHR – *in itself* problematic.[1481] In other words: the *absence* of any possibility for same-sex couples to legalize their relationship and thus, gain residency rights, put them *in a different situation* than unmarried opposite-sex couples. However, the Italian authorities did not take this into account (without legitimate justification). Thus, the Court found a violation of Article 14 in conjunction with Article 8.[1482] This is, to a certain degree, vaguely reminiscent of the CJEU's argumentation in *Hay*.[1483]

Another important case in this context is *Orlandi & Others v Italy*,[1484] where the ECtHR had to decide a case of a same-sex couple who married abroad and were denied the recognition of their relationship (in any form) in Italy. The Court found that the fact that Italy provided no form of legal protection or recognition of their relationship was a violation of Article 8 ECHR. This was an impressive victory for same-sex family rights.[1485]

As promising as these developments seemed, the Court has fallen back into inconsistent approaches in its recent case law regarding the particular rights should be afforded to same-sex

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[1481] Ibid, paras 82, 83.

[1482] Ibid, paras 86-98. For an analysis of the case see: Nelleke Koffeman, 'Taddeucci and McCall v. Italy: Welcome Novelty in the ECtHR's Case-Law on Equal Treatment of Same-Sex Couples' (*strasbourgobservers.com,* 2016) <https://strasbourgobservers.com/2016/07/27/taddeucci-and-mccall-v-italy-welcome-novelty-in-the-ecthrs-case-law-on-equal-treatment-of-same-sex-couples/> accessed 11 May 2018.

[1483] See *supra,* note 1337.

[1484] *Orlandi* App nos 26431/12; 26742/12; 44057/12 and 60088/12.

[1485] Ibid, paras 209-211.

families. After important rulings strengthening same-sex families, the Court refused to go any further. In *Hallier*,[1486] applicants challenged the denial of paternity leave to the mother's registered same-sex partner. The Court contended that the disparate treatment was not grounded on sexual orientation, since paternity leave was restricted to biological fathers. Hence, if the mother would have been in a heterosexual relationship, her partner would not be considered for paternity leave either, if he was not the biological father. Thus, the government had acted within its margin of appreciation.[1487] The Court found the application inadmissible.

Another case is interesting in this context, even though it was already decided in 2013: In *Boeckel & Gessner-Boeckel*,[1488] the Court was asked to examine whether German authorities' refusal to register a same-sex partner in the birth certificate of a child, born into a same-sex registered partnership, amounted to a violation of Article 8 and to discrimination under Article 14 in conjunction with Article 8. The Court found both applications inadmissible for being manifestly ill founded, since the applicants were not in a similar situation to a married different-sex couple regarding a child's birth certificate.[1489] It noted that even though there was a (rebuttable) presumption of paternity regarding the mother's husband under German law – which meant that a birth certificate registration was not restricted to the *biological* father – this did not matter in the present case, because there was no factual foundation for a legal presumption that the child descended from the mother's same-sex partner.[1490]

These decisions are a disappointing reversal to antiquated notions of "biology." Even though the Court had refused lines of argumentation that circled around "natural conception" in *X & Others* or *Vallianatos*, it did not bother to evaluate whether such argumentation was legitimate in the present applications. This seems *inconsistent* in light of its previous case law; it is particularly surprising in *Hallier*. In *X & Others*, the Court had rejected the Austrian government's argument, which was largely based on a technicality – namely, that the Austrian Civil Code prohibited the

[1486] *Hallier & Others v France* App no 46386/10 (ECtHR, 18 January 2018).

[1487] Ibid, para 32.

[1488] *Boeckel* App no 8017/11.

[1489] Ibid, paras 29-33.

[1490] Ibid, para 30.

adoption of a step-child by a man, as long as the (legal) ties to the biological father were not severed, or by a woman, as long as the (legal) ties to the biological mother still existed,[1491] which rendered same-sex step parent adoptions legally impossible.[1492] Austria had contended that this didn't amount to discrimination based on sexual orientation, because any other *female* person might not have adopted the child, as well, such as an aunt or grandmother. The Court was also not convinced by Austria's reliance on the "natural family" as a legitimate model that adoptions should try to emanate.[1493]

In *Hallier*, however, the Court disregarded all that. It was satisfied with the formalistic justification of the French government – namely, that the present situation did not amount to discrimination, since even a *male* partner (who was not the biological parent) could not have applied for paternity leave. It disregarded that this evaluation, *de facto*, made it impossible for same-sex partners to ever enjoy paternity leave. It also did not challenge the biologist assumption[1494] underlying the restriction of paternity leave to *biological* fathers – just like in *Boeckel*, where it was also content with the notion that "natural conception" was the guiding principle for birth certificate registrations, and that thus, a presumption of parenthood could only apply to a mother's male, and not to her female, partner.[1495]

The Court's 2016 decision in *Aldeguer*[1496] also seems like a step back from the Court's increasingly progressive and consistent stance on LGBT rights. The facts of the case display parallels to *Karner*[1497] or *Kozak*,[1498] since *Aldeguer* concerned legal advantages attached to relationship status after a partner's death (*Karner* and *Kozak* dealt with the succession to the

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[1491] § 182 (2) Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) 1.1.1812 JGS Nr. 946/1811 (ABGB) (as amended).

[1492] *X & Others* App no 19010/07, para 65. See discussion of *X & Others* in Section 15.2.6.

[1493] Ibid, para 76.

[1494] For a historical account of how "nature" or "biology" is invoked in societal debates in order to justify political concepts, see, e.g., Haraway, *Simians, Cyborgs, and Women. The Reinvention of Nature*.

[1495] *Boeckel* App no 8017/11, paras 29-33.

[1496] *Aldeguer* App no 35214/09.

[1497] *Karner* App no 40016/98.

[1498] *Kozak* App no 13102/02.

deceased partner's tenancy rights, and *Aldeguer* with the applicant's right to a survivor's pension). In all three cases, the couples had lived for many years in stable relationships. However, while the Court recognised in *Karner* and *Kozak* that stable same-sex relationships gave rise to certain rights that could not be restricted to different-sex partnerships, it decided differently in *Aldeguer.*

Even though present Spanish law regarding survivor's pensions did not discriminate between different- and same-sex partners, same-sex marriage was only introduced in Spain three years after the death of the applicant's partner, and the applicant was thus not eligible for survivor's pension. This led the applicant to advance a similar argument as in *Mata Estevez*,[1499] claiming that the fact he was *not allowed* to marry had put him and his partner in a similar situation to heterosexual couples who were prevented to marry due to Spain's restrictive divorce policy until 1981.[1500] In fact, for surviving partners of heterosexual couples who were prevented from entering marriage due to Spain's divorce prohibition, there *was* a provision in the pension scheme, granting them survivor's benefits. However, there was no such provision for same-sex couples. Spain's Social Tribunal had indeed granted the applicant survivor's benefits by analogy to the above-mentioned heterosexual couples, but the Madrid High Court reversed the Tribunal's decision, which was again confirmed by both the Spanish Supreme Court and the Constitutional Court.

The ECtHR, after a strikingly short and formalistic assessment, found no violation of the Convention. Even though it contended that since *Mata Estevez*, the legal recognition of same-sex couples had evolved,[1501] it held that Spain *presently* provided for survivor's pensions for married same-sex couples. Furthermore, a wide margin of appreciation was allowed to States when it came to general economic or social measures, and that "in an area of evolving rights where there is no established consensus, the Court has admitted that States must also enjoy a margin of appreciation in the *timing* of the introduction of legislative changes."[1502] Here, the Court did not

[1499] *Mata Estevez* App no 56501/00.

[1500] *Aldeguer* App no 35214/09, para 56.

[1501] Ibid, para 75.

[1502] Ibid , para 82 (*emphasis added*).

consider the fact that same-sex relationships touched upon an individual's identity and would therefore warrant a narrower margin (as it had in *Oliari*)[1503], nor did it go into a substantial examination of factual discrimination, as it had done in *Karner*.[1504]

The Court's reasoning regarding the *comparability* of the applicant in *Aldeguer* with a heterosexual surviving spouse, disadvantaged by Spain's former divorce laws, is particularly confusing. The Court conceded that

> "although there was in both cases a legal impediment to marriage, this impediment was of a different nature. ... The inability of a [different-sex] couple in that situation to marry before 1981 *did not result from the sex or the sexual orientation of its members* but from the fact that one or both partners were legally married to a third person and that divorce was not permitted at the time of the death of one of the partners. What was at stake was an impediment to *remarrying* which affected one or both partners, not an impediment to *marrying*: the specific factual and legal situation addressed by the 1981 legislation cannot be genuinely compared to the position of a same-sex couple who were *ineligible for marriage in absolute terms*, irrespective of the marital status of one or both of its members."[1505] (*emphasis added*)

Here, the Court conflated the "comparability" question with the question of whether disparate treatment was based on a protected ground (sexual orientation). Trying hard to find some kind of legitimate distinguishing factor that would allow for an interpretation where sexual orientation *was not the main reason for disparate treatment* in this situation, the Court denied the comparability of the situations altogether. It constructed two potential comparators – *homosexual* partners affected by a *marriage* prohibition, in comparison to *heterosexual* partners affected by a *remarriage* prohibition – and decided to focus on the marriage/remarriage distinction as the defining factor of these groups, claiming it made them *incomparable*.

The Court's argument is circular. It basically goes: Heterosexual couples were *not* prevented

[1503] *Oliari* App nos 18766/11 and 36030/11, para 177.

[1504] *Karner* App no 40016/98.

[1505] *Aldeguer* App no 35214/09, para 87.

from marrying based on their sexual orientation (but on other grounds). Same-sex couples *were* prevented from marrying based on their sexual orientation. This made the latter group *ineligible* for marriage in absolute terms (not just relative terms), which put them in a fundamentally different situation to the former group. Hence, these two groups cannot be compared. Once this was established, the Court found that there was no disparate treatment based on sexual orientation.

Thus, the Court managed to avoid the actual issue at question – is the state allowed to draw a distinction *based on sexual orientation* for the purpose of granting state benefits? If the Court had followed its own case law, the answer would have to be "no." However, the Court, after advancing this circular argument, retreated to stating "in the Court's view, the difference in context and the difference in nature of the legal impediment to marriage make the situation of the applicant in 2005 fundamentally different from that of different-sex couples covered by additional provision [of the pension scheme]."[1506] This is a striking example of an unfortunate construction of comparability of situations by the Court, as well as *inconsistency.*

Arguably, the ECtHR did not *want* to decide in favour of the applicant. It is illuminating to read this decision together with the CJEU's decision in *Parris*,[1507] decided later in the same year, which has also been criticised for its inconsistency[1508] (especially when compared to CJEU's previous *Maruko, Römer* and *Hay* decisions).[1509] *Parris*, as mentioned previously, also dealt with survivor's pension in a situation where the state had already introduced same-sex marriages, but failed to provide transition provisions – and like the ECtHR in *Aldeguer,* the CJEU in *Parris* did not find anything wrong with this.[1510] It is interesting that *Parris* does not contain any mention of *Aldeguer* – even though, as I have shown in the previous chapter, the CJEU regularly refers to the ECtHR in the area of same-sex rights. Possibly, the CJEU found that *Aldeguer* did not

[1506] Ibid, para 88.

[1507] *Parris* (Case C-443/15) [2016].

[1508] See, e.g., Möschel, 'If and When Age and Sexual Orientation Discrimination Intersect: Parris. Case Note.'.

[1509] *Maruko* (Case C-267/06) [2008] ECR I-1757; *Römer* (Case C-147/08) [2011] ECR I-3591; *Hay* (Case C-267/12) [2013].

[1510] See discussion of *Parris* in Chapter 4, Section 12.1.1.

provide convincing reasoning to support its (similar) point of view.

Despite the highly *inconsistent* and formalistic reasoning in *Aldeguer*, it is noteworthy that there were no dissenting opinions. There is a point to be made that the ECtHR (perhaps like the CJEU, too) did not wish to "punish" a state that had already introduced same-sex marriages, merely for their lack of transitional provisions regarding certain benefits connected to that status.

In a way, the Court's complicated reasoning is reminiscent of its stance on same-sex marriage (as we shall see in the following part): marriage is a unique (and, as a consequence, somewhat incomparable) institution, and Member States have a considerable margin of appreciation in this context. This leads to further reflections on the right choice of *comparator* when advocating for same-sex family rights before the ECtHR. Since the case law of the Court has decisively established that rights within the penumbra of "marriage" have a special status, advocates will be most successful if they find *a different* comparator in situations where married (heterosexual) couples would be a *prima facie* obvioius comparator-choice. So far, the Court has only been willing to compare same-sex couples to married different-sex couples where the state in question did *not provide any legal protection whatsoever*.[1511] Thus, if the choice of a different comparator is not possible due to the particular facts of the case – activists might be well advised to carefully consider whether litigation is at all expedient, or rather counterproductive.

I will discuss the ECtHR's treatment of "marriage" more in-depth in the following part.

Despite some setbacks, when read under the lenses of activism, the development of same-sex family jurisprudence before the ECtHR is ultimately a success story. Indeed, the mere fact that *de facto* families were recognised by the Court in 2010 has opened up numerous roads for argumentation and gives advocates the chance to promote more workable definitions; the meaning and scope of the term is still very flexible and thus, contestable. Same-sex advocates

[1511] *Vallianatos* App nos. 29381/09 and 32684/09; *Oliari* App nos 18766/11 and 36030/11. On this issue, see Waaldijk, 'Great Diversity and Some Equality: Non-Marital Legal Family Formats for Same-Sex Couples in Europe', 56.

could well contribute to filling it with meaning.[1512] Indeed, they have already achieved considerable successes in this area.[1513] Furthermore, activists could expand on the fact that the protection of *de facto* families was in the best interest of the child, expressly urging the Court to link the rights of same-sex families to its case law regarding child protection issues (such as illegitimacy).[1514] The possibilities provided by this connection might be a very fruitful field for exploration in the future.[1515]

[1512] Hunter, 'Lawyering for Social Justice', 1013.

[1513] The Court, for instance, states in *X & Others*: "The Court finds force in the applicants' argument that *de facto* families based on a same-sex couple exist but are refused the possibility of obtaining legal recognition and protection. The Court observes that in contrast to individual adoption or joint adoption, which are usually aimed at creating a relationship with a child previously unrelated to the adopter, second-parent adoption serves to confer rights *vis-à-vis* the child on the partner of one of the child's parents." Thus, the court follows the assessment of the applicants and the third party interveners on behalf of the applicants. *X & Others* App no 19010/07, para 145.

[1514] E.g., *Marckx* App no 6833/74. See also Judge Villiger's dissent in *Gas & Dubois*. Dissenting Opinion by Judge Villiger, *Gas & Dubois* App no 25951/07.

[1515] Indeed, the Court itself refers to jurisprudence dealing with parental rights of a father of a child born out of wedlock, hinting that there were parallels to the present case. *X & Others* App no 19010/07, para 152.

## 15.3. Narrative Two: The Right to Marry

Marriage, just like family, is a highly contested term with strong societal connotations.[1516] Historically, the right to marry has been subjected to a multitude of different restrictions. The idea that *any man* and *any woman* can marry is, even in Europe, a relatively new concept.[1517] In its jurisprudence, the ECtHR had to deal with cases in which marriage was impeded by a variety of circumstances such as financial situation,[1518] degree of kinship,[1519] imprisonment,[1520] previous divorce,[1521] or ethnicity.[1522] Therefore, marriage is a more fluent and flexible term than it might seem at first glance; a strong discourse about its interpretation is not only led in the context of same-sex marriage, but in all different kinds of ways.[1523]

Article 12 of the ECHR protects the right to marry; however, its definition is far from being clear-cut. The ECtHR so far has decided a number of cases dealing with stable homosexual relationships, for instance, in the areas of tenancy and inheritance rights, immigration rights, etc.[1524] However, there have been fewer admissible (and notable) cases dealing with Article 12 claims regarding same-sex marriage, starting with *Schalk & Kopf v Austria*.[1525] Nonetheless, the Court has dealt with "marriage" extensively in other areas, most notably transgender* rights, but

[1516] On the underlying heteronormative biases of marriage, see, e.g., Warner, 'Normal and Normaller: Beyond Gay Marriage'.

[1517] Historically, there have always been restrictions on the right to marry, based on factors such as economic status, religion, consanguinity, race, and many more. For a comprehensive history of the cultural, legal and social notions on marriage across the world, see, e.g., Edward Westermarck, *The History of Human Marriage: In Three Volumes* (MacMIllan 1925).

[1518] *O'Donoghue & Others v UK* App no 34848/07 (ECtHR, 14 March 2011).

[1519] *B & L* App no 36536/02.

[1520] *Jaremowicz v Poland* App no 24023/03 (ECtHR, 5 January 2010); *Frasik* App no 22933/02.

[1521] *F v Switzerland* App no 11329/85 (ECtHR, 18 December 1987).

[1522] *O'Donoghue* App no 34848/07.

[1523] On this issue, see also the discussion on the heteronormativity of marriage within the U.S. LGBT movement in Section 18.4.

[1524] I have related samples of the respective case law in the previous section dealing with same-sex families in Section 15.2.

[1525] *Schalk & Kopf* App no 30141/04.

also regarding, *inter alia*, prisoners' right to marry,[1526] limits on remarriage after divorce,[1527] marriage between (not blood related) relatives,[1528] etc. Transgender* cases have famously challenged the traditional constructions of the term "marriage."[1529]

According to the Court's case law, States are allowed to impose certain restrictions on the right to marry as long as they are not so severe as to impair the very essence of this right.[1530] This follows also from the wording of Article 12 ECHR, which refers to "national laws governing the exercise of this right." The ECtHR thus has repeatedly tried to define what the "essence" of marriage actually is, and at which point a State interference becomes excessive. The margin of appreciation that States enjoy in this respect seems to vary, depending on the issue at hand.

In its 1987 decision *F v Switzerland*,[1531] dealing with a divorced man who wished to remarry but was forced to wait for three years before doing so (which constituted a violation of Article 12), the Court defined (legitimate) State restrictions in the following way:

> "Article 12… secures the fundamental right of a man and a woman to marry and to found a family. The exercise of this right gives rise to personal, social and legal consequences. It is 'subject to the national laws of the Contracting States', but 'the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired'… In all the Council of Europe's member States, these 'limitations' appear as conditions and are embodied in procedural or substantive rules. The former relate mainly to publicity and the solemnisation of marriage, while the latter relate primarily to capacity, consent and certain impediments.'"[1532]

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[1526] See, e.g., *Frasik* App no 22933/02; *Jaremowicz* App no 24023/03.

[1527] See, e.g., *F v Switzerland* App no 11329/85; *Saucedo Gómez* App no 37784/97.

[1528] *B & L* App no 36536/02.

[1529] Most famously: *Goodwin* App no 28957/95.

[1530] See, e.g., *B & L* App no 36536/02, para 34; *Goodwin* App no 28957/95, para 97.

[1531] *F v Switzerland* App no 11329/85.

[1532] Ibid, para 32.

### 15.3.1. Scope, Limits and Consequences of Marriage

Before relating the case law on same-sex marriage, it is expedient to have a quick look at some of the principles the ECtHR developed regarding marriage in general. In the 2000s, the ECtHR dealt with a number of cases in which the Court pondered on the scope and content of the right to marry according to Article 12. These cases are interesting in the context of same-sex marriage, as well, since they shed light on the Court's assessment of what constitutes an *excessive impediment* on the right to marry.

In *B & L v UK* (2005),[1533] the Court examined the case of a man who wanted to marry his former daughter-in-law, which was forbidden by domestic legislation since their previous spouses were still alive. The government pointed to *tradition* when trying to legitimize the prohibition, claiming a wide margin of appreciation had to be afforded in this matter. It also cited a common ground between Member States:

> "It was generally accepted in the Contracting States that some restrictions between degrees of consanguinity were justified, though rules differed. Similarly, most States had at some time restricted marriage between relationships of affinity. A considerable number of other countries maintained an absolute or conditional prohibition on such marriages (as far as they could establish some 21 Contracting States)."[1534]

The Court, however, was not convinced. It rejected the argument that the applicants were *not absolutely* impeded from marriage, since, in the hypothetical case of their former spouses' deaths, they *would* be able to exercise their marriage rights with each other.[1535] It is very interesting indeed that the Court stated that "the bar on marriage does not prevent the relationships from occurring"[1536] – this indicates that it considered the factual *existence* of the relationship to be a case in point for the *right* of the applicants to formalize this relationship. The logical parallel to same-sex relationships is obvious.

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[1533] *B & L* App no 36536/02.

[1534] Ibid, para 33.

[1535] Ibid, para 35.

[1536] Ibid, para 38.

In the cases of *Jaremowicz v Poland*[1537] and *Frasik v Poland*,[1538] the Court considered the situations of inmates who wished to marry despite their imprisonment. They were prohibited from doing so at the time being, but the government held that they could marry once they were released. The Court found a violation of Article 12. While it did accept that the States enjoyed a certain margin of appreciation in this matter (not stating, however, how wide it was), it held that this margin could not be used excessively, since "this would be tantamount to finding that the range of options open to a Contracting state included an effective ban on any exercise of the right to marry. The margin of appreciation cannot extend so far..."[1539]

The Court also provided a list of legitimate impediments to marriage in *Frasik* – which, notably, did not include any explicit reference to same-sex relationships:

> "The Convention institutions have accepted that limitations on the right to marry laid down in the national laws may comprise formal rules concerning such matters as publicity and the solemnisation of marriage. They may also include substantive provisions based on generally recognised considerations of public interest, in particular concerning capacity, consent, prohibited degrees of affinity or the prevention of bigamy. In the context of immigration laws and for justified reasons, the States may be entitled to prevent marriages of convenience, entered solely for the purpose of securing an immigration advantage. However, the relevant laws – which must also meet the standards of accessibility and clarity required by the Convention – may not otherwise deprive a person or a category of persons of full legal capacity of the right to marry with the partners of their choice…"[1540]

Even though this list is not exhaustive (which is indicated by expressions like "such… as," "may also include"), it still is noteworthy that the protection of traditional families or marriage (particularly with regards to same-sex partners) was not mentioned as a legitimate restriction.

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[1537] *Jaremowicz* App no 24023/03.

[1538] *Frasik* App no 22933/02.

[1539] *Jaremowicz* App no 24023/03, para 48; see also: *Frasik* App no 22933/02, para 88.

[1540] *Frasik* App no 22933/02, para 89; see also *Jaremowicz* App no 24023/03, para 49.

Arguably, the protection of traditional marriage or family can be subsumed under "public interest" – but this is also the case with other impediments that are explicitly mentioned, such as "the prevention of bigamy" or "immigration laws." The case was decided in 2010, just a few months before the Court's decision in *Schalk & Kopf* (dealing with exactly this issue).

The Court also expanded on the role of prejudice. In *Jaremowicz*, it called the prison authorities' behaviour subjective and biased, and held that it did not see any reason why the authorities should

> "evaluate the depth of the applicant's feelings, debate on the quality of his relationship and make remarks implicitly or explicitly criticising his decision to marry a particular person, based solely on the circumstances in which he found and chose his intended wife. … The choice of a partner and the decision to marry him or her… is a strictly private and personal matter and there is no universal or commonly accepted pattern for such a choice or decision."[1541]

The Court went on to state that in certain circumstances, prevailing conventions and norms of a Member State's society cannot be of relevance:

> "(T)he authorities are not allowed under Article 12 to interfere with a prisoner's decision to establish a marital relationship with a person of his choice, especially on the grounds that the relationship is not acceptable to them or deviates from prevailing social conventions and norms…",[1542] referring also to "tolerance and broadmindedness" as the "hallmarks of a democratic society."[1543]

This is in fact reminiscent of the Court's evaluation in *Dudgeon*.[1544]

The Court furthermore did not accept legal formalities as excuses for preventing the applicant from marrying. The government had argued that there was no formal statutory rule which

[1541] *Jaremowicz* App no 24023/03, paras 58, 59.

[1542] Ibid, para 59.

[1543] Ibid, para 53.

[1544] *Dudgeon* App no 7525/76, para 43.

impeded a prisoner to marry; the Court, however found: "In practice, the refusal had identical consequences as an effective legal bar on the exercise of his right guaranteed by Article 12."[1545] This seems like a strong commitment to perform a substantial examination by considering all the relevant facts – a commitment not always held up as vehemently as in this case.

In *O'Donoghue & Others v UK*,[1546] the Court dealt with the phenomenon of so-called "sham marriages," in which a non-citizen marries a citizen for the purpose of gaining residence rights or citizenship. The UK had introduced a complex, repeatedly revised scheme under which certain marriages were *prima facie* presumed to be sham marriages. Furthermore, there was a higher fee charged for a respective marriage application.

In this case, the Court made a statement (albeit a vague one) regarding the margin of appreciation afforded to States in the context of Article 12:

> "(I)n examining a case under Article 12 the Court would not apply the tests of 'necessity' or 'pressing social need' which are used in the context of Article 8 but would have to determine whether, regard being had to the State's margin of appreciation, the impugned interference has been arbitrary or disproportionate…"[1547]

It also held that "a Contracting State may properly impose reasonable conditions on the right of a third-country national to marry in order to ascertain whether the proposed marriage is one of convenience and, if necessary, to prevent it."[1548]

This seems like a shy attempt to conceptualise the margin of appreciation, distinguishing it from the narrow margin of Article 8 cases, and introducing separate instruments to discern its width: "arbitrariness" or "disproportionality." The proportionality test applied here seems to require the State to impose a "reasonable condition" in a non-arbitrary way. However, these terms remain shallow.

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[1545] *Jaremowicz* App no 24023/03, para 60.

[1546] *O'Donoghue* App no 34848/07.

[1547] Ibid, para 84.

[1548] Ibid, para 87.

In any case, a blanket prohibition of marriage for persons who fell within a certain category, as intended by the scheme, and a fee which was so high as to amount to a *de facto* obstacle for marriage, constituted, according to the Court, a violation of Article 12.[1549]

For the purposes of marriage equality, these cases contain interesting aspects.

*First*, the question of the breadth of the margin of appreciation is a recurring theme. While the Court still used this doctrine quite freely in *B and L*, without providing an explanation what it meant with "a certain margin," it seemed to at least try to distinguish the margin in Article 12 cases from the margin in Article 8 cases, referring to disproportionality and arbitrariness. However, this is a far cry from a rigorous framework and shows that the Court tends to decide respective questions on a case-by-case basis, thus producing certain *inconsistencies* in its case law.

This leads to the *second* observation – *the way* in which the Court examined the issues at hand: It *refused* to engage in formalistic hair-splitting, and instead looked at each respective situation as a whole, thus recognising and exposing prejudices and condemning practices which might have seemed neutral at first, but resulted in discrimination.[1550] Hence, the Court defined an interference with the essence of Article 12 quite narrowly: The right was infringed if someone could not marry right away, but had to wait a few years;[1551] by antiquated conceptions of sanguinity, rooted in tradition, even if there was common legal ground among Member States in this respect;[1552] by excessive fees which prevented marriage to a person of the applicant's choice;[1553] and even by the overly schematized approach of an administrative agency in the context of alleged sham marriages, resulting in a lack of substantive review of the facts (such as

[1549] Ibid, paras 88-91.

[1550] See, for instance, *Frasik* App no 22933/02; *Jaremowicz* App no 24023/03.

[1551] *Frasik* App no 22933/02; *Jaremowicz* App no 24023/03; but also *F v Switzerland* App no 11329/85.

[1552] *B & L* App no 36536/02.

[1553] *O'Donoghue* App no 34848/07.

the stability and affectionate nature of a relationship).[1554] All of this, in the Court's opinion, was tantamount to a marriage ban.

The Court could have accepted most of these impediments as legitimate if it had taken a more formalistic approach. In each of these cases, the Court could have found no violation of Article 12 by claiming that the applicants were generally free to marry – just not the person of their choice. But due to the Court's decision of substantively considering the situation as a whole, and by honouring the applicants' choice of their respective partners – as eloquently described in *Jaremowicz*[1555] – the Court took a more nuanced approach which was in tune with the applicants' life realities.

Connected to this is *thirdly* the Court's exemplary enumeration of "legitimate impediments." As mentioned above, it is noteworthy that in this context, an impediment relating to same-sex marriages – such as the protection of "traditional marriages" – was not explicitly mentioned.[1556] Given that *Frasik* and *Jaremowicz* were decided shortly before and *O'Donoghue* shortly after *Schalk & Kopf* – a case expressly dealing with a same-sex marriage claim under Article 12 – this begs the question whether this omission is a mere coincidence, or whether the Court intentionally excluded this criterion from its list in order to keep this door open. At the least, this can be read as an instance of *hesitation* by the Court. Moreover, in *B and L*, the Court rejected the government's claim that tradition was a legitimate excuse for upholding restrictive laws that prevented people from marrying the partner of their choice.[1557]

When contrasted with its jurisprudence regarding same-sex partners below, the respective *inconsistencies* become outright blatant.

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[1554] Ibid.

[1555] The Court writes: "Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for any automatic interference with prisoners' rights, including their right to establish a marital relationship with the person of their choice, based purely on such arguments as what – in the authorities' view – might be acceptable to or what might offend public opinion ... "*Jaremowicz* App no 24023/03, para 53.

[1556] *Frasik* App no 22933/02, para 89; see also *Jaremowicz* App no 24023/03, para 49.

[1557] *B & L* App no 36536/02, paras 39, 40.

## 15.3.2. Challenging traditional marriage – Transgender* Rights and the Right To Marry

First cases that challenged traditional conceptions of "marriage," forcing the ECtHR to question the definition of this term with regard to the hitherto accepted paradigm that marriage could only be concluded between a (biological) man and a (biological) woman, arose in the context of transgender* rights. Apart from interesting redefinitions of gender and/or sex[1558] (which I will mention only in passing, since my main focus lies on same-sex rights where the gender identity and sex of a person *per se* are not of the issue), the Court eventually moved away from constructing Article 12 in a textual sense,[1559] to acknowledging that changing societal realities demanded a more differentiated approach.[1560]

First cases in this area dealt importantly with the applicant's rights to change their birth certificates according to their newly acquired gender (or sex)[1561] and subsequent rights, such as the right to marry. In *Rees v UK* (1986), dealing with a post-operative female-to-male transsexual who wanted to marry his female partner, but was prevented from doing so based mainly on the fact that his birth certificate still denominated him as a woman, the Court held in relation to Article 12:

> "In the Court's opinion, the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 is mainly concerned to

[1558] See, e.g., the Court's redefinition of what it means to be a man or a woman in *Goodwin* App no 28957/95, para 100. The Court generally uses sex and gender indistinguishably.

[1559] *Rees v UK* App no. 9532/81 (ECtHR, 17 October 1986), para 49.

[1560] *Goodwin* App no 28957/95, paras 98-103.

[1561] The very first case reaching the Court was *Van Oosterwijck v Belgium*, concerning a post-operative transgender* man who was refused a change of his birth certificate by Belgium authorities. Even though the European Commission on Human rights admitted that Arts 8 and 12 had been violated, the Court concluded that domestic remedies had not been exhausted and therefore, did not examine the application on its merits. *Van Oosterwijck v Belgium* App no 7654/76 (ECtHR, 6 November 1980). *Rees* also dealt with the case of a post-operative transgender* man who failed to obtain a birth certificate according to his new sex, thus making a marriage to his female partner impossible. *Rees* App no. 9532/81.

protect marriage as the basis of the family."[1562]

Thus, it upheld a definition of marriage that was both very literal and strongly connected to procreation.[1563] The Court also expanded on the fact that national laws had to be taken into consideration regarding the exercise of this right.[1564] Even though the Court had repeatedly held (and continued to hold in *Rees*) that national laws could not restrict or reduce the right in such a way that the essence of the right was impaired, it did not see any problem with a State restricting marriage to persons of the opposite biological sex.[1565]

The Court's construction of Article 12 in this case has been criticised.[1566] Indeed, this restrictive interpretation of Article 12 seemed to be in contrast with the Court's previous case law, for instance in *Marckx v Belgium*, where the Court held in the context of "family life" that the Convention was a living instrument to be interpreted in present-day conditions.[1567] The Court's retreat to the mere wording of Article 12, while also indirectly hinting at the conceived inability of post-operative transsexual individuals to procreate, might be understood as an instance of insecurity and *hesitation* in the face of new societal and medical developments. It is interesting, however, that the holding in relation to Article 12 was unanimous; it seems that in the 1980s, transgender* people were still extremely marginalized in the public opinion. Furthermore, the traditional conception of marriage was as of yet largely unshaken by litigation concerning non-(hetero)normative relationships.

However, in 1990, the Court had a chance to reconsider its view in *Cossey v UK*.[1568] A large majority still held that the UK was justified in denying marriage to a transgender* woman,

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[1562] *Rees* App no. 9532/81, para 49.

[1563] Sarah Lucy Cooper, 'A Review of the Concurrent Debates About the Legal Recognition of Same-Sex Relationships in the Council of Europe and the United States' (2011) 5 Phoenix Law Review 39, 48.

[1564] *Rees* App no. 9532/81, para 50.

[1565] Ibid, para 50.

[1566] See, e.g., Robert Reed, 'Transsexuals and European Human Rights Law' in Helmut Graupner and Philip Tahmindjis (eds), *Sexuality and Human Rights A Global Overview* (Haworth Press 2005), 69.

[1567] *Marckx* App no 6833/74, para 41.

[1568] *Cossey* App no 10843/84.

claiming that the applicant's inability to marry did not stem from any *legal* impediment; after all, she was able to marry (a woman), since UK law perceived her to be a man, even though she lived as a woman.[1569] The Court did wonder whether it should depart from its Rees judgment, conceding that "[s]uch a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions."[1570] However, after conducting a quick examination of *European consensus* on this matter,[1571] the Court held while some Member States *would* allow a marriage between Cossey and a man, these developments were not significant enough to call for an abandonment of the traditional concept of marriage.[1572] Therefore, the Court did not see itself in a position to take a new approach regarding the interpretation of Article 12.

This time, eight judges dissented in four different opinions. One of the most powerful dissents was written by Judge Martens; it is unusually long (almost 20 pages) and contains 49 footnotes. Among other things, he called for a more functional approach towards marriage that would take "factual conditions of modern life" into consideration.[1573] He based parts of his argument on the freedom of people to choose their own fate: "Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best for his personality."[1574] Furthermore, Judge Martens examined the meaning of "marriage" in the context of Article 12. While he did not question the view of marriage as being between people of the opposite sex, he did challenge the essentialism attached to biologist interpretations of "sex" and points to marriage's societal connotations:

> "It is true that Article 12… by speaking of 'men and women' clearly indicates that marriage is the union of two persons on the opposite sex. That does not necessarily mean, however, that 'sex' in this context must be interpreted as 'biological sex'. Nor can it be

[1569] Ibid, para 43.

[1570] Ibid, para 35.

[1571] Ibid, para 40.

[1572] Ibid, para 46.

[1573] Dissenting Opinion of Judge Martens, *Cossey v UK* App no 10843/84 (ECtHR, 27 September 1990), para 4.4.3

[1574] Ibid, para 2.7.

> maintained that 'tradition' implies that 'sex' in this context can only mean 'the biological sexual constitution of an individual which is fixed at birth'. That interpretation has, therefore, to be supported by further arguments… Marriage is far more than a sexual union, and the capacity for sexual intercourse is therefore not 'essential' for marriage. Persons who are not or are no longer capable of procreating or having sexual intercourse may also want to and do marry. That is because marriage is far more than a union which legitimates sexual intercourse and aims at procreating: it is a legal institution which creates a fixed legal relationship between both the partners and third parties … it is a societal bond, in that married people … 'represent to the world that theirs is a relationship based on strong human emotions, exclusive commitment to each other and permanence'; it is, moreover, a species of togetherness in which intellectual, spiritual and emotional bonds are at least as essential as the physical one."[1575]

Three things are quite noteworthy in the *Rees* and *Cossey* decisions from an activist point of view.

*First*, the way in which the Court evoked the concept of "traditional marriage," a very *ambiguous* term, is telling. It is reminiscent of instances in which the Court dealt with the "traditional family protection" rationale discussed in the previous section; new developments had given rise to the challenge of an institution (in the present cases, marriage), but the Court was not yet ready to go into a substantial examination of the concept itself. Hence, it fell back on simplistic and restrictive interpretations of the Article in question, relying strongly on marriage as the basis for procreation.

Judge Martens skilfully explained in his dissent in *Cossey* that marriage – even traditional marriage – cannot be understood in such restrictive terms. Even traditional marriage, he remarked, can be constructed to include transsexual individuals. Therefore, there might lie quite some force in the attempt to not only *challenge* the legitimacy of applying a rationale which values tradition over modern life realities – but indeed to *deconstruct* the meaning of *tradition*

[1575] Ibid, paras 4.5.1-4.5.2.

*itself* by advancing new interpretations that are more inclusive. This might be an interesting argumentative route for activist lawyers when it comes to the advancement of same-sex marriage.

*Second*, the formalistic argumentation of the Court when finding that there was no violation of Article 12 in *Rees*[1576] is somewhat comparable to its course of reasoning in *Gas & Dubois*: It applied a similar method of teleologically splitting the circumstances into two separate legal issues, which ultimately resulted in a distortion of the actual situation.[1577] First, it examined whether there was a right for transsexual persons to be recognised according to their chosen sex, finding no violation of Article 8. Second, it examined whether to refuse marriage of a (cisgendered) man to another (cisgendered) man was legitimate – and found no violation of Article 12. Therefore, it avoided dealing with the actual issue at hand – that a transgender* individual was *de facto* prevented from marrying altogether. This mode of argumentation was not only blind to instances of indirect discrimination – it also was unlikely to hold up in the long run, as we shall see.[1578] Therefore, this kind of misplaced hyper-formalism could also be seen as an indicator for an impending transition; a sign that the Court lacked a clear concept of how to deal with changed realities and thus, displayed *inconsistency* and *hesitation*.

*Third*, in sustaining this interpretation, the Court cited *European consensus* in *Cossey* – albeit in a quite superficial way. The Court stated, almost as a side note, that it had not been informed of any

> "significant scientific developments that have occurred in the meantime [since Rees]; in particular, it remains the case – as was not contested by the applicant – that gender reassignment surgery does not result in the acquisition of all the biological characteristics

[1576] *Rees* App no. 9532/81, para 50.

[1577] In *Gas & Dubois* App no 25951/07, as discussed in Section 13.2.6, the Court separately examined two issues: On one hand, the legitimacy of States to uphold heterosexual marriage – and found no violation of Article 12. On the other hand, it looked into the restriction of stepparent adoption to married people – and found no violation of Article 8. By intentionally not connecting these two issues, the Court therefore did not consider the fact that in this constellation, no homosexual person could ever adopt their partner's child, and whether this amounted to discrimination based on sexual orientation. See discussion *supra,* at 300.

[1578] Indeed, the Court revised its ambiguous approach in *Goodwin* App no 28957/95.

> of the other sex. There have been certain developments since 1986 in the law of some of the member States of the Council of Europe. ... [H]aving regard to the existence of little common ground between the Contracting States, [this is] an area in which they enjoy a wide margin of appreciation."[1579]

In fact, in the late 1980s, there *had* been a number of interesting scientific publications on the causes and consequences of transsexualism and gender reassignment surgery.[1580] Possibly there was a certain lapse on the part of the applicant's counsel of providing *expertise* in the form of ample medical and legal evidence to support their case.

Furthermore, in 1989, the Council of Europe had issued a recommendation on the condition of transsexuals, pointing to significant medical developments and urging Member States to adjust their legislation concerning the issuance of birth certificates and other personal documentation.[1581] The Court took note of this, but rather viewed the adoption of the Recommendation (as well as the adoption of a resolution on discrimination against transsexuals by the European Union Parliament)[1582] as a point in favour of the government, showing that there was need of harmonization of laws in Europe, which in turn meant that at present, a diversity of practice existed. Hence, there was no common ground among the Member States. This is a bit of an awkward construction, given that the adoption of these documents might have very well pointed to a growing consensus regarding this issue, as dissenting judges MacDonald, Spielmann, Palm, Foighel and Pekkanen pointed out.[1583]

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[1579] *Cossey* App no 10843/84, para 40.

[1580] Indeed, the 1980s were notorious for an emerging FTM (female to male ) transgender* community; for instance : Ray Blanchard, 'The Classification and Labeling of Nonhomosexual Gender Dysphorias' (1989) 18 Archives of Sexual Behavior 315, 315-334.

[1581] PACE Recommendation 1117 (1989) on the condition of transsexuals, adopted by the Parliamentary Assembly 29 September 1989.

[1582] European Parliament Resolution of 12 September 1989 on discrimination against transsexuals [1989] OJ C 256/33.

[1583] Joint partly dissenting opinion by Judges MacDonald and Spielmann, *Cossey v UK* App no 10843/84 (ECtHR, 27 September 1990), para 2; Joint dissenting opinion by Judges Palm, Foighel and Pekkanen, *Cossey v UK* App no 10843/84 (ECtHR, 27 September 1990), para 3.

*Fourth*, the *dissents* in *Rees*, and particularly in *Cossey*, are an outstanding sign of *disagreement* on part of the Court – especially given the multitude and breadth of the dissenting opinions in *Cossey*. Judge Marten's dissent in this case illuminates a remarkable commitment to honour individual choice – in particular, the legitimate attempt of individuals to fulfil and shape their own destiny.

And *fifth*, *Rees* and *Cossey* both demonstrate the opportunities and limits of drawing on the Court's transgender* jurisprudence for same-sex marriage claims. The points outlined above show that there would be a number of interesting parallels to the fight for marriage equality, especially regarding the Court's reiteration that Article 12 had to be interpreted in light of social realities,[1584] and Judge Martens' claim that the right to marry should be separated from the ability to procreate, as explicated in his dissent.[1585] However, even the progressive remarks of Judge Martens do not question the heteronormative construction of marriage as a bond between a man and a woman. By focusing on the issue of "sex" – in other words, the question of whether a person is to be regarded as a man or woman – the judges circumvent the necessity to examine a deeper question: What is the legitimacy to restrict marriage (and the legal benefits it entails) to one specific form of cohabitation – namely, a two-person, sexual relationship between individuals of the opposite sex?[1586]

### 15.3.2.1. *Goodwin v UK* and Possible Repercussions for the Fight for Marriage Equality

After a few other non-successful cases,[1587] with many judges dissenting,[1588] the Court changed

[1584] *Cossey* App no 10843/84, para 35.

[1585] Dissenting Opinion of Judge Martens, App no 10843/84, para 4.4.3.

[1586] It is of course very justifiable to maintain that the fight for marriage equality itself challenges merely a small part of these conventional dichotomies (the "man marries woman" part), and is generally not capable or willing to answer the underlying question of why a modern society should give prevalence (including legal benefits) to certain lifestyles over others. See also Nancy D. Polikoff, 'Law that Values All Families: Beyond (Straight and Gay) Marriage' (2009) 22 Journal of the American Academy of Matrimonial Lawyers 85.

[1587] *B v France* App no 13343/87 (ECtHR, 25 March 1992); *X, Y & Z v UK* App no 21830/93 (ECtHR, 22 April 1997); *Sheffield & Horsham v UK* App nos 22985/93 and 23390/94 (ECtHR, 30 July 1998).

its mind regarding the marriage rights of transgender* people. One of the respective cases deserves mention due to a paragraph in one of its dissents: *Sheffield and Horsham v UK (1998)* dealt with the question of whether the refusal of authorities to change birth certificates to reflect the (post-surgery) gender of the applicants amounted to a violation of Article 8 (private life), Article 8 in conjunction with Article 14, as well as Article 12. The Court found no violations.[1589]

Judge Van Dijk did not agree with the majority's opinion; his dissent also included a reference to same-sex couples (in the context of Article 12):

> "(E)ven if one starts from the presumption that Article 12 has to be considered to refer to marriages between persons of the opposite sex – a presumption which still seems to be justified in view of the clear wording of the provision, *although it has the unsatisfactory consequence that it denies to, or at least makes illusive for, homosexuals a right laid down in the Convention* – the applicants should be treated as women under Article 12, and should be allowed to marry men."[1590] (*emphasis added*)

While Judge Van Dijk did not speak out in favour of same-sex marriage, his formulation at least seemed to express doubts regarding the *prima facie* exclusion of same-sex couples from the protection of Article 12.[1591]

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[1588] In *Sheffield & Horsham* App nos 22985/93 and 23390/94, for instance, there were nine dissenting judges regarding an Article 8 violation, and two regarding an Article 12 violation. In total, there were six separate opinions filed, two concurring (or partly concurring) opinions, three dissenting (or jointly dissenting) opinions and one dissenting declaration. Joint Concurring Opinion of Judges de Meyer, Valticos and Morenilla, *Sheffield and Horsham v UK* App nos 22985/93 and 23390/94 (ECtHR, 30 July 1998); Concurring Opinion of Judge Freeland, *Sheffield and Horsham v UK* App nos 22985/93 and 23390/94 (ECtHR, 30 July 1998); Joint Partly Dissenting Opinion of Judges Bernhardt, Vilhjálmsson, Spielmann, Palm, Wildhaber, Makarczyk and Voicu, *Sheffield and Horsham v UK* App nos 22985/93 and 23390/94 (ECtHR, 30 July 1998); Partly Dissenting Opinion of Judge Casadevall, *Sheffield and Horsham v UK* App nos 22985/93 and 23390/94 (ECtHR, 30 July 1998); Dissenting Opinion of Judge Van Dijk, *Sheffield and Horsham v UK* App nos 22985/93 and 23390/94 (ECtHR, 30 July 1998); Declaration of Judge Wildhaber (dissenting), *Sheffield and Horsham v UK* App nos 22985/93 and 23390/94 (ECtHR, 30 July 1998).

[1589] *Sheffield & Horsham* App nos 22985/93 and 23390/94.

[1590] Dissenting Opinion of Judge Van Dijk, *Sheffield & Horsham* App nos 22985/93 and 23390/94, para 8.

[1591] This has also been observed by Cooper, 'A Review of the Concurrent Debates About the Legal Recognition of Same-Sex Relationships in the Council of Europe and the United States', 52.

In 2002, the Court decided *Goodwin v UK,*[1592] a case of a post-operative transgender* woman who wanted, among other things, to marry her (male) partner and was prevented from doing so due to the authorities' refusal to change her birth certificate. *Goodwin* is considered a milestone in transgender* rights jurisprudence before the ECtHR; it is in fact an impressive decision, also in the context of same-sex marriage advocacy.

Interestingly, the Court referred to a case concerning same-sex rights – its *Dudgeon* decision[1593] – to assert that a serious interference with private life could arise where domestic laws conflicted with important aspects of personal identity.[1594] Then, it examined medical and scientific issues at length,[1595] albeit reaching the conclusion that the state of the art did not offer any insights that were relevant for the legal recognition of transgender* individuals.[1596]

As in a previous case,[1597] the British civil rights group "Liberty" was involved in the case as a third party intervener, providing ample evidence regarding national legal developments that favoured the acceptance of transsexual people as individuals of their chosen sex.[1598] The Court indeed took note of some of their points;[1599] it concluded:

> "The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals."[1600]

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[1592] *Goodwin* App no 28957/95.

[1593] *Dudgeon* App no 7525/76.

[1594] *Goodwin* App no 28957/95, para 77.

[1595] Ibid, paras 81-83.

[1596] Ibid, para 83.

[1597] *Sheffield & Horsham* App nos 22985/93 and 23390/94.

[1598] *Goodwin* App no 28957/95, paras 55-57.

[1599] Ibid, paras 84, 85, 103.

[1600] Ibid, para 85.

Hence, the Court admitted that to date, there was *no commonality of legal approaches* in different areas of law relevant in the context of transgender* rights, such as "marriage, filiation, privacy or data protection."[1601] However, instead of taking this – as it had done previously[1602] – as a reason to dismiss the complainant's claim, it stated that "the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising."[1603] It expressly determined the absence of common approaches as irrelevant in the present case, choosing to focus instead on a "trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals."[1604] Here, the Court looked into a trend, rather than the *status quo* – both regarding the development of social views, and laws. It is arguable that without Liberty's comprehensive brief, the Court might have constructed *European consensus* differently.

Regarding Article 12, the Court finally uncoupled marriage and reproduction, (as Judge Martens had previously suggested in his *Cossey* dissent):[1605]

> "(T)he Court observes that Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision."[1606]

The Court also recognised the relevance of the societal implications of marriage:

> "The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the national laws of the Contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the

[1601] Ibid, para 85.

[1602] E.g., in *Sheffield & Horsham* App nos 22985/93 and 23390/94; or *Rees* App no. 9532/81*Cossey* App no 10843/84, para 40.

[1603] *Goodwin* App no 28957/95, para 85.

[1604] Ibid, para 85.

[1605] Dissenting Opinion of Judge Martens, App no 10843/84, para 4.4.3.

[1606] *Goodwin* App no 28957/95, para 98.

very essence of the right is impaired…"[1607]

Furthermore, the Court reconsidered its previous formalistic reasoning regarding access to marriage for transgender* individuals. Instead of analytically detaching the applicant's right to have her sex duly registered from her ability to exercise marriage rights, it evaluated the situation as a whole:

> "The right under Article 8 to respect for private life does not however subsume all the issues under Article 12, where conditions imposed by national laws are accorded a specific mention. The Court has therefore considered whether the allocation of sex in national law to that registered at birth is a limitation impairing the very essence of the right to marry in this case. In that regard, it finds that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed."[1608]

Even though the Court did not, in principle, reconsider the wide margin of appreciation that States enjoyed in this regard, it nonetheless held that this margin was not without limits; it could not be constructed in a way that would impose an effective bar on any exercise of the right to marry on a person.[1609] In conclusion, it found that there has been a violation of Article 12.

It needs to be noted that the "sex" of the applicant factors importantly into the Court's decision. Ultimately, a crucial part of its reasoning rests on the finding that the applicant in the present case ought to be viewed as a woman, based on a variety of factors such as her social gender role, her sexual reassignment surgery, and others.[1610] This decision does not, however, question the definition of marriage as a heterosexual institution – it merely reviewed essentialist constructions

[1607] Ibid, para 99.

[1608] Ibid, para 101.

[1609] Ibid, para 103.

[1610] Ibid, para 100.

of sex and gender, reaching the conclusion that a person *can*, effectively and legally, change their sex. But once the new sex is acquired, the person in question is again caught in the heteronormative matrix, only able to marry someone from the (now) opposite sex. In this regard, the usefulness of the ECtHR's transgender* jurisprudence for marriage equality endeavours is limited.

Nonetheless, the *Goodwin* decision does contain a few very promising litigation opportunities for same-sex marriage advocates.

*First*, it explicitly referred to a decision dealing with same-sex rights – *Dudgeon*[1611] – when determining to what degree a State was allowed to impose laws that interfered with an individual's identity. This might just be a coincidence; on the other hand, it hints to the fact that the Court is not *entirely* reluctant to draw parallels between the importance of "identity" in cases dealing with transsexualism and sexual orientation, and assigns it a comparable value. *E contrario* it could be argued that if the Court sees the identity of a transsexual person infringed by restrictive marriage laws – then it should review its stance on same-sex marriage, as well.[1612]

After all, the successful choice of a person to change their identity *requires* the acceptance of society at large and the legal order in particular.[1613] In the same vein, the choice of a person to be true to their sexual orientation equally demands adaptation and acceptance from their environment. It would indeed be cynical to claim that a transgender* person was not discriminated against, simply because they might choose to ignore their identity and instead behave in accordance to their discarded gender; but it is just as cynical to hold that a homosexual person is not discriminated against simply based on the fact that they would theoretically be able

[1611] *Dudgeon* App no 7525/76.

[1612] To date, the Court has expanded the "identity" argument to cases involving some kind of legal recognition of same-sex couples – see, e.g., *Oliari* App nos 18766/11 and 36030/11, para 177 – but not to same-sex marriage.

[1613] *Goodwin* App no 28957/95, para 77: "It must also be recognised that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity. … A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety."

to exert certain rights (such as marriage), just as long as they would be willing to deny their sexual orientation and thus, a part of their identity.[1614]

In fact, the Court itself has suggested in *Schalk & Kopf* for an assessment of same-sex marriage, "certain principles might be derived from the Court's case-law relating to transsexuals."[1615] However, so far, it has not followed up on this notion, pointing to the special status of the institution of marriage, usually ascertaining a lack of *European consensus* and thusly applying a wide margin of appreciation.[1616] Indeed, in its later *Hämäläinen* decision, it used this assessment to the disadvantage of a transgender* woman, treating the applicant's wish to stay married to her wife and thus protect her (existing) family under Article 8 as a same-sex marriage case and applying a wide margin of appreciation[1617] (therefore finding no violation of the Convention).

On the same note, there is a very compelling point to be made that the Court's assessment of what an "absolute impediment to marry" entails could just as well be applied to homosexual individuals. Let us look at the facts: The applicant in *Goodwin*, according to the laws of the UK, was allowed to marry. Of course, not the partner of her choice – but she could have married a woman. The Court rightly did not accept this logic anymore; it deemed it "artificial" to assert that under the factual conditions, Goodwin was *not* deprived of her Article 12 right.[1618] Granted, the Court attached quite a lot of importance to the fact that Goodwin was a post-operative transgender* individual and lived as a woman. But if the Court takes its own expressed commitment to safeguarding a person's identity against state interference seriously – and finds, as it has, that sexual orientation indeed creates a legitimate and defendable identity – then there is a clear *inconsistency* between its transgender* marriage and same-sex marriage jurisprudence. And this indeed seems to be the case; while the Court has recognised, in the context of same-sex couples, that forming stable relationships pertains to an individual's identity,[1619] it has not

[1614] As we shall see, this, however, seems to be the Court's current position regarding same-sex marriage.

[1615] *Schalk & Kopf* App no 30141/04, para 50.

[1616] *Gas & Dubois* App no 25951/07, paras 65-68; *Charpentier* App no 39651/11, para 51.

[1617] *Hämäläinen (GC)* App no 37359/09 , para 75.

[1618] *Goodwin* App no 28957/95, para 101.

[1619] See, e.g., *Oliari* App nos 18766/11 and 36030/11, para 177.

expanded this recognition to include marriage. This can be understood as an instance of clear *inconsistency*.[1620] At this point, it is also worth remembering Judge Van Dijk's dissent in *Sheffield and Horsham*;[1621] if nothing else, it signals that the exclusion of gay and lesbian couples from marriage is a point of contention within the Court (*disagreement*).

*Second*, *Goodwin* once again demonstrates the importance that the Court attaches to *European consensus*. As in previous cases, activists – in this case, the NGO Liberty – have managed to provide *expertise* that figured into the Court's decision.

*Third*, the fact that the Court decisively disentangled marriage and (natural) reproduction can be seen as a huge step towards progressive constructions of marriage; this question is of course also relevant in the context of same-sex marriage (since same-sex couples cannot conceive children with one another).[1622]

### 15.3.3. Hesitation: *Schalk & Kopf*

As discussed above, in *Schalk & Kopf*, [1623] the Court explicitly included same-sex couples in the scope of "family life" under Article 8. The applicants had also claimed a violation of Article 12 (right to marry).

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[1620] This inconsistency has been pointed out, *inter alia*, by Sarah Lucy Cooper, 'Marriage, Family, Discrimination & Contradiction: An Evaluation of the Legacy and Future of the European Court of Human Rights' Jurisprudence on LGBT Rights' (2011) 12 German Law Journal 1746, 1754.

[1621] Dissenting Opinion of Judge Van Dijk, *Sheffield & Horsham* App nos 22985/93 and 23390/94.

[1622] However, the Court took a huge step back on this issue in its *Boeckel* and *Hallier* decisions (both applications were found inadmissible), as discussed Section 15.2.8. *Boeckel* App no 8017/11; *Hallier* App no 46386/10. In both cases, it accepted that "natural parenthood" or "natural procreation" was a legitimate reason for drawing a distinction between same-sex and different-sex couples – in the case of *Boeckel*, regarding the paternity presumption within married different-sex couples, and in *Hallier*, regarding paternity leave which was only available to biological fathers. In *Vallianatos*, however, it had still found that the fact of "natural conception" did not allow the Greek government to draw a distinction between same-sex and different-sex couples regarding their access to civil unions. *Boeckel* App no 8017/11; *Hallier* App no 46386/10; *Vallianatos* App nos. 29381/09 and 32684/09. See also discussion in Section 15.2.7.

[1623] *Schalk & Kopf* App no 30141/04, paras 93-95.

In its assessment of Article 12, the ECtHR discussed several possible interpretative methods.[1624] It conceded that a historical interpretation made it clear that the framers of the Convention did not have same-sex relationships in mind when they formulated the Article.[1625] The Court also observed that only a minority of States allowed same-sex marriage at the present time, concluding there was no *consensus* on the issue.[1626]

Furthermore, it distinguished the case from *Goodwin*, claiming that the separation of marriage and reproduction[1627] did *not* allow for any conclusions regarding same-sex marriage; after all, the partners in *Goodwin* were ultimately considered to be of different genders.[1628] However, it *did* leave a door open for future re-consideration, stating "the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article 12 is inapplicable to the applicants' complaint."[1629]

Here, the Court's argumentation displayed *inconsistency* to its reasoning in similar cases, since it refused to find that the choice of who to marry was a "personal and private matter"[1630] if this choice fell on a person of the same sex. The joint dissenting opinion of Judges Rozakis, Spielmann and Jebens dealt mostly with the Court's ultimate finding that there had not been a violation of Article 14 taken in conjunction with Article 8 of the Convention. However, their dissent also assessed the comparability of same-sex relationships to different-sex relationships (albeit in the ambit of Article 14). They held that the Court, having identified

> "a '*relevantly similar situation*', and emphasised that '*difference based on sexual orientation require particularly serious reasons by way of justification,*' the Court should have found a violation of Article 14 taken together with Article 8 of the Convention ... in

[1624] Ibid, paras 54-64.

[1625] Ibid, paras 55.

[1626] Ibid, paras 53, 58.

[1627] *Goodwin* App no 28957/95, para 101.

[1628] Ibid, paras 57, 59.

[1629] *Schalk & Kopf* App no 30141/04, para 61.

[1630] as it had held, just a few months earlier, in *Jaremowicz* App no 24023/03, paras 58-59.

> the absence of any cogent reasons offered by the respondent Government to justify the difference of treatment, there should be no room to apply the margin of appreciation. Consequently, the '*existence or non-existence of common ground between the laws of the Contracting States*' is irrelevant as such considerations are only a subordinate basis for the application of the concept of the margin of appreciation. ... Any absence of a legal framework offering [same-sex couples], at least to a certain extent, the same rights or benefits attached to marriage ... would need robust justification, especially taking into account the growing trend in Europe to offer some means of qualifying for such rights or benefits."[1631] (*citations omitted*)

Even though the judges mentioned families, and not marriages – if the fact that a same-sex relationship is comparable, in its essence, to a stable different-sex relationship, the only distinction is *sexual orientation* (which required, as dissenters noted, a narrow margin of appreciation, and limited reliance on societal consensus) – this should arguably apply to the access to marriage, as well.[1632]

There are a few indicators for strategic litigation opportunities to be found in this case – albeit mostly based on the omissions of the Court.

*First*, the Court's assessment that Article 12 was, in theory, applicable to same-sex contexts has opened the door for subsequent litigation by suggesting that the interpretation of this *vague and ambiguous* term was not carved in stone. After all, the Court did not declare the application on the face as inadmissible with regards to Article 12, as it could well have done; it explicitly endorsed a flexible construction, conscious of social developments. Even though the Court was not yet ready to follow through and examine the case at hand as thoroughly and substantively as other Article 12 cases, it admitted that same-sex couples *could* forward admissible claims under this Article. Taken together with the Court's omission to expressly include the protection of

[1631] Joint dissenting opinion by Judges Rozakis, Spielmann and Jebens, *Schalk & Kopf* App no 30141/04, paras 8-9.

[1632] This obvious parallel has been pointed out, e.g., by Emmanuelle Bribosia, Isabelle Rorive and Laura Van den Eynde, 'Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience' (2014) 32 Berkeley Journal of International Law 1, 19.

traditional marriage (possibly with regard to same-sex couples) in its list of legitimate impediments in *Frasik*,[1633] this could be read as a positive sign.

*Second*, the construction of *European consensus* by the Court is slightly reminiscent of its transgender* jurisprudence. Before *Goodwin*, it had also focused mainly on the laws of its Member States; however, it reconsidered this approach in *Goodwin*, using the extensive *expertise* provided by applicants and third party interveners to conduct a more sophisticated evaluation, including the consideration of legal trends and social attitudes.[1634] While it cannot be estimated to which degree this evidence had tangible influence on the Court's change of heart, it is fair to say that the briefs brought forward supplied the Court with argumentation material to support its opinion.

*Third*, it is striking that in *Schalk & Kopf*, the Court failed to examine or even consider the concrete reality of the partnership in its assessment of Article 12, even though it had done so extensively in other marriage cases, holding, for instance, that a law or practice which amounted to a *de facto* ban of marriage was a clear violation of Article 12, as it had done, e.g., in *Frasik*, *O'Donoghue* or *Jaremowicz*.[1635] After all, *Schalk & Kopf* dealt just as much with the impossibility of an individual to marry the partner of his choice. This is a clear *inconsistency*.

### 15.3.4. Are Same-Sex Couples Comparable to Married Couples? *Computer Says No...*[1636]

However, just like the story about same-sex families, the story about marriage equality is not a linear one. And indeed, recent cases before the Court have marked a backward trend of sorts for marriage equality.

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[1633] *Frasik* App no 22933/02, para 89; see also *Jaremowicz* App no 24023/03, para 49.

[1634] *Goodwin* App no 28957/95, paras 84, 85, 103.

[1635] *Frasik* App no 22933/02; *Jaremowicz* App no 24023/03; a few months later: *O'Donoghue* App no 34848/07.

[1636] This expression is borrowed from the TV Show "Little Britain." 'Little Britain' Series 3, Episode 1 (BBC, 17 November 2005).

*Gas & Dubois* – while not directly including an Article 12 complaint – led the Court to reiterate that governments did not have an obligation to grant same-sex couples access to marriage.[1637] What is more, the Court cited its decision in *Schalk & Kopf* to *support* this point, therefore undermining the progressive potential that *Schalk and Kopf* might have developed.[1638]

Even though the claim of the applicants in *Gas & Dubois* pointed out that their situation was similar to that of a married couple *merely in the limited context of their desired adoption rights*, the Court reacted with constraint; it held that "marriage confers a special status on those who enter into it,"[1639] and that the applicants (for the purposes of adoption) were not in a comparable situation to a married couple. Therefore, there was no difference in treatment based on sexual orientation.[1640] This is a stark, indeed, almost a *verbatim* contradiction to its reasoning in *Schalk & Kopf* (not to mention other cases), where it clearly stated (albeit in the context of Article 14 in conjunction with Article 8):

> "While the parties have not explicitly addressed the issue whether the applicants were in a relevantly similar situation to different-sex couples, the Court would start from the premise that same-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship."[1641]

*Gas and Dubois* exemplifies the exceptionalism of marriage in the Court's LGBT rights jurisprudence.[1642] Once a case deals with (or sometimes even only touches upon)[1643] same-sex

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[1637] *Gas & Dubois* App no 25951/07, para 66. I have discussed this part in greater detail in the previous example regarding same-sex family rights, in Section 15.2.6..

[1638] Ibid, para 66.

[1639] Ibid, para 68.

[1640] Ibid, para 69.

[1641] *Schalk & Kopf* App no 30141/04, para 99.

[1642] Wintemute has claimed that the ECtHR has constructed a "wall" around (same-sex) marriage. Robert Wintemute, 'Marriage, Adoption, and Donor Insemination for Same-Sex Couples: Does European Case-Law impose any Obligations on Italy?' (2014) GenIUS 35, 39.

marriage, the Court is usually unwilling to conduct a thorough, substantive investigation,[1644] holding that the *status of marriage* is so special that it prevents comparability (for instance, of the situation of stable same-sex relationships with the situation of married couples).[1645]

In *Gas & Dubois*, just one judge dissented – Judge Villiger – and he did not take issue with the Court's assessment regarding same-sex marriage.[1646] However, the concurring opinion by Judge Spielmann, joined by Judge Berro-Lefèvre, did question the Court's strong refusal to establish *any* similarities of the couple at hand with a married couple. While this concurring opinion in principle agrees with the finding of the majority, it does state:

> "I am of the view that, contrary to what is asserted in paragraph 68 of the judgment, for the purposes of second-parent adoption the applicants' legal situation is comparable to that of a married couple."[1647]

Ultimately, however, the concurring judges agreed with the majority, stating that even though they thought a reform of the contested provisions was indicated, it should be brought about by legislative changes, not via the Court.[1648] This might be read as an instant of *hesitation within* a *disagreement*; it exemplifies, in an interesting manner, the bind in which (progressive) judges find themselves regarding the issue of how to adequately deal with same-sex marriage.

Even though the doubts of Judges Spielmann and Berro-Lefèvre were apparently not pressing enough to issue a dissent, they seemed to suggest that a committed and stable same-sex

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[1643] As was exemplified, for instance, by cases dealing with same-sex parent adoptions – once the status of "marriage" entered the analysis, the Court's reasoning often displayed a formalistic style, devoid of its usual considerations when assessing impediments to marriage. This becomes evident when comparing, i.e., *Gas and Dubois* or *Aldeguer* with *Goodwin*, *Frasik* or *O'Donoghue*. *Gas & Dubois* App no 25951/07; *Aldeguer* App no 35214/09; *Goodwin* App no 28957/95; *Frasik* App no 22933/02; *O'Donoghue* App no 34848/07. It will become even more evident later on.

[1644] See also *Aldeguer* App no 35214/09.

[1645] See also Waaldijk, 'Great Diversity and Some Equality: Non-Marital Legal Family Formats for Same-Sex Couples in Europe', 55.

[1646] Dissenting Opinion by Judge Villiger, *Gas & Dubois* App no 25951/07.

[1647] Concurring Opinion of Judge Spielmann joined by Judge Berro-Lefévre, *Gas & Dubois* App no 25951/07.

[1648] Ibid.

relationship *can* be compared, in principle, to a heterosexual marriage. In their short concurring opinion, amounting to less than a page, they did however not seem ready yet to pose the logical follow-up questions which flow from such an assessment.[1649] Nonetheless, the thoughts expressed in this concurring opinion can be read as a definite sign of *hesitation*.

In *X & Others v Austria*, the Court did recognise a violation of Article 14 in conjunction with Article 8.[1650] However, it also used the opportunity to once again reiterate its assessment of *Gas & Dubois* on marriage rights of same-sex couples under the Convention (namely, that same-sex couples were not in a comparable situation to married different-sex couples),[1651] even though the applicants did not raise any claim in this regard. Again, Judge Spielmann concurred, on similar grounds as in *Gas & Dubois.*[1652] He held that the Court's examination of the comparability of a same-sex with a married couple was misguided, given that the applicants themselves did not claim a respective violation.[1653] In fact, he seemed to suggest that the Court's dismissive comments on same-sex marriage are, if not misguided, so at least debatable.

The Court's decision in *Charpentier*[1654] then merely repeated what the Court had already stated on the issue; its assessment is extremely short (5 paragraphs), and there are no concurrent or dissenting opinions. Two years before *Charpentier*, the Court had decided another interesting case with regard to marriage – *Hämäläinen v Finland*.[1655] In this case, a transgender* woman wanted to stay married to her (female) wife, whom she had a child with prior to undergoing gender reassignment surgery. She complained that Finish law – which only allowed same-sex registered partnerships at the time – required her to choose between her marriage and her official recognition as a woman. The issue eventually went before the Grand Chamber.

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[1649] Ibid.

[1650] *X & Others* App no 19010/07.

[1651] Ibid, paras 105-106, 131.

[1652] Concurring Opinion of Judge Spielmann joined by Judge Berro-Lefévre, *Gas & Dubois* App no 25951/07, para 2.

[1653] Concurring Opinion of Judge Spielmann, *X & Others* App no 19010/07, paras 2, 3, 4.

[1654] *Charpentier* App no 39651/11.

This is also true for the Article 12 ECHR assessment in *Oliari* App nos 18766/11 and 36030/11.

[1655] *Hämäläinen (GC)* App no 37359/09 .

The Chamber had examined whether it was a disproportionate interference into the applicant's private and family life under Article 8 to require her to transform her marriage into a partnership, in order to be officially recognised in the gender of her choice.[1656] The Grand Chamber, however, took a different approach; it was of the opinion that "the question to be determined by the Court is whether respect for the applicant's private and family life entails a positive obligation on the State to provide an effective and accessible procedure allowing the applicant to have her new gender legally recognised while remaining married."[1657] Thus, the Grand Chamber examined the case as a matter relating importantly to same-sex marriages.[1658]

The Grand Chamber conducted a thorough investigation into the *status quo* of the legal situations in Member States.[1659] It observed that

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

With regard to the permission of same-sex marriages in particular, the Court stated that there was no *European consensus*. Hence, states had a wide margin of appreciation in this matter.[1660]

The applicant had also claimed that her Article 12 rights were infringed, based on the fact that the "compulsory termination of marriage" affected "the substance of the right to marry." Article 12 should thus be construed to also cover the continued existence of a marriage.[1661] The Grand

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[1656] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *The European Convention on Human Rights* (7th edn, Oxford University Press 2017), 431.

[1657] *Hämäläinen (GC)* App no 37359/09 , para 64.

[1658] Ibid, paras 70, 71.

[1659] Ibid, paras 31-33.

[1660] Ibid, paras 73-75.

[1661] Ibid, paras 93-94.

Chamber examined Article 12, contending however that it was not necessary to make a separate finding under this Article.[1662] It stated,

> "The Court reiterates that Article 12 of the Convention is a *lex specialis* for the right to marry. It secures the fundamental right *of a man and woman* to marry and to found a family. Article 12 expressly provides for regulation of marriage by national law. *It enshrines the traditional concept of marriage as being between a man and a woman* (see Rees v. the United Kingdom, cited above, § 49). While it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples (see Schalk & Kopf v. Austria, cited above, § 63)."[1663] (*emphasis added*)

The explicit mention of the "traditional concept of marriage between a man and a woman" seems like a setback after the Court's rather progressive view in *Schalk & Kopf* that Article 12 was, in essence, not restricted to marriages between men and women, and needed to be interpreted in a dynamic way. After all, in *Schalk & Kopf*, the Court had still stated that it

> "would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article 12 is inapplicable to the applicants' complaint."[1664]

The Grand Chamber concluded that there had been no violation of Article 14, taken together with Articles 8 and 12 of the Convention.[1665] Remarkably, it denied that the applicant was in a *comparable situation* to that of a married person; it held:

> "In her complaints the applicant compared her situation to that of cissexuals, who had obtained legal gender recognition automatically at birth and whose marriages, according to the applicant, did not run the risk of 'forced' divorce in the way that hers did ... the applicant's situation and the situations of cissexuals are not sufficiently similar to be

[1662] Ibid, para 97.

[1663] Ibid, para 96.

[1664] *Schalk & Kopf* App no 30141/04, para 61.

[1665] *Hämäläinen (GC)* App no 37359/09 , para 113.

compared with each other. The applicant cannot therefore claim to be in the same situation as cissexuals."[1666]

This broad construction of *comparators* (transsexuals to cissexuals) and the subsequent denial of "comparability of situations" (which precludes a finding of disparate treatment) is rather odd, especially given the Court's *Goodwin* decision.[1667]

Dissenting judges Sajó, Keller and Lemmens picked up on this point, as well as on the Court's somewhat i*nconsistent* construction of *consensus*. Recalling the Court's *Goodwin* decision, they claimed that its reflections on *consensus* should have also been applied to the present case:

> "'The Court ... attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals' (see Christine Goodwin, cited above, § 85). ... We regret that the majority rejects these issues simply on the grounds that the applicant's situation is not similar enough to that of cissexuals (see paragraph 112 of the judgment). The majority does not deal with the issue of whether the applicant has been subjected to discriminatory treatment vis-à-vis heterosexuals (see paragraph 105 of the judgment). We cannot think of any situation – other than cases of fictitious or unconsummated marriage, which are a different matter – in which a legally married cisgender heterosexual couple would be required to choose between maintaining their civil status and obtaining identity cards reflecting the gender with which they identify."[1668]

The dissenters went on to write:

> "[T]he question of whether an issue arises under Article 12 becomes more difficult after a finding, such as that of the majority, that there has not been a violation of Article 8. We

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[1666] Ibid, paras 111-112.

[1667] *Goodwin* App no 28957/95.

[1668] Joint dissenting opinion of Judges Sajó, Keller and Lemmens *Hämäläinen v Finland (GC)* App no 37359/09 (ECtHR, 16 July 2014), paras 5, 19.

> believe that the majority should have examined the issue of whether Article 12 guarantees not only a right to marry, but also a right to remain married unless compelling reasons justify an interference with the civil status of the spouses. We do not consider the gender reassignment undergone by one spouse to be a compelling reason justifying the dissolution of a marriage where both spouses expressly wish to continue in their pre-existing marital relationship."[1669]

*Hämäläinen* shows that the Court increasingly refuses to apply any kind of substantial evaluation of discrimination if marriage is involved. Indeed, as dissenters have noted, the Court refuses to draw inferences from its own case law, failing to apply its progressive evaluations of substantial discrimination as it had done, e.g., in *Goodwin*.

Lastly, there are also developments that allow for cautious optimism. The 2017 case *Ratzenböck and Seydl v Austria*[1670] demonstrates how the ECtHR can be used by savvy national lawyers to exert domestic pressure for same-sex marriage, despite the ECtHR's current antagonism towards the subject. *Ratzenböck* dealt with an Austrian *heterosexual* couple that claimed the Austrian Registered Partnership Act[1671] was discriminatory, since it prevented them from registering. The Court (unsurprisingly) found no violation of the Convention, particularly because it claimed that there were no longer substantial differences between marriages and registered partnerships in Austria.

The most interesting aspect about this case, however, is its national context. Applicants in this case were represented by Austrian activist and lawyer Helmut Graupner, who advanced this case also as a means to exert political pressure for the adoption of same-sex marriage in Austria. At the time the case emerged, a coalition of social democrats and conservatives was in charge of government and legislature; and while social democrats were pushing for marriage equality, conservatives refused to cooperate. Thus, this case was partly meant as a domestic political

[1669] Ibid, para 16.

[1670] *Ratzenböck & Seydl v Austria* App no 28475/12 (ECtHR, 20 March 2017).

[1671] Austrian Partnership Act (*Eingetragene Partnerschafts-Gesetz - EPG*), FamRÄG 2009, BGBl I 2009/135 (Austria).

warning sign, because, as Graupner put it,

> "what's a real devil's choice for conservatives is to open up alternative forms of partnership to heterosexual couples. That undermines the institution of marriage. So I always tell conservatives that they should give us same-sex marriage to avoid registered partnerships for heterosexual couples."[1672]

Graupner is also the initiator of "Ehe Gleich,"[1673] an Austrian-wide campaign to introduce same-sex marriage, which had requested a popular referendum on the issue. It was discussed in parliament in November 2017.[1674] However, the Austrian Constitutional Court declared that denying same-sex couples access to marriage was unconstitutional on 4 December 2017,[1675] making it the first court in Europe to introduce marriage equality. The case, of course, was also argued by Graupner.

[1672] Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014).

[1673] Ehe gleich <http://www.ehe-gleich.at/> (accessed 31 January 2018).

[1674] Bürgerinitiative "EHE GLEICH! Aufhebung des Eheverbots für gleichgeschlechtliche Paare" vom 09.11.2017 (XXVI.GP) vormals 85/BI vom 05.08.2015 (XXV.GP) (AUT).

[1675] VfGH 04.12.2017, G258/2017 (AUT).

## 16. Conclusions to Chapter 5

The ECHR contains several protections for LGBT rights. This chapter has provided an overview of these provisions,[1676] thus giving an answer to a part of the preliminary investigation of subset 3.1. of the third inquiry.[1677]

The ECtHR has developed a large body of case law on LGBT rights, especially in the context of same-sex families. Its case law on same-sex marriage is less comprehensive, which is why it made sense to also include other cases on marriage in this analysis, in order to point out parallels and differences, and possibly gain insights for marriage equality litigation.

The two case law narratives I have presented in Sections 14 and 15 have allowed an analysis of the Court's case law regarding its potential for serving as a basis for strategic litigation efforts. The narratives have shown the Court's gradual acceptance of non-traditional family forms, as well as the limits of its willingness to promote LGBT rights – especially regarding marriage.

The Court's case law was reviewed under the lens of the on-going struggle for LGBT rights, with a special focus on indicators for strategic litigation opportunities. Hence, this analysis parts from more traditional academic approaches by taking a decidedly partisan standpoint. Retelling the Court's reasoning as a field of activist possibilities puts litigants (applicants as well as third party interveners) in the centre of the story and elevates them from mere addressees of the law to actors who can use the circumstances they encounter to further their agendas.

This point of view thus allows for an evaluation of the emancipatory potential of the case law for activist interventions, in line with subsets 3.2. and 3.3. of the third inquiry of my research question: *Can the respective case law of the Courts be analysed in an actor-centred way – and does it provide room for activist intervention?* and *How could an activist reading of the European Courts' LGBT rights case law look like?*

[1676] See Section 14.

[1677] See *supra*, at 17.

I hope to have shown that a reading of the ECtHR's LGBT rights jurisprudence is indeed possible, pointing out both indicators which would allow for activist intervention, as well as suggestions on strategy. In the following, I will present a summary of my findings.

## 16.1. Indicators for Strategic Litigation Opportunities

### 16.1.1. Vague and ambiguous terms

*Vague* or *ambiguous concepts* such as "family," "marriage" or "tradition" (*inter alia*) are often highly relevant arguments in the ECtHR's reasoning. These terms have acquired legal significance (also based on their recurring usage in ECtHR case law), but are nonetheless rooted in, and draw meaning from, lay term usage. These two meanings tend to influence each other; hence, a change in the "civilian" understanding of a term can affect its usage by the Court and thus, amend its legal significance.[1678] The Court's own pretence that the Convention needed to be interpreted dynamically, in light of present-day conditions, gives additional impetus to this indicator of strategic litigation opportunities.

In its case law, the Court has often examined what constituted a "family," looking at a variety of different elements to establish whether "family ties" worth protecting existed. In its landmark case *Marckx v Belgium*,[1679] it applied a functional analysis, stating that substantive factors (e.g., cohabitation or *de facto* relationship with a child) could point to the existence of a family. Similarly, in *Saucedo Gómez*, it looked into the nature of the relationship, applying a functional approach to determine whether a family in the meaning of Article 8 existed.[1680] In *Fretté*, it put great weight on the fact that the applicant *had not formed a family yet*, and stated that future family ties were not protected by Article 8.[1681]

[1678] And vice versa.

[1679] *Marckx* App no 6833/74.

[1680] *Saucedo Gómez* App no 37784/97.

[1681] *Fretté* App no 36515/97, para 42.

In the context of LGB rights, the Court had originally denied that same-sex couples could form a family.[1682] In *Karner*, the Court started to take a more positive approach, leaving the question explicitly open.[1683] And finally, in *Schalk & Kopf*, the Court included same-sex couples in the realm of "family life" under Article 8,[1684] recognising that same-sex couples could form a "*de facto* family." However – as dissenters had pointed out – the term "*de facto* family" remains vague, especially since the Court did not draw any inferences from its finding, as dissenters also pointed out;[1685] importantly, it did not require States to provide any kind of legal framework to protect same-sex families.

In *Gas & Dubois*, it again missed a chance to advance a systemically sound interpretation of "*de facto* families,"[1686] especially ignoring that in this case, there *already was* a relationship of the parent in question with the child – a main difference of this case to *Fretté,* where the Court had held that the applicant had not established ties to a child yet.[1687] Thus, it did not draw the obvious parallel to its illegitimacy case law, where it had held that the "best interest of the child" (*inter alia*) demanded an examination of the *de facto* parent-child relationship.[1688] In *X & Others* however, decided only a year later, the Court explicitly referred to the importance of *de facto* family ties and the best interest of the child.[1689] In *Oliari,* the Court no longer shied away from suggesting that same-sex couples deserved legal protection,[1690] closing the gap to *Schalk and Kopf*, where it had suggested that same-sex families deserved protection without formulating what this entailed.[1691]

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[1682] *Kerkhoeven* App no 15666/89; *Johnston* App no 9697/82 , para 55.

[1683] *Karner* App no 40016/98, para 33.

[1684] *Schalk & Kopf* App no 30141/04, paras 94, 95.

[1685] Joint dissenting opinion by Judges Rozakis, Spielmann and Jebens, *Schalk & Kopf* App no 30141/04, para 4. See also discussion in Section 14.2.5.

[1686] *Gas & Dubois* App no 25951/07.

[1687] *Fretté* App no 36515/97, para 42.

[1688] *Marckx* App no 6833/74, para 31.

[1689] *X & Others* App no 19010/07, paras 145, 146.

[1690] *Oliari* App nos 18766/11 and 36030/11, paras 165, 174-180.

[1691] As pointed out by dissenters: Joint dissenting opinion by Judges Rozakis, Spielmann and Jebens, *Schalk & Kopf* App no 30141/04, para 4. See also discussion in Section 14.2.5.

The multiple ways in which the Court has conceptualised "family," and the various factors it has considered in this regard, demonstrate the *vagueness* of the term. This has constituted an important indicator for strategic litigation opportunities – and indeed, activists have repeatedly contributed to filling the concept of "family" with meaning, as I have shown – ultimately contributing to the Court's same-sex inclusive construction of "family."[1692] These interventions were particularly valuable when establishing the existence of a *European consensus*, where their *expertise* was arguably regularly used (and sometimes even cited) by the Court.[1693] Thus, the case law development of the term "family" presents a successful example of the strategic use of a litigation opportunity indicator (*vague and ambiguous terms*).

Connected to the term "family" is, of course, the concept of "traditional family." The protection of the "traditional family" was in the past often accepted by the Court as a legitimate reason for disparate treatment; not only disparate treatment of same-sex couples in comparison to married couples,[1694] but also, sometimes, of different-sex couples regarding benefits attached to the status of marriage.[1695] Here, the Court has not advanced a comprehensive interpretation of what "tradition" entails; in *X and Others*, at least, it has claimed that a "traditional family" was not automatically in the best interest of a child, and it was on the government to prove that the "traditional family" was endangered by same-sex second parent adoption.[1696] The protection of

[1692] See discussion in Section 15.2.

[1693] E.g., in *Karner* App no 40016/98, paras 36, 37 (explicit mention); *Oliari* App nos 18766/11 and 36030/11, paras 171, 173 (explicit mention of statistics provided by ARCD); *Goodwin* App no 28957/95, para 84, citing Liberty's intervention in paras 55-56; *X & Others* App no 19010/07, paras 149, 150, which mirrors third party interveners' arguments in the submissions, Joint Written Comments of FIDH, ICJ, ILGA-Europe, BAAF, NELFA and ECSOL (submitted 1 August 2012) to *X & Others* App no 19010/07, paras 16-19; and others.

[1694] *Mata Estevez* App no 56501/00.

[1695] *Saucedo Gómez* App no 37784/97.

[1696] *X & Others* App no 19010/07, para 141.

"traditional marriage" is, however, still used by the Court in order to negate an obligation of a Member State to grant access to marriage for same-sex couples.[1697]

"Marriage" in general is another *vague and ambiguous* term. The Court's respective case law demonstrates the *vagueness* of this concept, as does the Court's reluctance to interpret it coherently throughout its case law. Generally, the Court has applied quite a narrow margin of appreciation in cases where it felt that the State imposed restrictions on marriage that impaired the very essence of this right.[1698] The ECtHR has defined this "essence" quite broadly, claiming, *inter alia*, that 3-year-waiting periods before remarrying unjustifiably restricted this right, [1699] as did marriage prohibitions for prisoners[1700] or former in-laws.[1701] The Court has also included transgender* people in the realm of Article 12 – even though initially, they were denied the right to marry the person of their choice.[1702] The Court's reasoning in earlier cases, especially in *Cossey* and *Sheffield*, applied rigid *formalism* and elicited a number of *dissents*[1703] (which can be also read as a sign of *hesitation and disagreement*). In *Goodwin*, the ECtHR finally undertook a more comprehensive evaluation that resulted in granting a transgender* woman the right to marry under Article 12.[1704] Importantly, the Court referred to the *expertise* of NGOs in this

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[1697] See especially the confusing constructions of "marriage" by the Court – for one, its progressive construction in *Schalk & Kopf* App no 30141/04, para 61; followed by less progressive interpretations, e.g. in Joint dissenting opinion of Judges Sajó, Keller and Lemmens *Hämäläinen (GC)* App no 37359/09 , para 96.

[1698] Most famously: *Goodwin* App no 28957/95.

[1699] *F v Switzerland* App no 11329/85, para 32.

[1700] *Jaremowicz* App no 24023/03.

[1701] *B & L* App no 36536/02.

[1702] *Rees* App no. 9532/81; *Cossey* App no 10843/84; *Sheffield & Horsham* App nos 22985/93 and 23390/94.

[1703] For instance, in *Cossey* App no 10843/84: Dissenting Opinion of Judge Martens, App no 10843/84; Joint partly dissenting opinion by Judges MacDonald and Spielmann, App no 10843/84; Joint dissenting opinion by Judges Palm, Foighel and Pekkanen, App no 10843/84. In *Sheffield & Horsham* App nos 22985/93 and 23390/94: Joint Concurring Opinion of Judges de Meyer, Valticos and Morenilla, *Sheffield & Horsham* App nos 22985/93 and 23390/94; Concurring Opinion of Judge Freeland, *Sheffield & Horsham* App nos 22985/93 and 23390/94; Joint Partly Dissenting Opinion of Judges Bernhardt, Vilhjálmsson, Spielmann, Palm, Wildhaber, Makarczyk and Voicu, *Sheffield & Horsham* App nos 22985/93 and 23390/94; Partly Dissenting Opinion of Judge Casadevall, *Sheffield & Horsham* App nos 22985/93 and 23390/94; Dissenting Opinion of Judge Van Dijk, *Sheffield & Horsham* App nos 22985/93 and 23390/94; Declaration of Judge Wildhaber (dissenting), *Sheffield & Horsham* App nos 22985/93 and 23390/94. See also discussion in Section 15.3.1.

[1704] *Goodwin* App no 28957/95.

context.[1705]

However, in the realm of same-sex marriage, the Court has accepted a wide margin of appreciation.[1706] Apart from showing that the Court has been *inconsistent* in this regard, this also illuminates the *vagueness* of the term "marriage." Article 12 itself is formulated in a gender-neutral way.[1707] This has been accepted by the Court in *Schalk & Kopf*, where it held that it "would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex."[1708] Furthermore, the Court has declared in more than one instance that the Convention was a living instrument that needed to be interpreted in a dynamic way, reflecting present day conditions.[1709] However, in cases such as *Hämäläinen*, it has fallen back on conservative constructions of Article 12, claiming that it "secures the fundamental right of a man and woman to marry and to found a family ... It enshrines the traditional concept of marriage as being between a man and a woman ..."[1710]

While the Court's progressively more favourable stance on transgender* rights (and ultimately, its *Goodwin* judgment) allowed for cautious optimism regarding the Court's position on same-sex marriage,[1711] the translatability of its transgender* jurisprudence to the same-sex rights context remains questionable. Importantly, the Court's transgender* jurisprudence does not question the definition of marriage as a *heterosexual institution*.[1712] It does, however, contain a few elements that could be interesting for same-sex rights litigation efforts, such as the

[1705] Ibid, para 85.

[1706] This has been confirmed by the Court's latest case on the issue: *Charpentier* App no 39651/11, para 38.

[1707] Bribosia, Rorive and Van den Eynde, 'Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience', 9-10.

[1708] *Schalk & Kopf* App no 30141/04, para 61.

[1709] *Marckx* App no 6833/74, para 41; *Goodwin* App no 28957/95, para 74.

[1710] Joint dissenting opinion of Judges Sajó, Keller and Lemmens *Hämäläinen (GC)* App no 37359/09 , para 96.

[1711] Especially since the Court, in *Schalk & Kopf*, accepted that "certain principles might be derived from the Court's case-law relating to transsexuals." *Schalk & Kopf* App no 30141/04, para 50.

[1712] See discussion *supra,* at 340.

conceptual de-coupling of marriage froom the possibility to (naturally) procreate.[1713]

Generally, the ECtHR has framed the question of same-sex marriage in the context of Article 12 as a form of "equality" question – are same-sex couples entitled to equal treatment with different-sex couples regarding their ability to marry?[1714] The Court usually answers this question in the negative, since it assumes that marriage confers a "special status" that does not *necessarily* extend to same-sex couples.[1715] This is the main difference to the ECtHR's construction of same-sex "family" rights.[1716] In the latter category of cases, the Court tends to adopt a narrow margin of appreciation;[1717] in the former category of cases, however, the Court accepts a wide margin of appreciation in the absence of a clear *European consensus*.[1718] This might be seen as somewhat *inconsistent* regarding its *Schalk & Kopf* judgment, where it did – after all – hold that marriage had "undergone major social changes" since the adoption the ECHR,[1719] and did not *per se* exclude same-sex couples, even though the developments did not yet require their inclusion.[1720]

For the construction of the terms "family" and "marriage" – as well as for the width of the margin of appreciation afforded to States in the area of Article 8 (family life) and Article 12 (marriage) – other factors, such as the Court's use of *European consensus* or its recognition of *NGOs as experts* indicate interesting litigation opportunities, as does the Court's display of

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[1713] *Goodwin* App no 28957/95, para 98.

[1714] Frances Hamilton, 'Gays and the European Court of Human Rights: The Equality Argument' in Carlo Casonato and Alexander Schuster (eds), *Rights on the Move Rainbow Families in Europe* (University of Trento 2014), 78.

[1715] See, e.g., *Gas & Dubois* App no 25951/07, para 68.

[1716] In *Oliari,* the Court considered the "general need for legal recognition and the core protection of the applicants as same-sex couples" as a core part of an individual's identity. *Oliari* App nos 18766/11 and 36030/11, para 177.

[1717] It has done so since *Dudgeon* App no 7525/76, applying this approach to families, e.g., in *Schalk & Kopf*. *Schalk & Kopf* App no 30141/04.

[1718] Hamilton, 'Gays and the European Court of Human Rights: The Equality Argument', 78; Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law', 128.

[1719] *Schalk & Kopf* App no 30141/04, paras 55, 58.

[1720] Ibid, paras 55-61.

*inconsistency, hesitation and disagreement*. Read together, these indicators allow for a number of strategic conclusions regarding future litigation.

## 16.1.2. European Consensus

Usually, the Court refers to *European consensus* in order to determine the appropriate margin of appreciation that it wishes to afford to a State. The concept is difficult to evaluate from the viewpoint of same-sex rights activists. On one hand, it is has proven a very powerful gateway for social change. In almost every case that resulted in a favourable change for LGBT people, the Court has evoked *consensus*.[1721] Importantly, LGBT rights activists have contributed to the Court's evaluation of *consensus*.[1722] On the other hand, the Court has also often cited *consensus* in decisions that had a negative outcome from the perspective of LGBT rights,[1723] especially in the context of same-sex marriage.[1724] As of yet, the Court has not followed a coherent approach when examining *consensus.*

*Firstly*, the Court has several different ways to conduct a comparative research into consensus. Sometimes, it compares the legal *status quo* of its Member States;[1725] other times, it draws conclusion from the observation of *legal trends or developments*.[1726] The latter usually allows for an LGBT friendly construction. Sometimes, it consults EU materials in order to back up its *consensus* analysis,[1727] which is interesting given that not all Council of Europe (CoE) Member States belong to the EU. In a few cases, the Court has also looked into social attitudes or societal

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[1721] E.g., *Dudgeon* App no 7525/76, para 60; *Karner* App no 40016/98, para 36; *Schalk & Kopf* App no 30141/04, paras 93-93; *Vallianatos* App nos. 29381/09 and 32684/09, para 91; *Oliari* App nos 18766/11 and 36030/11, paras 177, 178.

[1722] For instance: *Karner* App no 40016/98, paras 36, 37; *Goodwin* App no 28957/95, para 84, citing paras 55-56; *Oliari* App nos 18766/11 and 36030/11, paras 171, 173, citing statistics provided by ARCD.

[1723]E.g., *Fretté* App no 36515/97, paras 35-36; *Cossey* App no 10843/84, para 40; *Hämäläinen (GC)* App no 37359/09 , paras 73-75; *Aldeguer* App no 35214/09 , para 82; and many others.

[1724] E.g., *Schalk & Kopf* App no 30141/04, para 46; *Hämäläinen (GC)* App no 37359/09 , paras 73-75.

[1725] E.g., *Hämäläinen (GC)* App no 37359/09 , paras 73-75.

[1726] E.g., *Taddeucci* App no 51362/09, para 177; *X & Others* App no 19010/07, para 91.

[1727] E.g., *Schalk & Kopf* App no 30141/04, para 105; *Cossey* App no 10843/84, para 40; *EB* App no 43546/02, para 93, citing para 26.

trends regarding a particular issue; in *Schalk & Kopf*, it cited the "rapid evolution of social attitudes" as one of the most important reasons to include same-sex couples in the realm of "family life" under Article 8.[1728] This is often backed up by statistics or (sometimes) scientific material.[1729] It is not always clear why the Court chooses a particular mode of comparative evaluation instead over another in a given case; indeed, it often uses a mixed approach.[1730]

A *second* point which remains unclear in the Court's construction of *consensus* regards the *subject* of its evaluation. In other words – what exactly is the *research topic* of the Court? This is particularly connected to the question of how to proceed if there is legislative *silence* in a certain matter – i.e., neither express prohibitions nor permissions of a certain issue (such as in the context of adoptions by a homosexual individual).[1731] A very interesting example are the cases *Fretté*[1732] and *EB.*[1733] In *Fretté*, the Court framed the subject of its inquiry as follows: Did CoE Member States allow "same-sex parenting," and in particular – did they have legislation permitting singe-parent adoption by homosexual individuals?[1734] And furthermore, what was the stance of the scientific community on this issue?[1735] It came to the conclusion that the Member States legislations were largely silent on this issue, and construed this silence in favour of the government.[1736]

Learning from the *Fretté* experience, activist lawyers were successful in proposing an alternative construction in *EB.*[1737] They argued that in countries that permitted single-parent adoptions,

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[1728] *Schalk & Kopf* App no 30141/04, paras 94, 95.

[1729] E.g., *Dudgeon* App no 7525/76, para 60; *Goodwin* App no 28957/95, paras 81-85; *Fretté* App no 36515/97, para 42; *X & Others* App no 19010/07, paras 55-56; *Oliari* App nos 18766/11 and 36030/11, paras 171, 173.

[1730] *Dudgeon* App no 7525/76, para 60; *Vallianatos* App nos. 29381/09 and 32684/09, para 91; *Schalk & Kopf* App no 30141/04, paras 92-95.

[1731] See discussion in Section 15.2.7.

[1732] *Fretté* App no 36515/97.

[1733] *EB* App no 43546/02.

[1734] *Fretté* App no 36515/97, paras 36, 41. See discussion *supra,* at 288.

[1735] Ibid, para 42.

[1736] Ibid, para 42.

[1737] See discussion *supra,* at 294.

there were usually no express legal exclusions of homosexual individuals. Moreover, there was an emerging trend of allowing even the *more controversial* joint adoption by same-sex couples. Thus, it could be concluded that the absence of express legislation concerning single-parent adoptions of homosexuals was *not* a sign of *absence of consensus* on this matter. Rather, legislation including homosexual individuals was not necessary, since they were implicitly included in provisions allowing single-parent adoption.[1738] Even though the Court did not conduct a consensus examination in this regard, it did portray both the government's[1739] and the applicant's[1740] opinions in this matter, and contend explicitly that the "present case does not concern adoption by a couple or by the same-sex partner of a biological parent, but solely adoption by a single person."[1741] In this sense, it is arguable that the construction of *consensus* as advanced by LGBT rights activists had some kind of bearing on the Court's reasoning.

*Thirdly*, the Court does not seem to have a coherent method for deciding in which cases it is adequate to rely on *consensus*, and in which it is not. It often uses *consensus* to determine the width of the margin of appreciation afforded to Member States when dealing with sensitive political or moral issues – including same-sex marriage or same-sex parenthood.[1742] However, the Court's reliance on *consensus* has not been without contention.[1743] In *Fretté*, for instance, dissenters pointed out that a heavy reliance of consensus – leading to the acceptance of a wide margin of appreciation – "paves the way for States to be given total discretion … [which is], when couched in such general terms, liable to take the protection of fundamental rights backwards."[1744] In *Oliari*, the Court itself seemed to view a reliance on consensus with

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[1738] Written Comments of FIDH, ILGA-EUROPE, BAAF & APG, submitted on 3 June 2005 to *EB* App no 43546/02, paras 7-13.

[1739] *EB* App no 43546/02, para 65.

[1740] Ibid, para 61.

[1741] Ibid, para 49. See also discussion *supra,* at 294.

[1742] For instance, *Karner* App no 40016/98, para 36; *Schalk & Kopf* App no 30141/04, paras 93-93; *X & Others* App no 19010/07, paras 149-150; *Vallianatos* App nos. 29381/09 and 32684/09, para 91; *Oliari* App nos 18766/11 and 36030/11, paras 177, 178.

[1743] Arai-Takashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, 211-212; Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards', 844.

[1744] Joint Partly Dissenting Opinion by Judges Bratza, Fuhrmann and Tulkens, *Fretté* App no 36515/97, para 2(c).

ambiguity where core rights, touching on an individual's identity, were involved.[1745]

The Court has not yet developed a concise framework of when and how to examine *consensus*, what exactly to examine, and to which extent it should matter.[1746] What is clear, however, is that it plays a powerful role – which makes it an interesting concept for social change advocates.[1747] And in fact, activist lawyers have, time and again, importantly contributed to the Court's construction of consensus by way of providing *expertise*.[1748]

### 16.1.3. Inconsistency, Hesitation and Disagreement

The Court's case law is riddled with *inconsistency*, *hesitation* and *disagreement.* The most obvious *inconsistencies* regard the Court's refusal to draw evident parallels between its same-sex rights case law and its findings in other matters, such as its illegitimacy jurisprudence,[1749] or parts of its transgender* marriage decisions.[1750]

But even *within* its LGBT rights case law, the Court displays inconsistencies. After *Schalk and Kopf*, where it established that same-sex couples can form a family,[1751] the Court's willingness to protect the rights of same-sex couples seemed to increase. In *Oliari*, the Court demanded that the Italian government provide some kind of legal recognition for same-sex couples.[1752] This line

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[1745] *Oliari* App nos 18766/11 and 36030/11, para 177. See discussion *supra,* at 312.

[1746] Consequently, particular constructions of consensus are often criticised in dissenting opinions. See, e.g., Joint partly dissenting opinion by Judges MacDonald and Spielmann, App no 10843/84, para 2; Joint dissenting opinion by Judges Palm, Foighel and Pekkanen, App no 10843/84, para 3; Joint dissenting opinion of Judges Sajó, Keller and Lemmens *Hämäläinen (GC)* App no 37359/09 , paras 5, 19.

[1747] This has been confirmed by the activists I interviewed, *inter alia*: Robert Wintemute, King's College London (2014); Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014).

[1748] For instance: *Karner* App no 40016/98, paras 36, 37; *Goodwin* App no 28957/95, para 84, citing paras 55-56; *Oliari* App nos 18766/11 and 36030/11, paras 171, 173, citing statistics provided by ARCD.

[1749] *Marckx* App no 6833/74. See also discussion in Section 15.2.6.

[1750] *Goodwin* App no 28957/95. See also discussion in Section 15.3.1.

[1751] *Schalk & Kopf* App no 30141/04, paras 94, 95.

[1752] *Oliari* App nos 18766/11 and 36030/11, paras 165, 174-180.

of reasoning was developed and expanded in *Taddeucci*,[1753] dealing with residence rights of stable same-sex couples, and *Orlandi*,[1754] concerning the recognition of same-sex marriages concluded abroad. However, somewhat surprisingly, the Court refused to recognise other same-sex family rights, such as paternity leave for same-sex parents.[1755]

Closely connected to this is the Court's treatment of the "traditional family protection" rationale, often advanced by governments when trying to justify an interference in an Article 8 right. The Court has displayed considerable *inconsistencies* in its application. While it has readily accepted this excuse in the beginning of its same-sex rights case law,[1756] it started to be more reluctant towards it in *Karner*, claiming that States would have to show that the exclusion of homosexual people was *necessary* to protect the traditional family.[1757] And in *X & Others*, it was not convinced at all that prohibiting step-parent adoptions for same-sex couples in any way protected the "traditional family."[1758] In this case, it furthermore stated that the government had not proven the link between the "best interest of a child" and the prohibition of same-sex second parent adoptions,[1759] thus questioning implicitly the government's reliance on the "traditional family protection" rationale in this context. In fact, if the "traditional family protection" is disconnected from the "best interest of the child," it might be deprived of a big part of its impetus. After all, if the argument that the "traditional family" was the best place for a child is no longer convincing, then it is questionable what is left worth protecting by this rationale.

However, later cases have brought back a certain sub-form of the "traditional family protection" rationale, dressed in biologist assumptions of parenthood. In *Hallier*, the Court accepted the French government's refusal to grant paternity leave to the female partner of the biological mother, based on the fact (simply put) that paternity leave was reserved for *biological*

[1753] *Taddeucci* App no 51362/09.

[1754] *Orlandi* App nos 26431/12; 26742/12; 44057/12 and 60088/12.

[1755] *Hallier* App no 46386/10.

[1756] See discussion in Section 15.2.2.

[1757] *Karner* App no 40016/98, para 37.

[1758] *X & Others* App no 19010/07, para 141.

[1759] Ibid, paras 144-146.

*fathers*.[1760] Therefore, the Court's conceptualisation of the "traditional family protection" rationale is still *inconsistent*.

Another sign for *hesitation*, often leading to *inconsistency*, can be derived from the Court's reasoning style. Sometimes, the Court embarks on a very principled and substantive evaluation, considering in detail the facts of the case and looking at the whole situation. On other occasions, however, it retreats into a brief, formalistic assessment that appears to distort the circumstances, instead of illuminating them.

For example, the Court sometimes appears to apply an overly formalistic frame to cases, splitting the circumstances of a case into isolated parts, which it examines separately. In *Gas & Dubois*, for instance, the Court investigated *first* whether a State could legitimately prevent same-sex couples from marrying (which it could), and *second* whether a State could legitimately equip marriage with special rights, such as stepparent adoption rights (which it also could).[1761] Splitting the facts into these parts veiled the actual issue – namely, the fact that in this constellation, no homosexual person could ever adopt their partner's child. The Court thus got out of examining whether this amounted to discrimination based on sexual orientation.[1762] It applied similar techniques in other cases as well[1763] – mostly in situations where it denied the existence of rights (or State interferences in these rights), resulting in *inconsistencies* with its previous case law. Such decisions can also be read as signs of *hesitation*; arguably, the Court might apply such a method instead of a substantive analysis in cases where it is reluctant to challenge the status quo.

Interestingly, these decisions were often followed (sometimes shortly after) by less formalistic judgments, providing a well-reasoned basis for an LGBT-friendly change in jurisprudence. For instance, year later, *Gas & Dubois* was followed by the well-reasoned and thoughtful *X &*

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[1760] For this reason, the Court held that there was no comparable situation and thus, no discrimination. *Hallier* App no 46386/10, para 32; see also discussion in Section 15.2.8.

[1761] *Gas & Dubois* App no 25951/07.

[1762] See discussion *supra,* at 300.

[1763] E.g., in *Rees* App no. 9532/81, para 50; *Aldeguer* App no 35214/09.

*Others* decision.[1764] *X & Others* had a very similar fact pattern to *Gas & Dubois* (although the Court insisted that there were differences); in *X & Others*, the Court came to the conclusion that in the present case, the State was not justified to prohibit stepparent adoptions. The Court's similarly formalistic decisions in *Rees*,[1765] *Cossey*[1766] or *Sheffield*,[1767] (the latter two also riddled with dissents),[1768] were followed by *Goodwin*[1769] not much later.

In this sense, overly formalistic decisions displaying *inconsistency or hesitation* present interesting strategic litigation opportunities – hinting at discordance among the judges, or signalling that the Court was unsure which road to take and thus settled for the smallest common denominator. Accordingly, such decisions are often issued with a high number of *dissents*, or at least concurring opinions with different interpretations of the subject matter.[1770] These decisions thus could be read as indicators of impending transition.

Accordingly, instances of *inconsistency* can be found – and pointed out by activists – not only within the Court's LGBT rights case law, but indeed, when contrasting its case law in this area with its case law in other areas (possibly including international developments).[1771] In fact, this

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[1764] *X & Others* App no 19010/07.

[1765] *Rees* App no. 9532/81.

[1766] *Cossey* App no 10843/84.

[1767] *Sheffield & Horsham* App nos 22985/93 and 23390/94.

[1768] In *Cossey* App no 10843/84: Dissenting Opinion of Judge Martens, App no 10843/84; Joint partly dissenting opinion by Judges MacDonald and Spielmann, App no 10843/84; Joint dissenting opinion by Judges Palm, Foighel and Pekkanen, App no 10843/84. In *Sheffield & Horsham* App nos 22985/93 and 23390/94: Joint Partly Dissenting Opinion of Judges Bernhardt, Vilhjálmsson, Spielmann, Palm, Wildhaber, Makarczyk and Voicu, *Sheffield & Horsham* App nos 22985/93 and 23390/94; Partly Dissenting Opinion of Judge Casadevall, *Sheffield & Horsham* App nos 22985/93 and 23390/94; Dissenting Opinion of Judge Van Dijk, *Sheffield & Horsham* App nos 22985/93 and 23390/94; Declaration of Judge Wildhaber (dissenting), *Sheffield & Horsham* App nos 22985/93 and 23390/94. See also discussion in Section 15.3.1.

[1769] *Goodwin* App no 28957/95.

[1770] See *supra,* note 1768. See also: Joint Partly Concurring Opinion by Judge Costa, joined by Judges Jungwiert and Traja, *Fretté* App no 36515/97; Joint Partly Dissenting Opinion by Judges Bratza, Fuhrmann and Tulkens, *Fretté* App no 36515/97; Concurring Opinion of Judge Costa, joined by Judge Spielmann, *Gas & Dubois* App no 25951/07; Concurring Opinion of Judge Spielmann joined by Judge Berro-Lefévre, *Gas & Dubois* App no 25951/07; *Van Gend & Loos* (Case 26/62) [1963] ECR 1Dissenting Opinion by Judge Villiger, *Gas & Dubois* App no 25951/07.

[1771] Globally, same-sex marriage is developing very quickly. See *infra*, note 1831.

strategy is often applied by activists.[1772] Nigel Warner (ILGA-Europe) explains:

> "What we're trying to do is make sure [the judges] don't forget. We put all these things they've already said in different cases [not dealing with sexual orientation] into a sexual orientation [context], so you've got a consolidated statement. Then you're trying to go beyond – this is going to help not just the sexual orientation cases, but other cases, too. ... [People at Court] see it as being useful from a workload perspective. And a lot of stuff is repeating their own cases onto [the judges]."[1773]

While this approach has been quite successful in the area of family rights, considering also the Court's repeated referral to briefs by third party interveners, it has not been as successful in the area of same-sex marriage.

There is a point to be made that the Court's same-sex marriage case law is highly *inconsistent* when contrasted to its marriage case law in other contexts. Whereas the Court uses substantive and principled methods of evaluation in cases *not* directly connected to same-sex marriage, it advances formalistic excuses once the access to same-sex marriage is involved. It is interesting that the Court recognises an interference with the essence of the right to marry where a person is prevented from marrying a person of their choice, such as their daughter in law,[1774] or is prevented from marriage due to their particular circumstances, such as being in prison[1775] – but finds no problem with the fact that same-sex individuals are barred from marrying a whole category of people – the only category that they could, based on their particular circumstances (being homosexual), possibly choose a partner from.

This is especially *inconsistent* regarding the ECtHR's positive development of transgender* rights. The *inconsistencies* of its same-sex rights case law with certain parts of its transgender*

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[1772] Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014); Robert Wintemute, King's College London (2014); Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014).

[1773] Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014).

[1774] *B & L* App no 36536/02.

[1775] *Jaremowicz* App no 24023/03; *Frasik* App no 22933/02.

jurisprudence are blatant.[1776] After all, the *Goodwin* case[1777] dealt with a very similar issue that same-sex marriage cases deal with – whereas Goodwin was allowed to marry a female person, she was legally prevented from marrying a male person. Put bluntly, the person she wished to marry had the wrong gender. The Court found that this legal impediment infringed on the very essence of her right to marry.[1778] It is hard to understand why a gay man, who is legally prevented from marrying a male person, should be in a significantly different position.

It needs to be noted, however, that the Court constructed the issue at hand in a different manner, linking Goodwin's right to marry to her full legal recognition as a woman.[1779] Nonetheless, even the Court itself accepted in *Schalk & Kopf* that certain general principles might be derived from *Goodwin* which could also apply to same-sex marriage.[1780] It has however not drawn any consequences from this assessment since.

While the Court's marriage jurisprudence – its judgments as well as its inadmissibility decisions – are ripe with *inconsistency, hesitation and disagreement*, this, however, does not necessarily mean that transition is imminent. In fact, the Court thus far has been quite decisive in its opinion that Article 12 did *not* guarantee *access* to same-sex marriage. Even though after the Court's *Schalk & Kopf* decision, some observers assumed that the front against same-sex marriage had begun to crack,[1781] this crack has not widened as of yet. In fact, the Court, in its subsequent decisions, such as *Aldeguer*,[1782] *Hallier*[1783] or *Hämäläinen*,[1784] upheld its conservative stance on

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[1776] Especially, of course, with its *Goodwin* decision. *Goodwin* App no 28957/95.

[1777] Ibid.

[1778] Ibid, paras 97, 98.

[1779] Ibid, paras 97-103.

[1780] *Schalk & Kopf* App no 30141/04, para 50.

[1781] There was optimism after *Schalk & Kopf* regarding the prospects for same-sex marriage; see, e.g., Bribosia, Rorive and Van den Eynde, 'Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience'; Cooper, 'Marriage, Family, Discrimination & Contradiction: An Evaluation of the Legacy and Future of the European Court of Human Rights' Jurisprudence on LGBT Rights', 1763.

[1782] *Aldeguer* App no 35214/09.

[1783] *Hallier* App no 46386/10.

[1784] *Hämäläinen (GC)* App no 37359/09 .

same-sex marriage. These cases show that the Court increasingly refuses to apply any kind of substantial evaluation of discrimination if marriage is involved. Indeed, as dissenters in *Hämäläinen* have noted, the Court refuses to draw inferences from its own case law, failing to apply its previously developed standards in determining "whether and to what extent differences in otherwise similar situations justify differential treatment." [1785]

It is possible that the Court's *inconsistent* case law is a result of trying to appease reactionary political tendencies. As Mowbray points out, the Court seeks to "[strike] a fair balance between judicial innovation and respect for the ultimate policy-making role of member States in determining the spectrum of rights guaranteed by the Convention."[1786] This means it is – and has to be – well aware of political realities; and same-sex marriage is a contentious issue, especially in Eastern European countries. Consequently, the Court has to be cautious not to endanger its own impact by being *too* progressive and inciting backlash that might, eventually, put in question its own legitimacy.

There is an argument to be made that this is possibly not the end of the road for same-sex marriage and subsequent rights, but rather, an instance of *massive hesitation* on part of the Court. Nonetheless, the Court's present behaviour indicates the need for *caution* when litigating LGB rights, and for *incremental* approaches (see below).

### 16.1.4. Recognition of NGOs as experts

The Court has, time and again, referred to the expertise of NGOs and LGBT rights activists in its

[1785] Joint dissenting opinion of Judges Sajó, Keller and Lemmens *Hämäläinen (GC)* App no 37359/09 , para 19. The dissenters cite the Court's case law in *X & Others* App no 19010/07, para 98; *Vallianatos* App nos. 29381/09 and 32684/09, para 76; and others.

[1786] Mowbray, 'The Creativity of the European Court of Human Rights', 79.

reasoning.[1787] This is particularly relevant when the Court conducts an examination of the *European consensus* within its Member States, as the case law samples have shown. In cases like *Karner*[1788] or *Oliari*,[1789] the Court has recognised their expertise and cited their briefs as evidence for a changed reality.

Of course, this recognition presents a great strategic litigation opportunity for activist lawyers, providing their arguments with considerable leverage. This is echoed by activists; as Matthew Evans (AIRE Centre) explains,

> "Once you've built up a reputation, a body of cases and a body of interventions, that's what you base your next intervention on. ... So you say – the reason why we want to intervene is because we have all this expertise and background knowledge, and we've taken on all these cases."[1790]

In other words, the more activist groups intervene, the more reputation they may gain before the Court (of course, given that their interventions are well-researched and legally sound).

## 16.2. Strategic Litigation Activities

### 16.2.1. Interpretative Interventions

As repeatedly mentioned, advancing favourable *interpretations* of influential concepts within the Court's jurisprudence (especially *vague and ambiguous* concepts) is the main strategy activist

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[1787] For instance, *Karner* App no 40016/98, paras 36, 37 (explicit mention); *Goodwin* App no 28957/95, para 84, citing Liberty's intervention paras 55-56; *Oliari* App nos 18766/11 and 36030/11, paras 171, 173, citing statistics provided by ARCD; *X & Others* App no 19010/07, paras 149, 150, which mirrors third party interveners' arguments in the submissions, Joint Written Comments of FIDH, ICJ, ILGA-Europe, BAAF, NELFA and ECSOL (submitted 1 August 2012) to *X & Others* App no 19010/07, paras 16-19; *Vallianatos* App nos. 29381/09 and 32684/09, para 91, mirroring Written Comments of FIDH, ICJ, AIRE CENTRE and ILGA-EUROPE, submitted on 20 June 2011, *Vallianatos* App nos. 29381/09 and 32684/09, paras 2, 3, 5, appendix; and others.

[1788] *Karner* App no 40016/98, paras 36, 37.

[1789] *Oliari* App nos 18766/11 and 36030/11, paras 171, 173, citing statistics provided by ARCD.

[1790] Matthew Evans, AIRE Centre, London, GB (2014); Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014); Robert Wintemute, King's College London (2014).

lawyers can employ to take part in judicial decision making. As critical legal theory accounts have shown, legal activity is a form of language[1791] – and thus, requires interpretation.

The ECtHR's practice of understanding the ECHR as a "living instrument" and constructing its Articles in light of present day realities ("evolutive approach")[1792] provides activist advocates with opportunities to participate in the construction of relevant terms by way of "interpretative intervention." The case law shows that successful re-interpretations of the term "family" in *Schalk & Kopf*,[1793] or "gender" in *Goodwin*,[1794] have ultimately heightened the protection of LGBT people under the ECHR. And, as indicated in the case law sample I have provided, activists have indeed, time and again, participated in judicial meaning forming at the ECtHR.

Unfortunately, LGBT rights activists have been less successful when trying to re-interpret the meaning of "marriage" in a more inclusive way. In the realm of marriage, the Court has rather retreated to accepting conservative constructions of the term, as exemplified by its statement in *Hämäläinen* that Article 12 enshrined the "traditional concept of marriage as between a man and a woman."[1795]

### 16.2.2. Choosing the Right Comparator

In the ambit of Article 14, a person needs to claim that they have been treated differently than another person in a "comparable situation," and that this differential treatment was not justified, in order to establish discrimination. In order to establish a "comparable situation," a comparator needs to be determined – a person in a relevantly similar situation, with the main difference being a "protected ground,"[1796] such as sexual orientation.

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[1791] Hutton, *Language, Meaning and the Law*, 12. See discussion in Chapter 1, Section 3.2.

[1792] First in *Tyrer v UK* App no 5856/72 (ECtHR, 25 April 1978), para 183; see also, e.g.: *Schalk & Kopf* App no 30141/04, para 57.

[1793] *Schalk & Kopf* App no 30141/04, paras 94, 95.

[1794] *Goodwin* App no 28957/95, para 100.

[1795] *Hämäläinen (GC)* App no 37359/09 , para 96.

[1796] Rights (ed), *Handbook on European Non-Discrimination Law*, 23.

Hence, one of the most crucial strategic decisions is the choice of the "right comparator." This is especially important in issues touching upon marriage, since the ECtHR has repeatedly referred to the "special status of marriage" in order to deny comparability of situations.[1797] A particularly striking example of the Court's unwillingness to compare the situation of a same-sex partner to a married partner is *Aldeguer*. Even though the applicant constructed the comparator narrowly, claiming he was treated differently (for the purpose of certain pension benefits) than a heterosexual individual who had been prevented from marrying due to Spain's absence of divorce laws until 1981, the Court denied comparability. It conflated its assessment of "comparability" with an evaluation of whether the applicant's differential treatment was based on his "sexual orientation," concluding that his absolute inability to marry (due to his sexual orientation) put him in a different position than a heterosexual person that was only barred from *re*marriage pre-1981.[1798] Consequently, it concluded that this difference made "the situation of the applicant in 2005 fundamentally different from that of different-sex couples."[1799]

In other words: Even in such a similar situation, the Court denied comparability if marriage is involved. Arguably, the applicant had no other choice than to use the comparator he picked. Nonetheless, applicants might be most successful if they avoid a comparison involving marriage altogether. While this is not possible in every case (in *Aldeguer*, for instance, there most likely was no other option), this example allows for wider strategic considerations. If strategic litigation in the realm of LGBT rights is perceived as a long-term, comprehensive project that aims farther than at the outcome of a single case, the Court's behaviour in the context of marriage indicates that cases which necessarily require a comparison with married couples should best not be brought before the Court at this point, since the Court will most likely deny comparability. In the worst scenario, such cases might even fortify its anti-same-sex-marriage jurisprudence.

[1797] For instance, in *Gas & Dubois* App no 25951/07, para 68.

[1798] *Aldeguer* App no 35214/09, para 87.

[1799] Ibid, para 88.

And indeed, cases that applied a comparator other than a married person were more successful. For instance, in *Karner*, the applicant chose the comparator of "life companion" – instead of "married partner,"[1800] claiming that he was in a similar situation (with regards to tenancy law) as an unmarried heterosexual individual whose long-term partner had died. In *X and Others*, the applicants used unmarried different-sex couples as a comparator,[1801] claiming that for the purpose of second-parent adoptions, they were in a similar situation as long-term, unmarried different-sex couples. Both cases succeeded.

In fact, there is an argument to be made that comparisons with married different-sex couples should be avoided at all costs. The Court's refusal to even consider the comparability of marriage to any other form of cohabitation has led to strikingly detrimental decisions. As Waaldijk notes,

> "in such same-sex cases that made it to the European Court of Human Rights, the comparability test has until now meant nothing but trouble, even if the partners had entered into a registered partnership and the case involved some material benefit. In fact, the court in Strasbourg has invoked the lack of comparability so often in these cases that it has never had to go into an assessment of the justification of a distinction."[1802]

However, exceptions to this rule might be cases such as *Orlandi* or *Taddeucci*, were the same-sex partners were already married and only sought some kind of recognition of their relationship in another CoE Member State. In *Taddeucci*, the applicants sought rights for the same sex partner (as a family member),[1803] and in *Orlandi*, they wanted a registration of their marriage.[1804]

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[1800] *Karner* App no 40016/98, para 29.

[1801] *X & Others* App no 19010/07, para 64.

[1802] Waaldijk, 'Great Diversity and Some Equality: Non-Marital Legal Family Formats for Same-Sex Couples in Europe', 55.

[1803] *Taddeucci* App no 51362/09.

[1804] *Orlandi* App nos 26431/12; 26742/12; 44057/12 and 60088/12.

Both cases were successful. Arguably, the Court is more willing to protect already established marriages than to liken (unmarried) same-sex couples to married couples.[1805]

### 16.2.3. Providing expertise

As shown above, the Court has referred to activist input on numerous occasions, especially when trying to determine *European consensus*.[1806] Even though it is generally hard to say whether judges seriously ponder on evidence brought forward by applicants and third parties,[1807] or merely use it (polemically put) as a sales pitch for pre-conceived notions or personal beliefs[1808] – there is no doubt that presenting well-reasoned arguments can have effect: In the best case, by actually convincing one or more judges, or by providing arguments for benevolent judges. An important point in this regard was made by Robert Wintemute: "In a way, you're trying to show the Court that the judgment will not be so radical or revolutionary."[1809]

### 16.2.4. Use of an Incremental Approach

One thing that the LGBT case law development of the ECtHR clearly shows is that at times, cautious approaches will be more successful than sweeping demands for equality. Generally, a piece-meal approach focusing on single rights has proved most promising. Also, advancing same-sex rights *nationally* might help prepare the ground for future litigation at the ECtHR.

The Court's same-sex family jurisprudence seems to prove this: After winning access to more and more rights, the recognition of same-sex couples as families did not seem like such a big

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[1805] However, in *Hämäläinen*, the Court was unwilling to protect the marriage of a transgender* woman who after her transition could not stay married to her wife. It claimed that „the applicant's situation and the situations of cissexuals are not sufficiently similar to be compared with each other. The applicant cannot therefore claim to be in the same situation as cissexuals." *Hämäläinen (GC)* App no 37359/09 , para 112.

[1806] See *supra*, note 1787.

[1807] This is one of the issues that legal realism brings up. See discussion in Chapter 1, Section 3.2.

[1808] A mixture of both might be closest to the truth. See Robertson, *The Judge as Political Theorist. Contemporary Constitutional Review*.

[1809] Robert Wintemute, King's College London (2014).

step anymore. This may very well have contributed to the Court's willingness to ultimately include homosexual families in the scope of "family life" under Article 8,[1810] and to its requirement that States (at least Italy) should offer civil unions.[1811]

This assessment is echoed by activists, who have pointed to the fact that the ECtHR is generally reluctant to make huge leaps.[1812] This is especially true if a case touches upon the matter of same-sex marriage;[1813] indeed, in *X & Others*[1814] the Court even felt compelled to repeat that States were not required to provide same-sex marriage, even though the applicants had not even made Article 12 claims – a fact criticised by a concurring opinion.[1815]

Especially the ECtHR's same-sex marriage cases can be read as an indicator regarding the *timing for* and *reach of* strategic litigation efforts. Activists might be well advised to be very cautious with the kinds of litigation they engage in, avoiding as much as possible to even brush the subject of marriage, and applying instead a careful *incremental* approach. Such attempts have been successful, inter alia, in *Oliari*, *Taddeucci* and *Orlandi*.[1816]

This does not mean that litigation striving to achieve marriage equality will never be successful – just not right now; as with same-sex families, it is possible that the "stage" has to be prepared first, for instance, by pushing for marriage in a number of Member States before going back to the ECtHR.[1817]

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[1810] *Schalk & Kopf* App no 30141/04, paras 93-95.

[1811] *Oliari* App nos 18766/11 and 36030/11.

[1812] Robert Wintemute, King's College London (2014); Matthew Evans, AIRE Centre, London, GB (2014); Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014).

[1813] See also discussion in Section 15.3.4.

[1814] *X & Others* App no 19010/07, para 106.

[1815] Concurring Opinion of Judge Spielmann, *X & Others* App no 19010/07, paras 1-3.

[1816] *Oliari* App nos 18766/11 and 36030/11; *Taddeucci* App no 51362/09; *Orlandi* App nos 26431/12; 26742/12; 44057/12 and 60088/12.

[1817] Similar strategies have worked well in the US context. See also discussion in Chapter 6, Section 17.5.

## 16.3. Concluding Observations to Section 16

The two case law samples underline the usefulness of looking at legal developments in the area of LGBT rights in an activist-centred, systematic way that transcends a particular case. By doing this, "litigation opportunities" and other important strategic conclusions for long-term litigation efforts can become evident.

For instance, it might be a project of the future to establish parallels between different branches of the Court's case law; for example, by drawing the line between same-sex couples with children and the Court's illegitimacy jurisprudence. Indeed, this was pointed out by Judge Villiger in his dissent in *Gas & Dubois*;[1818] after all, a child in a same-sex family should have just the same rights as a child in a different-sex family.

Moreover, the case law samples I provided underscore the importance of looking at indicators for "strategic litigation opportunities" in an interrelated, contextual way. For example, the Court's marriage case law reflects the *vagueness* of the term "marriage." To date, however, the Court has fortified its reluctance to include same-sex couples in Article 12 with a solid body of case law. Thus, in the context of marriage, the *vagueness* of this term does not extend an invitation to LGBT rights activists to advance more favourable constructions by way of litigation *at the present time*. All the opposite – the Court's behaviour rather requires a careful, *incremental approach* in this matter, illuminating the importance of *timing* when devising a litigation strategy. This mirrors the experience of US LGBT rights activists, who – as I will show[1819] – consider these considerations to be essential.[1820]

Therefore, there is a strong argument to be made that at the present time, pushing for marriage equality before the ECtHR is not advisable at the present time. The Court has developed quite a

[1818] As pointed out, e.g., by Judge Villiger in his dissent in *Gas & Dubois*. Dissenting Opinion by Judge Villiger, *Gas & Dubois* App no 25951/07.

[1819] See Chapter 6, Section 17.5.

[1820] Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014); Kevin Cathcart, Lambda Legal – Defense and Education Fund USA (2014); Elizabeth Gill, ACLU – American Civil Liberties Union for Northern California (2014).

comprehensive body of negative case law on the issue at this point and seems to shut down every effort to push for same-sex marriages (even non-efforts, see the Court's statement in *X and Others*),[1821] using such litigation to fortify its restrictive marriage-jurisprudence.[1822]

However, ECtHR case law in this area and the litigation leading up to it has *also* invigorated activism on the ground, as the example of *Ratzenböck and Seydl v Austria*[1823] has shown. While the case was unsuccessful at the ECtHR level, it was expertly used by activist lawyer Helmut Graupner to mobilize support and generate awareness and discussion in Austria; and indeed, in December 2017, the Austrian Constitutional Court became the first court within Europe to legalize same-sex marriage (as mentioned).[1824]

This is an interesting inspiration for further litigation in the area of same-sex rights. A long term strategy focusing *first* on pushing for same-marriage in more Member States in order to *then* going back to the ECtHR (after a significant number of states have allowed same-sex marriage), might have chances of success.[1825]

Such a long-term strategy was successfully carried out by the US LGBT rights movement, as we will see in the next Chapter. Elizabeth Gill (ACLU), for instance, pointed out in the context of the US that sometimes "you don't start in federal court – you start in a state court, where you can build up, or in state legislatures."[1826] US activists generally underlined the importance of not trying too much, too soon,[1827] aligning their litigation efforts with the social realities of their environment. In fact, after first successes in the area of same-sex marriage rights – such as the

[1821] *X & Others* App no 19010/07, para 106.

[1822] In this context, Robert Wintemute has talked about a "marriage wall." Wintemute, 'Marriage, Adoption, and Donor Insemination for Same-Sex Couples: Does European Case-Law impose any Obligations on Italy?', 39.

[1823] *Ratzenböck* App no 28475/12.

[1824] VfGH 04.12.2017, G258/2017 (AUT).

[1825] This is, indeed, echoed by experts I interviewed. Robert Wintemute, King's College London (2014); Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014).

[1826] Elizabeth Gill, ACLU – American Civil Liberties Union for Northern California (2014).

[1827] Ibid.

1993 *Baehr* decision by the Hawaii Supreme Court[1828] – activists were very cautious *where* and *how* to push for marriage equality. After collecting an impressive amount of data on LGBT-friendly academics, judges, politicians, journalists and others for each state, they first attempted to achieve marriage equality a crucial number of states before approaching the US Supreme Court.[1829] Indeed, this might be an interesting strategy for the European context, as well.

Summarizing, it needs to be pointed out that the Court's recent case law has to be understood in a wider context. Successful cause lawyering is usually a long-term strategy, and it cannot be evaluated based on the outcome of single cases. Negative decisions can serve to adapt and shape a strategy.[1830] In any way, given recent national and international developments and the quick progression in the area of same-sex rights,[1831] there might be a few chapters left to be written in the (non-linear) story of the fight for marriage equality in Europe.

In light of the above, this Chapter has answered subsets 3.2. and 3.3. of the third inquiry of my research question, namely: *Can the respective case law of the Courts be analysed in an actor-centred way – and does it provide room for activist intervention?* and *How could an activist reading of the European Courts' LGBT rights case law look like?* in the context of the ECtHR.

[1828] *Baehr v Lewin,* 852 P.2d 44 (Haw. 1993) (USA).

[1829] Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014).

[1830] See, for instance, the lessons drawn from *Gas & Dubois* App no 25951/07 and the subsequent adaption of "comparator" in *X & Others* App no 19010/07. See Section 15.2.6.

[1831] Recently, there were a lot of developments in the area of marriage equality – within Europe, for instance, the last months before the conclusion of this work have seen the first judgment by a constitutional court enabling marriage in Europe (the decision of the Austrian Constitutional Court *supra,* note 1824), and the CJEU's *Coman* decision, dealing with the definition of "spouse" for the purposes of free movement under the Citizens' Rights Directive (2004/38/EC) [2004] OJ L 158/77. *Coman and Others* (Case C-673/16) [2018]. See also *Orlandi* App nos 26431/12; 26742/12; 44057/12 and 60088/12. And across the Atlantic, the U.S. Supreme Court has, as mentioned in previous chapters, ruled on marriage-equality in its 2015 decision *Obergefell v Hodges,* 576 U.S. ___ (2015) (USA).

# CHAPTER 6

## CASE STUDY: EXPERIENCE OF THE US LGBT RIGHTS MOVEMENT

This chapter aims to provide a "best practice example" for the creative use of strategic litigation to advance LGBT rights – particularly in the context of marriage equality. In this part, I will largely rely on 13 interviews with LGBT rights activists, led over the course of 2014.[1832]

While, as I will argue,[1833] the European LGBT movement is not identical to the US LGBT movement, there are still interesting lessons to be learned from the US context.

I will relate the beginnings of the LGBT movement's marriage equality litigation, showing that it cannot be understood in terms of striving for victories in single cases, but rather as a systemic, long-term approach. In this sense, I will also discuss a common criticism regarding the sustainability of strategic reform litigation – the "backlash" thesis.[1834] I will conclude that while backlash was, indeed, a symptom of successful LGBT rights efforts, it was not a unique reaction to litigation in particular – but rather a reaction to a more permissive climate in general. Moreover, if strategic litigation is understood as a long-term project, the backlash thesis loses a lot of its cognitive strength; after all, marriage equality was, in 2015, won at court.[1835]

I will also describe that litigation was never an isolated approach, but rather embedded in a larger strategy, including, *inter alia*, legislative lobbying, media approaches and others.

Then, I will relate the LGBT movement's divided stance on "marriage," describing how it came about that it was ultimately adopted as a main agenda point. I will discuss whether demanding

[1832] See Introduction, Section 0.7.

[1833] See Section 18.1.

[1834] Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* .

[1835] *Obergefell v Hodges,* 576 U.S. ___ (2015) (USA).

marriage affirmed heterosexist stereotypes, robbing the movement of its more radical edge[1836] – or whether it actually facilitated a deeper debate of marriage, including its heterosexist biases. This discussion will also tie back to the theoretical considerations in Chapter 1 regarding the mutual influence structure of law and social reality,[1837] and the emancipatory potential of legal strategies.[1838]

As I will argue, marriage – as the relationship "norm" – exerts normative influence on all forms of relationships.[1839] Therefore, alternatives to marriage – such as civil unions or registered partnerships – will always remain exactly this: alternatives. Thus, they cannot effectively challenge the normativity of marriage. If we contend that it is unrealistic that marriage will be abolished in the near future,[1840] then it might be worthwhile to challenge the meaning of marriage *itself*. In this sense, overturning of one of marriage's premises – the different-sex requirement – might be a door-opener for further challenges. In any case, I will show that the marriage equality movement has actually enabled discussions about non-traditional family forms and lifestyles, rather than shut the discussion down.

I will also describe the concrete approaches applied by activists, such as using compelling narratives to create successful cases, and using "incremental" litigation strategies, rather than demanding too much, too soon.

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[1836] This has been claimed by several scholars, such as Polikoff, 'We Will Get What We Ask For: Why Legalizing Gay And Lesbian Marriage Will Not Dismantle The Legal Structure Of Gender In Every Marriage', Ettelbrick, 'Wedlock Alert: A Comment on Lesbian and Gay Family Recognition', Warner, 'Normal and Normaller: Beyond Gay Marriage'.

[1837] See Chapter 1, Section 3.2.1.

[1838] See Chapter 1, Section 4.

[1839] This point has been made by a number of scholars; see, e.g., Warner, 'Normal and Normaller: Beyond Gay Marriage', 138; Marcus Herz and Thomas Johansson, 'The Normativity of the Concept of Heteronormativity' (2015) 62 Journal of Homosexuality 1009; Sushila Mesquita, *Ban Marriage! Ambivalenzen der Normalisierung aus queer-feministischer Perspektive* (Zaglossus 2011), and many others.

[1840] Which has been demanded by some, see, e.g., Mesquita, *Ban Marriage! Ambivalenzen der Normalisierung aus queer-feministischer Perspektive*.

## 17. The US LGBT Movement's Quest for Marriage Equality

The legal struggle for marriage equality has made US headlines in the past three decades;[1841] it has drawn both applause and criticism from progressive legal scholars.[1842] A large part of this fight is and has been fought before the courts.[1843] Therefore, it provides a "best practice example" for a successful LGBT rights cause lawyering project.

In this sense, the US experience might provide interesting insights for the European context, most importantly in terms of conceptualising the important role activists can play by way of litigation before constitutional (or quasi-constitutional) courts. Whereas the US legal traditions, of course, differ from European legal traditions, the main inquiry is nonetheless relevant: How and what can activist lawyers contribute to the development of an area of law via litigation?

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[1841] Richard Bernstein, 'A Stand on Homosexuality for Both Left and Right' *New York Times* (New York, 6 September 1995); Katharine Q. Seelye and Janet Elder, 'Strong Support is Found for Ban on Gay Marriage' (*New York Times*, 21 December 2003) <http://www.nytimes.com/2003/12/21/us/strong-support-is-found-for-ban-on-gay-marriage.html> (accessed 31 January 2018); Dean E. Murphy, 'San Francisco Mayor Exults in Move on Gay Marriage' (*New York Times*, 19 February 2004) <http://www.nytimes.com/2004/02/19/us/san-francisco-mayor-exults-in-move-on-gay-marriage.html> (accessed 31 January 2018); Pam Belluck, 'Massachusetts Arrives at Moment for Same-Sex Marriage' (*New York Times*, 17 May 2004) <http://www.nytimes.com/2004/05/17/us/massachusetts-arrives-at-moment-for-same-sex-marriage.html> (accessed 31 January 2018); Adam Liptak, 'California Court Affirms Right to Gay Marriage' (*New York Times*, 16 May 2008) <http://www.nytimes.com/2008/05/16/us/15cnd-marriage.html> (accessed 31 January 2018); Jesse McKinley, 'Across U.S., Big Rallies for Same-Sex Marriage' (*New York Times*, 15 November 2008) <http://www.nytimes.com/2008/11/16/us/16protest.html> (accessed 31 January 2018); Abby Goodnough, 'New Hampshire Legalizes Same-Sex Marriage' (*New York Times*, 3 June 2009) <http://www.nytimes.com/2009/06/04/us/04marriage.html> (accessed 31 January 2018); David G. Savage and Timothy M. Phelps, 'Same-Sex Marriage Ruling Creates New Constitutional Liberty' (*L.A. Times*, 26 June 2015) <http://www.latimes.com/nation/la-na-supreme-court-gay-marriage-decision-20150626-story.html> (accessed 31 January 2018).

[1842] Approving: Cummings and NeJaime, 'Lawyering for marriage equality'; NeJaime, 'Winning Through Losing'; Chai R Feldblum, 'Gay Is Good: The Moral Case For Marriage Equality and More'' (2005) 17 Yale Journal of Law and Feminism 139.

Critical: Ettelbrick, 'Wedlock Alert: A Comment on Lesbian and Gay Family Recognition'; Warner, 'Normal and Normaller: Beyond Gay Marriage'.

Cautious: Melissa Murray, 'Obergefell v. Hodges and Nonmarriage Inequality' (2016) 104 California Law Review 1207; Franke, 'The Politics of Same-Sex Marriage Politics'.

[1843] For accounts on the U.S. LGBT movement and its litigation efforts, see, e.g., Cummings and NeJaime, 'Lawyering for marriage equality'; Eskridge Jr, 'Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States'; Schacter, 'The Other Same-Sex Marriage Debate'; Andersen, 'Transformative Events in the LGBTQ Rights Movement'.

To portray an adequate picture of the history of same-sex marriage in the US, this case study will convey the LGBT movement's contributions – especially because, as I will show, the *Obergefell* decision[1844] (which opened up marriage for same-sex couples across the United States) cannot be understood outside of the context of the legal LGBT activists' efforts. In the end, it was the impressive, long-term strategy applied by movement lawyers that achieved marriage equality in the United States. Therefore, I will apply an actor-centred approach in my analysis of the struggle for marriage equality.[1845]

Therefore, it is my deliberate choice to give the stage to activists themselves, in order to 1) outline their achievements, and 2) present a narrative that does not put the courts, but the advocates of same-sex rights in the centre of legal developments – a narrative, which I believe, is often missing in legal scholarship.[1846] Consequently, I will extensively rely on the interviews I conducted in 2014 with leading LGBT rights activists across the United States.[1847]

Ultimately, I believe this case study will show that using the courts in a strategic way in order to produce sustainable law reform actually *works*.

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[1844] *Obergefell v Hodges,* 576 U.S. ___ (2015) (USA).

[1845] In 2010, Scott L. Cummings and Douglas NeJaime have published their article "Lawyering for Marriage Equality," which also shines a spotlight on the LGBT movements' role in the struggle for marriage equality before the courts. However, whereas Cumming's and NeJaime's article is a contribution to the so-called "backlash-debate" – namely, the critique brought forward against strategic litigation which claims that social change through the courts is counterproductive and will create a societal backlash (which was especially salient during the discussion around Proposition 8 to the Californian Constitution, as I will discuss below) – my account focuses on the opportunities which activists encounter for producing change via litigation, and the strategies they developed. Cummings and NeJaime, 'Lawyering for marriage equality'.

[1846] Of course, there are exceptions; especially in the context of LGBT rights in the U.S., a number of legal scholars have focused on the workings of LGBT movements, see, e.g., NeJaime, 'Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage'; Cummings and NeJaime, 'Lawyering for marriage equality'; Eskridge Jr, 'Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States'; and others. See also: Siegel, 'The Jurisgenerative Role of Social Movements in United States Constitutional Law'.

[1847] On more details on the methodology of these interviews, see introduction, Section 0.7.

## 17.1. The Road to Marriage

26 June 2015 was a day of celebration for US LGBT rights supporters – it was the day the Supreme court announced its landmark decision *Obergefell v Hodges*,[1848] which paved the path for the recognition of marriage for same-sex couples across the United States.

The road to *Obergefell* was long, and it was made possible by a concerted effort of LGBT rights organisations within the United States.[1849] Before "marriage equality" became one of the main policy goals of the major LGBT organisations sometime in the late 1990s, the movement was openly divided on its stance regarding marriage.[1850]

Whereas the first marriage equality cases where already brought forward in the 1970s,[1851] in the aftermath of the Stonewall Riots of 1969, many queer and feminist activists saw this kind of litigation primarily as an attack on the heterosexist assumptions of marriage, namely its "sex-differentiated content" – and this is also how it was perceived by the wider public.[1852]

In 1993, the *Baehr v. Lewin*[1853] decision by the Hawaii Supreme Court marked the starting point of a more LGBT-friendly jurisprudence. Activists were involved in the case from the beginning;

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[1848] *Obergefell v Hodges,* 576 U.S. ___ (2015) (USA).

[1849] The existence of an intentional, elaborated strategy has been confirmed both by scholars and activists. See, e.g., Cummings and NeJaime, 'Lawyering for marriage equality'; NeJaime, 'Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage'; Eskridge Jr, 'Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States'; Andersen, 'Transformative Events in the LGBTQ Rights Movement'; Bernstein, 'Celebration and Suppression: The Strategic Uses of Identity by the Lesbian and Gay Movement'; and many others. Kevin Cathcart, Lambda Legal – Defense and Education Fund USA (2014); Elizabeth Gill, ACLU – American Civil Liberties Union for Northern California (2014); Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014); and others.

[1850] Mary Bernstein and Verta Taylor, 'The Debate Over Marriage in the Lesbian and Gay Movement' in Mary Bernstein and Verta Taylor (eds), *The Marrying Kind? Debating Same-Sex Marriage Within the Lesbian and Gay Movement* (University of Minnesoty Press 2013); NeJaime, 'Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage'.

[1851] See, e.g., *Baker v Nelson,* 409 U.S. 810 (1972) (USA).

[1852] Andersen, 'Transformative Events in the LGBTQ Rights Movement', 449; NeJaime, 'Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage', 95-97.

[1853] *Baehr v Lewin,* 852 P.2d 44 (Haw. 1993) (USA).

however, since the LGBT movement was divided on the issue of marriage, both the ACLU and Lambda Legal declined to represent the plaintiffs.[1854] However, the ACLU ultimately participated in the case as *amicus curiae*.[1855]

*Baehr* did not invalidate the state's laws regarding the impossibility of marriage for same-sex couples, but it opened the door for a sort of "partnership light" – so-called "reciprocal beneficiary relationships" (for both same- and opposite sex couples), introduced in 1997.[1856]

Vermont was the first state to introduce "civil unions" in 2000, following an activist test case – *Baker v. Vermont*.[1857] Three years later, in its landmark decision *Goodridge v. Department of Public Health*,[1858] the Massachusetts state appellate court found that same-sex couples had the right to marry, leading to Massachusetts being the first state to achieve marriage equality. The plaintiffs were represented by GLAD, and the decision was consequently celebrated as a huge success for LGBT activism.[1859]

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[1854] Michael D. Sant'Ambrogio and Sylvia A. Law, 'Baehr v. Lewin and the Long Road to Marriage Equality' (2011) 33 University of Hawai'i Law Review 705, 708.

[1855] Ibid.

[1856] In Hawaii, a more comprehensive civil union law came into effect in 2012, and same-sex marriage was allowed in 2013. William N Eskridge Jr, 'Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules' (2012) 100 The Georgetown Law Journal 1881, 1938. Keck, 'Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights', 153.

[1857] *Baker v Vermont,* 744 A.2d 864 (Vt. 1999) (USA). Mary Bonauto, an attorney for GLAD, represented the plaintiffs.

[1858] *Goodridge v Dept. of Public Health,* 798 N.E.2d 941 (Mass. 2003) (USA).

[1859] Ray Flynn, 'Massachusetts Court Supports Equal Marriage' (*Equal Marriage*, 18 November 2003) <http://www.samesexmarriage.ca/advocacy/massachusetts.htm> (accessed 31 January 2018); 'Goodridge v. Department of Public Health: Groundbreaking Case Seeking the Right To Marry for Same-Sex Couples in Massachusetts' (*lambdalegal.org*) <https://www.lambdalegal.org/in-court/cases/goodridge-v-department-of-public-health> (accessed 31 January 2018).

But these decisions arguably incited counter-mobilization.[1860] In 1996, as s reaction to *Baehr*, the United States Congress passed the "Defense of Marriage Act (DOMA),"[1861] declaring that federal law defined marriage as between "one man and one woman" and leaving it up to the discretion of each particular state whether it wanted to recognise any form of official validation of same-sex marriage enacted by another state, or not.[1862] After Vermont, there was no significant legislative backlash; however, some scholars have noted that the decision contributed to electoral losses of Democrats in the state elections a year later, causing the state house to become Republican.[1863] And *Goodridge*, though widely accepted within Massachusetts,[1864] led then president George W. Bush to criticise the court and re-affirm DOMA in his 2004 State of the Union Address:

> "A strong America must also value the institution of marriage. I believe we should respect individuals as we take a principled stand for one of the most fundamental, enduring institutions of our civilization. Congress has already taken a stand on this issue by passing the Defense of Marriage Act, signed in 1996 by President Clinton. That

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[1860] Rosenberg writes, in the context of the Hawaii decisions: "Despite these victories in court, same-sex marriage did not become legal in Hawaii. The decisions were quickly outpaced by subsequent political events. Opposition developed immediately after the 1993 decision. Following the trial court's decision in *Baehr v. Miike* (1996), opponents of same-sex marriage proposed an amendment to the Hawaiian Constitution that would reserve the issue of same-sex marriage for legislative determination, allowing but not requiring the legislature to restrict marriage to opposite sex couples only. Supporters of the amendment mobilized a variety of religious and other opponents of same-sex marriage, including the Mormon Church, the Christian Coalition, the Family Forum, and guitar-strumming Mike Gabbard's Alliance for Traditional Marriage, made up of Hare Krishna-style followers. Proponents of same-sex marriage were outorganized and outspent. ... In 1998, following a fierce campaign, Hawaiian voters ratified the amendment by a better than two to one vote (69.2 percent to 28.6 percent), in effect overruling the decisions in *Baehr v. Lewin* (1993) and *Baehr v. Miike* (1996)." (*citations omitted*) Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* , 343, 344.

[1861] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at I U.S.C. § 7 (Supp. 1996) and 28 U.S.C. § 1738C (Supp. 1996)) (USA); Michael D. Sant'Ambrogio, Sylvia A. Law, '*Baehr v. Lewin* and the Long Road to Marriage Equality' (2011) 33 University of Hawai'i Law Review 705, 721-722.

[1862] DOMA was eventually found unconstitutional by the U.S. Supreme Court in *United States v Windsor,* 570 U.S. ___ (2013) (USA).

[1863] Keck, 'Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights', 166; William N Eskridge Jr, *Equality Practice: Civil Unions and the Future of Gay Rights* (Routledge 2013), 81; Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* , 344-347.

[1864] Frank Phillips, Rick Klein, '50% in Poll Back SJC Ruling on Gay Marriage' (*Globe Newspaper*, 23 November 2003)<http://archive.boston.com/news/local/articles/2003/11/23/50_in_poll_back_sjc_ruling_on_gay_marriage/> (accessed 28 January 2018).

> statute protects marriage under Federal law as the union of a man and a woman, and declares that one state may not redefine marriage for other states. Activist judges, however, have begun redefining marriage by court order, without regard for the will of the people and their elected representatives. On an issue of such great consequence, the people's voice must be heard. If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process. Our Nation must defend the sanctity of marriage."[1865]

Consequently, George W. Bush explicitly supported an amendment to the US Constitution, which would have restricted marriage to different sex couples[1866] and had been introduced for the first time in 2002.[1867] The bill was re-introduced a number of times, but never passed Congress.

## 17.2. Fearing Backlash

Gerald N. Rosenberg cited these cases (among others) as supporting his "backlash thesis," outlined in his seminal work "The Hollow Hope. Can Courts Bring About Social Change?"[1868] According to his narrative, courts cannot effect sustainable change, since litigation would mobilize opponents,[1869] influence elections in a counter-productive way,[1870] and influence public opinion in a rather negative than positive manner.[1871] Numerous scholars have issued replies,

[1865] George W. Bush's Fourth State of the Union Address (2004), by George W. Bush.

[1866] Michael Allen, Alan Cooperman, 'Bush Backs Amendment Banning Gay Marriage' (*Washington Post*, 25 February 2004) <http://www.washingtonpost.com/wp-dyn/content/article/2004/02/25/AR2005032201695_pf.html> (accessed 28 January 2018).

[1867] H.J. Res.93 – Proposing an amendment to the Constitution of the United States relating to marriage (Federal Marriage Amendment (FMA)), considered by the 107th Congress (2002) (USA).

[1868] Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*

[1869] Ibid, 361-368.

[1870] Ibid, 369-382.

[1871] Ibid, 383-406.

relativizing or repudiating his view.[1872] Douglas NeJaime, as mentioned before, has described how even losing cases might have positive effects – by, among other things, generating publicity, sympathy and social movement mobilization.[1873]

This seems to correspond with activists' experiences. Kevin Cathcart, executive director of Lambda Legal, for instance claimed that the loss in *Bowers v. Hardwick*[1874] actually had a favourable impact on LGBT rights on the long run.[1875] In *Bowers*, the plaintiffs had challenged Georgia's sodomy law provisions. The LGBT chapter of the American Civil Liberties Union (ACLU) was involved in the case from the beginning, and Harvard Law School professor Laurence Tribe argued for the plaintiffs in the Supreme Court. However, the majority of Justices declined to find the provisions in question unconstitutional. Concurring with the majority, then-Chief Justice Warren E. Burger wrote that "[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards."[1876] He also favourably cited William Blackstone's description of an homosexual act as "'the infamous crime against nature' as an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature' and 'a crime not fit to be named.'"[1877]

The decision was highly controversial from the beginning. When it was overturned by *Lawrence v. Texas* in 2003,[1878] which invalidated sodomy laws around the country, Justice Kennedy, writing for the majority, noted: "*Bowers* was not correct when it was decided, and it is not

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[1872] Cummings and NeJaime, 'Lawyering for marriage equality'; Keck, 'Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights'; Eskridge Jr, 'Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States'; NeJaime, 'Winning Through Losing'; to just mention a few.

[1873] NeJaime, 'Winning Through Losing'.

[1874] *Bowers v Hardwick,* 478 U.S. 186 (1986) (USA).

[1875] Kevin Cathcart, Lambda Legal – Defense and Education Fund USA (2014).

[1876] *Bowers v Hardwick,* 478 U.S. 186 (1986) (USA), dissent by Justice Warren E. Burger.

[1877] Ibid, dissent by Justice Warren E. Burger, citing William Blackstone, *Commentaries on the Laws of England* (Claredon Press 1765-1769).

[1878] *Lawrence v Texas,* 539 U.S. 558 (2003) (USA).

correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."[1879]

Kevin Cathcart, executive director of national gay rights organisation Lambda Legal, understood *Bowers v. Hardwick* as actually having an invigorating effect for LGBT rights, both regarding the public opinion, as well as the LGBT movement itself:

> "People talk sometimes about losing forward, ... which is losing in a way that moves the issue. In a certain way, the *Hardwick* case actually lost forward, which is not what the Supreme Court intended by any means, but because the opinions were so over the top, some of them were so ugly, cheap, nasty and so uncomprehending. The reaction from editorial boards, political cartoonists, people in the community was so strong, that actually people who hadn't paid attention to the case while it was going up, paid a lot of attention when it lost."[1880]

One of the most interesting accounts on the impact of LGBT rights decisions by the US Supreme Court comes from political scientist Ellen A. Anderson[1881] – firstly, because Anderson wrote it *after* the *Obergefell* decision (enabling marriage equality in the United States), which equips her observation with the acumen of hindsight. Secondly, because she applies a social scientific perspective, measuring the social impact of a number of Supreme Court cases on LGBT rights, concluding that they indeed have transformative potential:

> "My findings show that judicial decisions can indeed catalyse radical change in the trajectory of a social movement, change that measurably alters the capacity of a social movement to effect its aims in a fashion that is dramatic, enduring, and proximate to the decision itself. ... Baehr dramatically changed the terms of the debate around LGBTQ rights, forcing rights groups to reorder their priorities to accommodate the goal of marriage equality. The decision sparked the creation of new activist nodes within the movement and sparked mobilization, particularly among opponents of marriage equality. Baehr also served as the catalyst for government repression, as opponents of marriage

[1879] Ibid.

[1880] Kevin Cathcart, Lambda Legal – Defense and Education Fund USA (2014).

[1881] Andersen, 'Transformative Events in the LGBTQ Rights Movement'.

equality successfully promoted the passage of laws specifically designed to stymie the progress of the LGBTQ rights movement."[1882]

This resonates with the experience of the activists themselves, many of whom have been involved in the LGBT movement for more than a couple of decades. Shannon Minter, legal director of the National Center for Lesbian Rights (NCLR), sees the backlash thesis as somewhat reductive:

> "I think that the backlash thesis was naive about politics; I think it only makes sense if you have this naive assumption that there is such a ting as just straight forward linear progress where you secure the beachheads for all time, and then move on to the next one. That is not the way that history or politics happen. There's an action and reaction, and we don't ever get to just quit and go home – ok, that's done now."[1883]

Elizabeth Gill, senior staff attorney at ACLU, made a similar point:

> "I think one of the points to remember in movements is that losses can be as important as wins. ... You're not recognising how civil rights movements work if you're totally afraid of losses. And political strategies can backfire all the time, too. ... Yes, stuff does backfire, and when you work in a place long enough, you become very cautious about pushing something forward prematurely, because you become more mindful of what the risks are when we lose."[1884]

## 17.3. Litigation Embedded in a Larger Strategy

Moreover, it would be misleading to think that the LGBT movement only focused on litigation in order to achieve its goals; in fact, it was just one of the approaches the LGBT movement used,

[1882] Ibid, 473-474.

[1883] Interview with Shannon Minter, Legal Director, NCLR – National Center for Lesbian Rights USA (telephone call, 14 March 2014).

[1884] Elizabeth Gill, ACLU – American Civil Liberties Union for Northern California (2014).

embedded in a more comprehensive strategy to advance social change.[1885] Kevin Cathcart, Lambda Legal:

> "In an ideal world we wouldn't have to bring impact litigation or civil rights law suits, because we would have good law and there wouldn't be discrimination. But that's not how it happens. We have to work every angle, every lever for change that there is. ... People sometimes naively think that what you need is a court decision. A court decision by itself doesn't get you everything you want, it has to have real power and life to it. ... No decision on marriage is going to do everything, we're going to be fighting about this for a long time to come."[1886]

Geoff Kors, Government Policy Director of the NCLR:

> "They [different kinds of approaches] need to be coordinated, and often you need to coordinate because you need legislation prior to litigation. And sometimes you need litigation first. And all of these [approaches] also need to be coordinated with public education and awareness efforts. Before we can pass legislation, you often need to help educate the public and the legislators to move them on an issue, and that happened clearly in the LGBT rights arena. Similarly, moving public opinion and educating people is important in litigation, because judges are people like everyone else, and the more you can educate them, and the more issues are being discussed and thought about, the better chance you have in prevailing."[1887]

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[1885] See, e.g., Scott Barclay, Mary Bernstein and Anna-Maria Marshall, 'The Challenge of Law. Sexual Orientation, Gender Identity, and Social Movements' in Scott Barclay, Bernstein, Mary, Marshall, Anna-Maria (ed), *Queer Mobilizations: LGBT Activists Confront the Law* (New York University Press 2009). See also: Elizabeth Gill, ACLU – American Civil Liberties Union for Northern California (2014); Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014); Geoff Kors, NCLR – National Center for Lesbian Rights USA (2014).

[1886] Kevin Cathcart, Lambda Legal – Defense and Education Fund USA (2014).

[1887] Geoff Kors, NCLR – National Center for Lesbian Rights USA (2014).

For this reason, most LGBT organisations I talked to not only employed litigation, but also a range of other activism forms.[1888] The Gay and Lesbian Alliance Against Defamation (GLAAD) was one of the organisations engaging almost exclusively in media advocacy. Tiq Milan, Senior Media Strategist at GLAAD:

> "We're sort of a media watchdog for the community, we stay on top of any type of unfair, offensive, or misrepresentative reporting on LGBT people. We also create media campaigns around specific issues."[1889]

Responding to the question of how GLAAD promoted legal approaches (by other NGOs), Tiq Milan responded:

> "We would basically come up with messaging around the issue, to start to galvanize the community, to get people to see what the issue was. It's really all about people understanding this from our vantage point. ... Framing it in such a way that we really speak to the commonality amongst all people, which is equality and help and fairness. And then we'll go ahead and disseminate that to our personal networks and our social networks via Facebook and Twitter, and then professional media networks, colleagues from magazines and newspapers. Just to make sure, to push the PSA [= public service announcement] that we would help them create. By doing that, we received, I think, over 50.000 views today, and being able to put the GLAAD brand behind things does help a lot. ... We do a lot of work around marriage equality. ... A lot of it was doing media campaigns and messaging and framing, but also reaching out to local organisations by state, working with them to make sure the message is localized for the constituents, but also that we have a broader national message. ... By us being able to get specific messages out and being able to create a community around these messages, I think it's really helped influence the policies and litigations around marriage equality."[1890]

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[1888] Elizabeth Gill, ACLU – American Civil Liberties Union for Northern California (2014); Jack Lorenz, Equality California (2014); Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014); Shannon Minter, NCLR – National Center for Lesbian Rights USA (2014).

[1889] Interview with Tiq Milan, Senior Media Strategist, GLAAD – Gay and Lesbian Alliance Against Defamation USA (telephone call, 10 March 2014).

[1890] Ibid.

As these interviews – and others – show, litigation was but one of many strategies which were used simultaneously to achieve social change. Litigation was carefully calibrated against other approaches, such as media campaigns and legislative lobbying, in order to create a fertile environment for both legal and social reform. In California, for instance, legislative lobbying and pedagogical measures – such as workshops for judges, lawmakers and other opinion leaders to sensibilize them for LGBT issues – took precedence over litigation, a lesson learnt from the Civil Rights Movement.[1891] However, litigation nonetheless occupied an important place in movement activism. But the choice to litigate was not taken lightly; cases were selected carefully, and the narratives told at court were constructed with great caution and reflection.[1892]

In order to do so, LGBT organisations worked closely together, carefully weighing the pros and cons of judicial involvement and communicating with each other every step of the way, building a tight-nit network in the course of it. Kevin Cathcart described how he spent years as a director of Lambda Legal flying around the country, talking to local NGOs and building up Lambda chapters in areas which were previously neglected by larger organisations.[1893] In fact, by the time I conducted the interviews in 2014, the level of coordination among NGOs was impressive. In the 80s and 90s, most major organisations were meeting at least twice a year, sharing information, updating one another about their projects and deciding on a common legal strategy.[1894] Jennifer Pizer, director of law and policy at Lambda Legal, described it as follows:

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[1891] Jack Lorenz, Equality California (2014).

[1892] Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014).

[1893] "There are a lot of people in this country, when they are facing problems the first thing they think is not 'let me call New York and look for help.' If you live in some rural part of the mid-west, the Deep South, or Texas, New York can seem very far away. Civil rights lawyers can seem very far away from a lot of regular people. Having offices in various regions makes us more accessible to people all across the country. We have help desks in all of our offices, it's got an 800 number so people can make toll free calls. They can call to ask for information, to look for representation, to find assistance, to help figure out if what happened to them is legal or illegal. What we discovered is, every time we opened another office, our intakes would skyrocket because people from Southern Georgia or Southern Carolina or Alabama will call Atlanta, even if they might not have called New York; people from Ohio and Indiana will call Chicago, but they might not have called New York. ... It makes us more accessible to people and enables us to do things we wouldn't necessarily be able to do if everybody was in New York." Kevin Cathcart, Lambda Legal – Defense and Education Fund USA (2014).

[1894] Elizabeth Gill, ACLU – American Civil Liberties Union for Northern California (2014).

> "The first marriage cases were filed in the early 70s ... in what we think of as the early years of the modern gay rights movement in the US ... The courts didn't take their arguments seriously ... In the mid 80s, there were a couple of other cases, also losses but we started to get thoughtful dissents. In 1993, the Hawaii Supreme Court said 'This looks like discrimination.' ... That opened the next chapter that we now have, of marriage work. We did an enormous amount of research, and when I say 'we' I mean the lawyers at the different major LGBT legal groups, with some law professors, volunteers, and some law firms, looking exhaustively at the laws of the different states, the courts, the process for mending state constitutions. Many different factors, to think about where else we should do litigation. ... It would be out of proportion that these islands way out in the Pacific would have an impact on the continental country. We needed to pump in some more activity in a place that would be taken seriously, to anchor the conversation on the mainland. Vermont was chosen because of a number of these factors, litigation was started there. ... So that was where we first had civil unions. Litigation was the driver of these major changes. Massachusetts was the third choice, then New Jersey."[1895]

In fact, Jennifer Pizer and her organisation had collected a whole wall full of binders, listing in great detail the legal situation in each state, possible allies among lawyers, NGOs, judges, lawmakers and politicians, the media, and so on.

## 17.4. Same-Sex Marriage – Affirming or Subverting Heteronormativity?

After *Baehr*, it became clear that marriage would stand at the centre of legal efforts.[1896] The reasons for this were diverse; as Tiq Milan (GLAAD) described it, marriage was a simple "message," an easily graspable concept with mobilizing potential.[1897] Importantly, it was seen as

[1895] Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014).

[1896] NeJaime, 'Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage', 106, 107.

[1897] Tiq Milan, GLAAD – Gay and Lesbian Alliance Against Defamation USA (2014).

a vehicle to educate the public about LGBT issues more generally.[1898] Apart from this, as Shannon Minter (NCLR) argued, a debate about marriage went right to the core of how people thought about relationships, enabling discussions about fundamental rights such as autonomy, dignity or privacy.[1899]

Publicly, marriage equality was increasingly perceived as a "showdown issue" between progressives and conservatives.[1900] This created momentum for marriage-equality-supporters within the LGBT movement, ultimately leading to the creation a long-term, concerted litigation strategy in pursuit of same-sex marriage.[1901]

However, the internal discussions around the issue hadn't ceased, albeit arguably decreased.[1902] The debate about the pros and cons of marriage equality among the US LGBT community had been going on for some decades before.[1903] Chai Feldblum sums up this debate as follows:

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[1898] Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014); Geoff Kors, NCLR – National Center for Lesbian Rights USA (2014).

[1899] Shannon Minter, NCLR – National Center for Lesbian Rights USA (2014).

[1900] Schacter, 'The Other Same-Sex Marriage Debate', 394.

[1901] NeJaime, 'Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage', 107, 108; Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014).

[1902] Eskridge argues that the AIDS crisis also might have created a shift towards marriage within the LGBT movement, replacing stability with the formerly advocated sexual freedom. William N Eskridge, *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* (The Free Press 1996), 54. Douglas NeJaime describes *Baehr* as an important factor for the LGBT movement to settle on marriage equality. Cummings and NeJaime, 'Lawyering for marriage equality', 106-108.

[1903] For a comprehensive account of this debate, see: Bernstein and Taylor, 'The Debate Over Marriage in the Lesbian and Gay Movement'. Marriage-positive accounts by legal scholars: Eskridge, *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment*; Thomas Stoddard, 'Why Gay People Should Seek the Right to Marry' in William B. Rubenstein (ed), *Cases and Materials on Sexual Orientation and the Law* (2 edn, West Academic Publishing 1997); and others. Critical of marriage: Katherine M. Franke, 'The Politics of Same-Sex Marriage Politics' (2006) 15 Columbia Journal of Gender and the Law 236; Nancy D. Polikoff, 'We Will Get What We Ask for. Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"' (1993) 79 Virginia Law Review 1535; and others. This debate is also prevalent in the activist community; however, most major LGBT organisations had agreed to push for marriage by the time I led interviews with them in 2014. See, e.g., Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014); Evan Wolfson, Freedom to Marry, New York, NY, USA (2014); Elizabeth Gill, ACLU – American Civil Liberties Union for Northern California (2014); and others.

> "There is a conversation that is happening regarding visions of normative good in the struggle for marriage equality - but it is largely an 'internal movement' debate about whether marriage is a good institution and whether it is one into which gay couples should seek entry. Radical feminists, queer theorists, and others argue that marriage, as historically and currently constructed, constitutes a normative harm that should be dismantled by society overall rather than embraced by gay couples. On the opposite end of the spectrum, socially conservative gay rights advocates argue that extending a traditional expectation of marriage to gay couples will help solidify an appropriate social norm of sexual restraint and care-giving within the family."[1904]

One of the main concerns of marriage-critical activists (particularly from smaller NGOs) regarded the fact that the fight for marriage equality would force the community to assimilate, disadvantaging other groups within the queer spectrum who had no interest in marrying, lived in polyamorous relationships, etc.[1905] Instead of destabilising marriage, the struggle to achieve marriage equality would rather cement marriage as a rather conservative, two-person union and thus push non-traditional family forms even further to the curve.[1906] Some activists furthermore conceded that the resources of the LGBT movement – especially regarding litigation – had been tied up in lawyering for marriage equality.[1907] (Others, however, have pointed out that the high visibility of the marriage equality campaign actually multiplied available funds, which benefitted all.[1908])

Shannon Minter, Legal Director of the National Center for Lesbian rights, responded to such arguments:

> "I certainly understand the concepts and the point [of this argument], but I actually think ... it is missing the forest for the trees. ... I have very little doubt that opening the world

[1904] Feldblum, 'Gay Is Good: The Moral Case For Marriage Equality and More''.

[1905] Andy Izenson, Diana Adams Law and Mediation, New York, NY, USA (2014).

[1906] Ibid.

[1907] Ricci J. Levy, Woodhull Freedom Foundation, Washington, DC, USA (2014); Tiq Milan, GLAAD – Gay and Lesbian Alliance Against Defamation USA (2014).

[1908] Evan Wolfson, Freedom to Marry, New York, NY, USA (2014).

> up to same-sex couples, their children and families being so visible and accepted and having legal protections, will make it much easier for other so-called non-traditional or alternative families to gain support and acceptance. ... So I guess that critique is off base in terms of how social change and legal change actually happen. ... [T]he evolution of marriage law has been ever in the direction of greater equity and equality and flexibility; and that has coincided with lifting social and legal restrictions and stigma on unmarried couples and other types of families, as well. They didn't cross purposes. ... I think it will just make it all the easier for courts and the public to accept all different kinds of families."[1909]

Indeed, the marriage equality movement might even have forced a deeper conversation about the "why" and the "what" of marriage,[1910] inviting a number of follow-up questions regarding the exclusion of other groups (such as, *inter alia*, polyamorous relationships) from the protections and advantages granted by the institution of marriage – or rather, it might have brought this conversation (which, as pointed out above, has been led by the LGBT movement for some time) to the fore.[1911]

The campaigns around marriage equality, so the argument of many activists went, has indeed served to raise understanding and acceptance for sexual minorities within the population, thus making it possible to push for other rights, as well – such as health care rights, anti-discrimination provisions, and, of course, civil unions.[1912] As Evan Wolfson, the founder of the New York-based NGO "Freedom to Marry" put it, "that we won domestic partnership in the United States ... is a product of the freedom-to-marry fight. We didn't win it by going out and fighting over domestic partnerships."[1913]

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[1909] Shannon Minter, NCLR – National Center for Lesbian Rights USA (2014).

[1910] Jack Lorenz, Equality California (2014).

[1911] This view, however, is not without contention: Ricci J. Levy, Woodhull Freedom Foundation, Washington, DC, USA (2014).

[1912] Evan Wolfson, Freedom to Marry, New York, NY, USA (2014); Shannon Minter, NCLR – National Center for Lesbian Rights USA (2014); Interview with Vickie Henry, Senior Staff Attorney, GLAD – Gay & Lesbian Advocates & Defenders, Boston, MA, USA (telephone call, 19 May 2014).

[1913] Evan Wolfson, Freedom to Marry, New York, NY, USA (2014).

The assessment that the struggle for marriage equality actually propelled more comprehensive reform seems to be supported by actual events; in the early to mid-2010s, an increasing number of states passed and/or updated legislation prohibiting discrimination based on sexual orientation, or on the protection of transgender* people.[1914] Of course, the organized opposition against progressive efforts increased, as well.[1915]

Despite these concerns, the movement presented itself relatively united towards the outside on the issue of the legal fight for marriage[1916] – this was also described by activists a strategic choice.[1917] Marriage seemed like a message that would serve to attract and ignite mobilization, a clear mission.[1918] Most activists agreed however that achieving marriage would not be the end of the line – it was merely one battle in a much more comprehensive project for total equality.[1919]

## 17.5. The Limited Promise of Law – Incremental Approach

LGBT activists were very careful not to attempt too much, too soon. As Elizabeth Gill, senior staff attorney at the ACLU, said:

> "I wouldn't start with the Supreme Court in terms of building a civil rights litigation strategy. ... The way that civil rights organisations have historically worked in the US courts is that you ask for something small, and you work on that. If you ask for

[1914] Andersen, 'Transformative Events in the LGBTQ Rights Movement', 466-469.

[1915] Ibid, 469.

[1916] Although critical voices, of course, remained – even though they did not seem to garner much media attention. Ricci J. Levy, Woodhull Freedom Foundation, Washington, DC, USA (2014).

[1917] Vickie Henry, GLAD – Gay & Lesbian Advocates & Defenders, Boston, MA, USA (2014); Elizabeth Gill, ACLU – American Civil Liberties Union for Northern California (2014); Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014).

[1918] Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014); Vickie Henry, GLAD – Gay & Lesbian Advocates & Defenders, Boston, MA, USA (2014).

[1919] Kevin Cathcart, Lambda Legal – Defense and Education Fund USA (2014); Evan Wolfson, Freedom to Marry, New York, NY, USA (2014).

everything in one swoop, you are going to lose. ... So it's really an incremental approach."[1920]

Consistent with the "incremental approach," LGBT activists started litigation in different states, carefully picking jurisdictions and promising cases,[1921] always with an eye to their potential to create system-wide change.[1922] In order to do this, the activists carefully monitored adjudication arising anywhere in the country.[1923] The major LGBT organisations worked hard to stay on top of the legal narrative; therefore, one important part of their work consisted in dissuading activists from pursuing cases that were perceived to be counterproductive.[1924]

Jennifer Pizer, director of law and policy at Lambda Legal:

"We were very careful about where we thought it would be sensible to bring cases. But lawyers in other places also filed cases, just because they wanted to. I feel I have spent a significant part of my time as a Lambda Legal attorney trying to encourage people to *not* do things, as much as to do things."[1925]

## 17.6. Legal Story Telling – Constructing a Compelling Case

Legal LGBT activists tried to perfect the art of constructing compassionate cases. Two factors were seen as especially important: 1) the way a case was framed, including its narrative and a set

[1920] Elizabeth Gill, ACLU – American Civil Liberties Union for Northern California (2014).

[1921] Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014); Vickie Henry, GLAD – Gay & Lesbian Advocates & Defenders, Boston, MA, USA (2014); Elizabeth Gill, ACLU – American Civil Liberties Union for Northern California (2014).

[1922] Vicky Henry, Senior Staff Attorney at GLAD: "GLAD does what is called 'impact litigation'. We don't just step in because any gay person is injured, for example via discrimination. What we're trying to do is to find the cases that will cause some sort of system-wide change." Vickie Henry, GLAD – Gay & Lesbian Advocates & Defenders, Boston, MA, USA (2014).

[1923] Kevin Cathcart, Lambda Legal – Defense and Education Fund USA (2014); Vickie Henry, GLAD – Gay & Lesbian Advocates & Defenders, Boston, MA, USA (2014).

[1924] Elizabeth Gill (ACLU) gives an example regarding a case in Arizona, brought forward by a small NGO, which was perceived as being counterproductive – both on legal grounds and based on the fact that the ACLU already was working on a more promising case in the region which had already reached the federal level. For the sake of protecting the NGO's identity (which I haven't spoken to), I will not disclose more information on this issue. Elizabeth Gill, ACLU – American Civil Liberties Union for Northern California (2014).

[1925] Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014).

of sympathetic clients; 2) the surrounding publicity work, making sure that the public (including the judges) would become aware of the case and its underlying story.

Vicky Henry, Senior Staff Attorney at GLAD, explained this in the context of the case *Gill v. Office of Personnel Management*.[1926] Eight same-sex couples, represented by GLAD, challenged Section 3 of the Defense of Marriage Act (DOMA)[1927] before the United States Court of Appeals for the First Circuit (a federal court), claiming that the restriction of marriage to "a man and a woman" infringed their constitutional rights by denying them access, among others, to spousal health care and retirement benefits. The court decided in their favour. Vicky Henry:

> "The cases that people can relate to have the power to change people's minds. If you look up *Gill v. Office of Personnel Management*, each one of those couples has a story that we can explain and people can relate to. For example, we represented a couple who worked for 30 or 40 years and retired. Normally, you can draw on your spouse's social security benefits, but because their legal marriage was not recognised, they couldn't do that. That strikes people as unfair. They worked just as hard and put in their time, and then they can't collect the same benefits. That bothers people. Even if you don't like gay people, that just strikes people as unfair."[1928]

Jennifer Pizer (Lambda Legal) called this kind of legal story telling the "theatre of the law," and activists successfully used this stage in order to educate the public (including judges and politicians) about LGBT rights. Jenny Pizer:

> "Impact cases are often drama and vehicles for telling a story. ... Our job, if I'm making, say, an equality argument, is to help the judge understand that these gay people are the same as straight people in all the ways that matter in this context. I can't just go in and say 'equality, equality, equality, we deserve equality' because if the judge thinks that we are different in a way that matters, then we are not entitled to different treatment. ... The

[1926] *Gill et al. v Office of Personnel Management,* 682 F.3d 1 (1st Cir. 2012) (USA).

[1927] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at I U.S.C. § 7 (Supp. 1996) and 28 U.S.C. § 1738C (Supp. 1996)) (USA); DOMA was eventually found unconstitutional by the US Supreme Court in *United States v Windsor,* 570 U.S. ___ (2013) (USA).

[1928] Vickie Henry, GLAD – Gay & Lesbian Advocates & Defenders, Boston, MA, USA (2014).

> point is [the plaintiffs] are real people, and they don't have horns, they don't have tails, they're smiling, they're warm, they're friendly... ok, these two boys have two dads and these two little girls have two mums, and they're families."[1929]

Changing the public perception of LGBT minorities was indeed seen as both an outcome and a prerequisite for successful litigation. Kevin Cathcart, executive director of Lambda Legal:

> "I don't disagree exactly with people who say the judges come in with a [preconceived] world view, but [this account] is a little too static. ... [w]hat trickles down to judges? Judges also live in the world, I like to think they read the newspapers, or they see the news, they have kids in school, or they live in the neighbourhood, they do something other than being judges. As a society is changing its notions of gay people in general, marriage, if you want to be specific – I think it's a mistake to think that the only influencers are the arguments in court, or the briefs that are submitted. I actually think the bigger influencers are the world which [the judges] live in. What's in the books they read, what's on the TV they watch, what's in the movies, and what are they hearing if they go to churches, what are they hearing when their kids come home from school, all this sort of thing."

The combined strategy of constructing compelling cases, media campaigns and legislative lobbying – all the time controlling the nation-wide narrative – led to a number of successes at court, as well as positive law reform.[1930] The progressive political climate of the Obama administration might have also contributed to this development.[1931] Of course, there were setbacks as well – under the impression of the advancement of marriage equality, a number of states passed constitutional bans on same-sex marriage. Many of them, however, were

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[1929] Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014).

[1930] Before *Obergefell*, same-sex marriage was legal (at least partially) in 38 states, with Missouri, Kansas and Alabama having certain restrictions. The 2013 *Windsor* decision (striking down DOMA) was a major catalyst; before Windsor, only 12 states allowed same-sex marriage. *United States v Windsor,* 570 U.S. ___ (2013) (USA). For an overview of the legal history leading up to same-sex marriage, see: 'State-by-State History of Banning and Legalizing Gay Marriage, 1994-2015' (*procon.org*, 16 February 2016) <https://gaymarriage.procon.org/view.resource.php?resourceID=004857> (accessed 11 January 2018).

[1931] Carlos A. Ball, 'Introduction: The Past and the Future' in Carlos A. Ball (ed), *After Marriage Equality The Future of LGBT Rights* (New York University Press 2016), 5.

eventually abolished, often struck down at court.[1932] The activist's goal was to set the stage for a positive Supreme Court judgement; activists strategically brought litigation covering most regions in the US, in order to create a considerable body of positive case law.[1933]

## 17.7. *Perry* to *Obergefell* – Winning It

It is an irony of history that the case that has been celebrated as a tide-turner for LGBT rights in the late 2000s / early 2010s – the widely-publicized California Northern District Court case which overturned Proposition 8, *Perry v Schwarzenegger*[1934] – was argued by two famous corporate lawyers instead of movement lawyers, one of which is a renowned conservative.[1935]

The California Supreme Court overturned the prohibition for same-sex couples to marry in May 2008, finding that this prohibition infringed the Californian Constitution.[1936] The case, *In Re Marriage Cases*, was argued by LGBT rights activists; however, there was initially a lot of concern regarding the timing of the case and its prospects of winning.[1937] The case arose out of conservative strategic litigation efforts, trying to overturn LGBT-friendly legislative

[1932] Ibid.

[1933] Evan Wolfson, Freedom to Marry, New York, NY, USA (2014); Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014).

[1934] *Perry v Schwarzenegger,* 704 F. Supp. 2d 921 (N.D. Cal. 2010) (USA).

[1935] Lionel Barber, 'Portrait of David Boies and Theodore Olson' (*Vanity Fair*, July 2014) at <https://www.vanityfair.com/news/politics/2014/07/david-boies-theodore-olson-marriage-equality> (accessed 11 January 2018). However, ACLU, NCLR and LAMBDA Legal filed a joint amicus brief, available at <http://hunterofjustice.com/files/perry-lgbt-grps-amicus-0210.pdf> (accessed 11 January 2018). And, of course, the cases leading up to this case were movement cases, such as *Strauss v Horton,* 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48 (Cal. 2009) (USA).

[1936] *In re Marriage Cases,* 183 P 3d 384 (Cal. 2008) (USA).

[1937] Cummings, 'The Pursuit of Legal Rights – and Beyond', 1281-1281.

developments.[1938] At this time, LGBT advocates had not planned to bring marriage-litigation in California on its own accord; in fact, there was a decisive commitment to wait.[1939] Nonetheless, since the case couldn't be stopped, LGBT advocates decided to participate (also for reasons of damage control) – and won.[1940]

However, the case produced massive conservative mobilization, and as a result, Proposition 8 – an amendment to the Californian Constitution – was passed by popular referendum[1941] in November 2008, stating that only marriages between "a man and a woman" were legally valid.[1942] The same legal team involved in *In Re Marriage Cases*, namely (on behalf of the plaintiffs) Lambda Legal, the NCLR and the ACLU of Northern California (among others), decided to challenge Proposition 8 at court.[1943] This time, they lost; the Court rendered Proposition 8 valid.[1944] After this, movement lawyers decided not to file a federal challenge, and advised Ted Olson – one of the lawyers who would argue on behalf of the plaintiffs in *Perry v Schwarzenegger* – accordingly.[1945] However, Olson and his colleagues decided to proceed with the suit, nonetheless.[1946] The case was successful.[1947]

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[1938] In 2004, San Francisco Mayor Gavin Newsom ordered the San Francisco County Clerk to issue marriage licenses to same-sex couples. He did not include LGBT rights leaders in this decision; in fact, there was some concern among the LGBT community regarding the soundness of this action, for fear of backlash. This critically affected the LGBT advocate's carefully timed strategy. And in fact, conservative groups filed legal challenges shortly after, *Proposition 22 Legal Def. & Educ. Fund v City of San Francisco, No. 503943,* 2005 WL 583129 (Cal. Super. Ct. 2005) (USA); and *Thomasson v Newsom, No. 428794,* 2005 WL 583129 (Cal. Super. Ct. 2005) (USA). Cummings and NeJaime, 'Lawyering for marriage equality', 1276-1281.

[1939] Cummings and NeJaime, 'Lawyering for marriage equality', 1269, 1270.

[1940] Ibid, 1282-1293.

[1941] H.J. Res.93 – Proposing an amendment to the Constitution of the United States relating to marriage (Federal Marriage Amendment (FMA)), considered by the 107th Congress (2002) (USA).

[1942] CAL. CONST. art. I, § 7.5 (USA).

[1943] A number of lawsuits challenged "Proposition 8); three of them were accepted by the California Supreme Court and consolidated as *Strauss v Horton,* 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48 (Cal. 2009) (USA).

[1944] Ibid; Cummings and NeJaime, 'Lawyering for marriage equality', 1296.

[1945] Cummings and NeJaime, 'Lawyering for marriage equality', 1311.

[1946] Ibid, 1299.

[1947] *Perry v Schwarzenegger,* 704 F. Supp. 2d 921 (N.D. Cal. 2010) (USA).

Despite its publicity, the case – which later went on to be reviewed by the 9th Circuit Court of Appeals and the US Supreme Court[1948] – was ambiguously received by the LGBT rights movement,[1949] both on grounds of its risky, purely litigation based approach, and the inclination of its arguments. The positive outcome of the case was seen as surprising, especially since Judge Vaughn Walker, who heard the case, had been hitherto perceived as rather conservative.[1950] The case, while lauded in the media as an enormous breakthrough,[1951] was received with caution in movement circles.[1952]

The plaintiffs heavily relied on the due process "right to marry"[1953] – therefore, according to critics, reinforcing the normative character of marriage as the only possible state-sanctioned relationship between two people. Berkeley Professor Melissa Murray sceptically notes the particular argumentative core of the plaintiffs' testimony, namely their claims that

> "their exclusion from marriage was an injury, affecting their opportunities for self-determination and individual growth. The ability to marry the person of their choice, they

[1948] The 9th District Court upheld *Perry v. Schwarzenegger* in *Perry v Brown,* 134 Cal. Rptr. 3d 499 (9th Cir. 2011) (USA). The issue was then decided by the U.S. Supreme Court as *Hollingsworth v Perry,* 570 U.S. 133 (2013) (USA).

[1949] Elizabeth Gill, ACLU – American Civil Liberties Union for Northern California (2014); Kevin Cathcart, Lambda Legal – Defense and Education Fund USA (2014); Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014).

[1950] The fact that Judge Walker came out as gay shortly after deciding the case was seen – mostly by critics of the decision – as a possible reason for his ruling, although thankfully, this line of argumentation was not picked up by most quality media. For an example of this debate, see: Lisa McElroy, Amanda Frost, 'Can a Judge Be Biased Because He Is Gay? (*huffingtonpost.com,* 22 November 2011) at <http://www.huffingtonpost.com/lisa-mcelroy/vaughn-walker-prop-8_b_1108844.html> (accessed 11 January 2018).

[1951] See, e.g., 'Reason Prevails on Prop. 8; Wednesday's Ruling Overturning the Ban on Same-Sex Marriage Changes the Debate Forever (Editorial)' *L.A. Times* (Los Angeles, 4 August 2010), at A26.

[1952] See, e.g., Andrew Koppelman, 'Judge Walker's Factual Findings' (*New York Times,* 11 November 2016), <http://www.nytimes.com/roomfordebate/2010/08/04/gay-marriage-and-the-constitution/judge-walkers-factual-findings> (accessed 11 January 2018). Positive: Clifford J. Rosky, 'Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law' (2011) 53 Arizona Law Review 913; Elizabeth Gill, ACLU – American Civil Liberties Union for Northern California (2014); Kevin Cathcart, Lambda Legal – Defense and Education Fund USA (2014); Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014).

[1953] *Perry v Schwarzenegger,* 704 F. Supp. 2d 921 (N.D. Cal. 2010) (USA), para 993. Rosky discusses this point, Clifford J Rosky, 'Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law' (2011) 53 Arizona Law Review 913, 918.

> argued, was a critical aspect of human existence, without which their essential humanity was compromised and demeaned. Importantly, their exclusion from civil marriage limited their opportunities to attain autonomy and joy in their personal lives." (*citations omitted*)[1954]

While this may well have been a strategic choice, it received extensive criticism by scholars close to the LGBT movement. Katherine Franke, for instance, disapprovingly defines the litigation strategy of lawyers Ted Olson and David Boies in the following way:

> "Recall that one of the main approaches taken at the trial by the so-called 'dream team' was to paint a picture of marriage as the most sacred, revered, mature form of adult coupling, thus denying access to marriage for same-sex couples is a constitutional injury because of the fundamentalness and sacredness of marriage."[1955]

However, different constructions are possible – and indeed, Franke applauded the decision of Judge Reinhardt of the 9th Circuit Court of Appeals[1956] – a decision which confirmed *Perry v. Schwarzenegger*[1957] – for following the argument of lawyer Therese Stewart. Stewart focused on the fact that the denial of marriage to same-sex couples, and same-sex couples alone, amounted to an unconstitutional deprivation of an existing right without legitimate reason under the Equal Protection Clause.[1958] Indeed, while an emphasis on the "uniqueness" of marriage arguably enforces the sanctimonious character of marriage as the only legitimizing institution for love relationships, a focus on the injustice of excluding a certain group of people from an existing institution has a different impetus. It is a struggle for equal treatment, rather than an implicit confirmation that marriage is so important that the exclusion from it would be tantamount to a degradation of love. Indeed, the latter argumentation line does not necessarily speak to the

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[1954] Melissa Murray, 'Marriage as Punishment' (2012) 112 Columbia Law Review 1, 3.

[1955] Katherine M. Franke, 'Court of Appeals Prop 8 Ruling: Treating Marriage as a License, not a Sacrament' (2012) 2 JL 465, 465.

[1956] *Perry v Brown,* 134 Cal. Rptr. 3d 499 (9th Cir. 2011) (USA).

[1957] *Perry v Schwarzenegger,* 704 F. Supp. 2d 921 (N.D. Cal. 2010) (USA).

[1958] Franke, 'Court of Appeals Prop 8 Ruling: Treating Marriage as a License, not a Sacrament', 466.

significance of marriage as an institution at all; instead, it states that while such a state-enforced institution exists, it cannot discriminate based on arbitrary characteristics.

The *Obergefell* decision marked the successful climax of the LGBT movement's marriage equality campaign. The Supreme Court's *Windsor*[1959] decision two years earlier (an ACLU case)[1960] had opened up the door for marriage equality by invalidating Section 3 of DOMA[1961] (which had federally defined "marriage" and "spouse" as only pertaining to different sex couples), thus signalling that the Court was becoming more susceptible towards the idea of same-sex marriage. The stage was set, also because a considerable number of states allowed for same-sex marriage or at least some kind of civil union.[1962]

In *Obergefell*, the Supreme Court noted that there already was a considerable body of case law on the issue of marriage equality by state courts, thus validating the efforts by the LGBT movement (which had, after all, strategically worked on building up to such a decision for several years).[1963] The Supreme Court, relying on previous case law,[1964] based its decision on the constitutional doctrines of both equal protection as well as the "right to marry" under the due process clause.[1965] Justice Kennedy, writing for the majority, points to the "interlocking nature of

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[1959] *United States v Windsor,* 570 U.S. ___ (2013) (USA).

[1960] Elizabeth Gill, ACLU – American Civil Liberties Union for Northern California (2014).

[1961] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), Sec 3, (codified at 28 U.S.C. § 1738C (Supp. 1996)) (USA).

[1962] Most activists agreed that timing was of the utmost importance, since a negative Supreme Court decision at this stage would do quite a lot of harm. That's why considerable effort was put into shutting down cases that were perceived as detrimental. Elizabeth Gill, ACLU – American Civil Liberties Union for Northern California (2014); Evan Wolfson, Freedom to Marry, New York, NY, USA (2014); Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014).

[1963] Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014); Evan Wolfson, Freedom to Marry, New York, NY, USA (2014).

[1964] Such as *Loving v Virginia,* 388 U.S. 1 (1967) (USA); *Griswold v Connecticut,* 381 U.S. 479 (1965) (USA); *Lawrence v Texas,* 539 U.S. 558 (2003) (USA); *United States v Windsor,* 570 U.S. ___ (2013) (USA); and others.

[1965] U.S.Const. amend. XIV, § 1 (USA) and U.S. Const. amend. V (USA). For a discussion of the relationship between the right to marry and equal protection, see: Cass R. Sunstein, 'Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection' (1988) 55 University of Chicago Law Review 1161.

these constitutional safeguards in the context of the legal treatment of gays and Lesbians,"[1966] which "prohibits this unjustified infringement of the fundamental right to marry."[1967] However, the greatest part of the majority opinion expands on the fundamental right to marry, constructing marriage as the ultimate fulfilment of a love relationship and even of a family unit:

> "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. ... The right to marry thus dignifies couples who 'wish to define themselves by their commitment to each other.' ... By giving recognition and legal structure to their parents' relationship, marriage allows children 'to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.' ... Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. ... this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order."[1968]

While the decision was generally received with joy among the LGBT community, there were also a number of critical voices, particularly among academia, claiming that while in principle favourable, this decision did solidify heteronormative ideals by presenting marriage as the ideal basis for partnership and family.[1969] As Melissa Murray writes,

> "Obergefell builds the case for equal access to marriage on the premise that marriage is the most profound, dignified, and fundamental institution into which individuals may enter. Alternatives to marriage, which I collectively term 'nonmarriage,' are by comparison undignified, less profound, and less valuable. On this account, the rationale

[1966] *Obergefell v Hodges,* 576 U.S. ___ (2015) (USA).

[1967] Ibid.

[1968] Ibid.

[1969] See, e.g., Murray, 'Obergefell v. Hodges and Nonmarriage Inequality'; Clare Huntington, 'Obergefell's Conservatism: Reifying Familial Fronts' (2015) 84 Fordham Law Review 23; Serena Mayeri, 'Marital Supremacy and the Constitution of the Nonmarital Family' (2015) 103 California Law Review 1277.

for marriage equality rests – perhaps ironically – on the fundamental inequality of other relationships and kinship forms."[1970]

Most activists I spoke with before the *Obergefell* decision came out had considered the question of whether to primarily push for equality arguments or liberty arguments ("right to marry"). This was perceived differently (but mostly, not as the most important question when litigating).

Elizabeth Gill, senior staff attorney at ACLU:

"... there are probably academic thinkers out there who have a much more sophisticated perspective on this than I do. I mean, from a litigator's perspective, you just use what you can use. Is it cleaner if they [the courts] do it in an equality frame? Yes. It's more complicated in a due process frame, because there is a lot of hostility out there to that..."[1971]

Shannon Minter, legal director at NCLR:

"One way to think about this would be to say, yes, we should not argue that marriage is a fundamental right and we should sort of de-constitutionalize marriage ... and encourage the courts to analyse it purely as a distributive or redistributive mechanism. So this then puts it really on just a policy level. One could argue about equality, and that will have a certain amount of leverage, but really, I think it would primarily have the effect of pushing discussions about marriage and disputes about marriage into a policy arena where you would just have to figure out – what makes sense? What benefits should go to whom? There would have to be good reasons for the way we set things up."[1972]

[1970] Murray, 'Obergefell v. Hodges and Nonmarriage Inequality', 1207.

[1971] Elizabeth Gill, ACLU – American Civil Liberties Union for Northern California (2014).

[1972] Shannon Minter, NCLR – National Center for Lesbian Rights USA (2014).

Be this as it may, the achievement of marriage is certainly not the end of the road.[1973] This is consistent with activists' views, who tended to understand their activism as an on-going practice without an expiry date, hatching on to political debates and forming them at the same time.[1974] Most of the activist lawyers I interviewed were deeply rooted in the LGBT movement and disposed of extensive and tight networks which connected many different levels of the movement with each other – local grassroots associations, state and federal organisations, radical and mainstream discourses, and so on – therefore, it is a safe assumption that future legal activism will be thoroughly informed by the movement's needs. Of course, the LGBT community is large and heterogeneous; there are many different views on what issue to focus on next.[1975] However, such a multiplicity of narratives is the hallmark of groups that reach a certain growth.[1976]

The LGBT movement hasn't seemed to loose momentum since, rather the opposite. Ellen Andersen examined the impact and transformative potential of a number of LGBT Supreme Court decisions, claiming that *Obergefell* could be "best understood as part of a large transformative event rather than as a singular event."[1977] Whereas a few NGOs who were mostly driven by the mission to achieve marriage equality – such as "Freedom to Marry" – closed its doors after *Obergefell*,[1978] most LGBT movements seem to have shifted their focus to other issues, especially under the impression of the repressive climate under the Donald Trump

[1973] Carlos Ball writes: "It is a grave mistake to believe that the favourable resolution of the marriage equality question somehow represents the end of the struggle for LGBT equality in this country. ... It does not minimize or trivialize the importance of nationwide marriage equality to remind ourselves, for example, that LGBT individuals continue to be the subjects of violence and harassment in places ranging from schools to streets; that denying jobs, housing, and goods and services to sexual and gender-identity minorities remains legal in most states; and that, as of this writing, both houses of Congress (as well as most state legislatures) are controlled by the GOP – a political party that has traditionally been unsupportive of LGBT equality measures."). Ball, 'Introduction: The Past and the Future', 6. Kevin Cathcart, Lambda Legal – Defense and Education Fund USA (2014).

[1974] Elizabeth Gill, ACLU – American Civil Liberties Union for Northern California (2014); Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014).

[1975] For a few suggestions on where to go next, see: Carlos A. Ball (ed), *After Marriage Equality: The Future of LGBT Rights* (New York University Press 2016).

[1976] Cover, 'Nomos and Narrative. Foreword to the 1982 Term of the Supreme Court', 15.

[1977] Andersen, 'Transformative Events in the LGBTQ Rights Movement', 466.

[1978] Ibid, 470-472.

presidency.[1979] And there seems to be an increase, rather than a decrease of funding.[1980] Presently, the opinion polls show that a solid majority of US citizens support same-sex marriage; the numbers having slightly increased post-*Obergefell*.[1981]

In conclusion, the US struggle for marriage equality was much more than a battle against state-imposed constraints, more than the fight for recognition and autonomy of an insular group (although it did contain elements of this).[1982] It actively engaged with its social surroundings, demanding equal access to mainstream institutions and thus ultimately shifting the underlying assumptions and distributive premises of such institutions. In this sense, the marriage equality discourse shifted the meaning of "marriage" and ultimately, shaped the US constitution.[1983]

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[1979] 'Under Attack, LGBT Movement Priorities Radically Shift' (*The Rainbow Times*, 20 December 2017) <http://www.therainbowtimesmass.com/under-attack-lgbt-movement-priorities-radically-shift/> (accessed 28 January 2018).

[1980] 'National LGBT Movement Report 2017' (*Movement Advancement Project MAP*, 2017). <http://www.lgbtmap.org/2017-national-lgbt-movement-report> (accessed 28 January 2018).

[1981] In 2015 (before and around the Supreme Court decision) polls showed that around 60% supported same-sex marriage: Janet Hook, 'Support for Gay Marriage Hits All-Time High – WSJ/NBC News Poll' (*Wall Street Journal*, 9 March 2015) <https://blogs.wsj.com/washwire/2015/03/09/support-for-gay-marriage-hits-all-time-high-wsjnbc-news-poll/> (accessed 31 January 2018); Justin McCarthy, 'Record-High 60% of Americans Support Same-Sex Marriage' (*gallup.com*, 19 May 2015) <http://news.gallup.com/poll/183272/record-high-americans-support-sex-marriage.aspx> (accessed 31 January 2018).

Two years after *Obergefell,* the numbers had slightly increased: Justin McCarthy, 'U.S. Support for Gay Marriage Edges to New High' (*gallup.com*, 3-7 May 2017) <http://news.gallup.com/poll/210566/support-gay-marriage-edges-new-high.aspx> (accessed 31 January 2018); 'Support for Same-Sex Marriage Grows, Even Among Groups That Had Been Skeptical' (*Pew Research Center*, 26 June 2017) <http://www.people-press.org/2017/06/26/support-for-same-sex-marriage-grows-even-among-groups-that-had-been-skeptical/> (accessed 31 January 2018).

[1982] Cover, 'Nomos and Narrative. Foreword to the 1982 Term of the Supreme Court', 26; Fraser, 'Rethinking Recognition'.

[1983] In this context, Rosky traces the development of the equal protection clause. Rosky, 'Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law'.

## 18. Conclusions to Chapter 6

There are many interesting inferences that can be drawn from the experiences of the US LGBT movement. Importantly, it shows that legal activism was indeed used as a successful strategy to elicit social change.

### 18.1. Meta-Narrative: Litigation Embedded in a Comprehensive Long-Term Strategy

Importantly, as I have shown, strategic litigation efforts regarding same-sex marriage rights were embedded in a larger strategy, carried by the LGBT movement at large and supported by media campaigns, legislative lobbying and other forms of activism. This strategy was constructed in accordance with major LGBT organisations, such as Lambda Legal, the LGBT chapter of the American Civil Liberties Union (ACLU), the National Center for Lesbian Rights (NCLR), Gay & Lesbian Advocates & Defenders (GLAD), and the Gay and Lesbian Alliance against Defamation (GLAAD). Notably, the use strategic litigation has catapulted major organisations[1984] to the forefront of the US LGBT movement in terms of agenda-setting and visibility.[1985]

The creation and execution of a long-term social change project, including the cooperation and coordination such an approach required, is, in my view, an important strength of the LGBT rights movement in the USA. It has included the setting of intermediary litigation goals,[1986] the evaluation of different States regarding their suitability for strategic litigation,[1987] and –

[1984] The following organisations, for example, have majorly contributed to the legal fight for marriage equality, as we have seen: Lambda Legal – Defense and Education Fund USA; GLAD – Gay and Lesbian Advocates and Defenders; ACLU – American Civil Liberties Union; NCLR – National Center for Lesbian Rights USA.

[1985] For a comprehensive account on this, see Barclay, Bernstein and Marshall (eds), *Queer Mobilizations: LGBT Activists Confront the Law*.

[1986] For a comprehensive account, see Cummings and NeJaime, 'Lawyering for marriage equality'; Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014). See also discussion in Section 17.4.

[1987] Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014).

importantly – considerations on *timing*, even if it meant discouraging particular litigation efforts.[1988]

This strategy was made possible by a high amount of coordination among different activist groups, such as regular institutionalized meetings and constant exchange of information, as well as agreeing on a common strategy and sticking to it. Major organisations invested a lot of time and resources to reach out to local NGOs, activists, lawyers and others, in order to involve them in the strategy, both to maximize impact and to create a coherent narrative.[1989] This long-term plan has significantly contributed to the success of the "marriage equality campaign," as the case study has shown.[1990]

Moreover, litigation was not seen as an end in itself, but as a vehicle for generating numerous effects, among them raising awareness for LGBT issues, educating the public (including judges and lawmakers), and inciting discussion on LGBT issues. Accordingly, activists saw their litigation efforts as part of an on-going struggle to advance LGBT rights, rather than singular attempts at law reform.

## 18.2. Incremental Approach

Connected to this is the finding that LGBT advocates applied an incremental approach regarding their litigation strategies, carefully constructing compelling cases along a sympathetic narrative, considering factors such as timing and choice of jurisdiction. As mentioned above, activists have also at times tried to stop litigation that was perceived as too risky or even detrimental.[1991]

[1988] See discussion in Section 17.5.

[1989] Kevin Cathcart, Lambda Legal – Defense and Education Fund USA (2014).

[1990] See discussion in Section 17.3.

[1991] See discussion in Section 17.5.

## 18.3. Backlash-Thesis

The concern of some scholars that using the courts to achieve change might backfire by creating a backlash, especially if the population is not on board,[1992] was also addressed in the sample I provided. A notable example was the fight for marriage equality in California: After an initial victory for LGBT advocates before the California Supreme Court which allowed same-sex marriage,[1993] California enshrined the definition of marriage as between a man and a woman in its state constitution by popular vote.[1994] This could be seen as an affirmation of the backlash thesis, as advanced by Rosenberg[1995] – victories at the judicial level can lead to counter-mobilization and thus, imperil the social justice project.

However, the story did not end there; in a follow-up decision, the Federal District Court in San Francisco found this provision unconstitutional;[1996] the issue ultimately went to the US Supreme Court, which did not engage with the merits of the case, but dismissed a challenge of the District Court's decision based on standing issues (leaving the District Court's decision in effect).[1997]

Hence, the question remains whether the mere possibility of negative results justifies the neglect of the courts as a possible venue for societal intervention. Social progress usually incites reactionary responses[1998] – but this is not necessarily a sole feature of judicially induced change.[1999] After all, there will always be parts of the population who oppose progress, and every social strategy is vulnerable to contingencies. Furthermore, even a loss in court might

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[1992] A powerful account regarding the backlash thesis comes from Gerald Rosenberg: Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*

[1993] *In re Marriage Cases,* 183 P 3d 384 (Cal. 2008) (USA).

[1994] Proposition 8 became law in 2008, CAL. CONST. art. I, § 7.5 (invalidated by *Perry v Schwarzenegger,* 704 F. Supp. 2d 921 (N.D. Cal. 2010) (USA)).

[1995] Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* .

[1996] *Perry v Schwarzenegger,* 704 F. Supp. 2d 921 (N.D. Cal. 2010) (USA).

[1997] *Hollingsworth v Perry,* 570 U.S. 133 (2013) (USA).

[1998] Eskridge Jr, 'Channeling Identity-Based Social Movements and Public Law', 471.

[1999] Cummings and NeJaime, 'Lawyering for marriage equality'.

produce positive results for same-sex movements, for instance, by mobilizing activism.[2000] Nonetheless, the danger of possible popular backlash warrants a careful evaluation of potential risks and benefits in order to find the best applicable strategy.

Consequently, while there was popular backlash against the advancement of LGBT rights along the way, the LGBT movement ultimately succeeded in advancing their narrative and achieving same-sex marriage equality country-wide via decision of the US Supreme Court. However, this decision can be understood not as an end point, but as an invigorating moment for future LGBT rights efforts.

## 18.4. Same-Sex Marriage – Affirming or Destabilising Heteronormativity?

Despite a lively debate on the issue of "marriage" within the LGBT community, "marriage equality" was the most visible agenda point of these organisations, which did raise criticism within some of the smaller, more specialised NGOs (such as the Woodhull Freedom Foundation). However, "marriage equality," as I have shown, was understood as a mobilizing message, capable of raising sympathy and acceptance of LGBT issues more generally in the public.[2001]

The debate of whether "marriage equality" ultimately strengthened heteronormative perceptions, or, on the other hand, served to subvert "marriage" as an institution, opening it up to more inclusive constructions in the long run, is not over. However, I hope to have shown that there is a strong point to be made that the success of repealing one of the traditionalist assumptions of marriage – the opposite sex requirement – might well serve as a gateway for future efforts to expand the meaning of "marriage," especially if legal categories (such as marriage) are understood as flexible, rather than fixed.

[2000] NeJaime, 'Winning Through Losing'.

[2001] See discussion in Section 17.4.

# CHAPTER 7

# CONCLUSIONS

## 19. Presentation of Findings

Both the CJEU and the ECtHR have developed their LGBT rights case law in the last years. While some scholars have challenged the democratic legitimacy of Courts participating in policy making ("separation of powers objection");[2002] the influence of the European High Courts on European and national policy is undeniable.[2003] Hence, civil society is well-advised to participate in judicial decision making by way of litigation.

Critical legal theories have questioned the potential of law to develop emancipatory impact ("law-sceptical objection").[2004] However, this thesis suggests that legal approaches (more precisely, strategic LGBT rights litigation before the European High Courts) can in fact advance a progressive agenda. An activist-centred reading of case law shows how such an approach can be put into practice.[2005] A case-study from the US context serves as a best practice example, containing valuable insights also for European LGBT rights litigation.[2006]

In order to answer the research question, I have first outlined the "lawyering for social change" approach, providing the theoretical background for "strategic litigation."[2007] I have defined "strategic litigation" as litigation that is a) carried out with the main purpose of effecting change that transcends the victory in a particular case, and b) litigation that prioritizes a specific (legal/social/political) agenda over the particular interests of a client (taking in mind that when it comes to the existing LGBT rights case law of the European High Courts, it is often not easy to

[2002] Bellamy, *Political Constitutionalism*; see also *supra*, at 11.

[2003] As I have shown in Chapter 1, Section 2.

[2004] See *supra*, at 12.

[2005] See Chapters 3, 4 and 5.

[2006] See Chapter 6.

[2007] See discussion in Section 1, *supra* at 37.

pin down the motivation for advancing a case, that there are overlaps, and that this motivation can change in the course of a case).[2008]

The research question has been structured into three fundamental inquiries, including a total of five subsets.

<table>
<tr><td colspan="2">Research Question: Can strategic litigation at the CJEU and the ECtHR be an emancipatory and feasible approach for the advancement of LGBT rights in Europe?</td></tr>
<tr><td>1) Do the Courts exert sufficient influence to justify strategic LGBT rights litigation attempts?</td><td></td></tr>
<tr><td rowspan="2">2) Do European Courts provide procedural spaces for activist (LGBT rights) lawyers?</td><td>2.1.) Do the European Courts provide access to justice for activist (LGBT rights) litigants? (precondition)</td></tr>
<tr><td>2.2.) Are the arguments of (LBGT rights) litigants adequately considered by the judges?</td></tr>
<tr><td rowspan="3">3) Can the case law of the European Courts be analysed and utilised in a progressive LGBT-rights enhancing way?</td><td>3.1.) Do European Union law and European human rights law protect LGBT rights? (precondition)</td></tr>
<tr><td>3.2.) Can the respective case law of the Courts be analysed in an actor-centred way – and does it provide room for activist intervention?</td></tr>
<tr><td>3.3.) How could an activist reading of the European Courts’ LGBT rights case law look like? (“strategic opportunities framework”)</td></tr>
</table>

This chapter contains a summary of the main findings of this thesis (organised along the structure of the research question), as well as a discussion of these findings (Section 20).

[2008] See *supra*, at 52.

## 19.1. Answering the First Inquiry

*Do the Courts exert sufficient influence to justify strategic LGBT rights litigation attempts?*

Both the CJEU and the ECtHR can be described as political spaces, since their decisions develop influence beyond particular cases.[2009] Both Courts have judicial review powers, and Member States usually comply with their judgments.[2010] Scholars have observed that the ECHR is an exceptionally effective human rights regime;[2011] the ECtHR itself also understands its judgments as serving "not only to decide cases brought before the Court, but more generally, to elucidate, safeguard and develop the rules by the Convention..."[2012] In the context of the CJEU, the doctrine of "supremacy" has particularly contributed to establishing the CJEU's decision as binding and providing its decisions with policy impact.[2013] Scholars like Stone Sweet have thus defined the Court as a policy maker within the EU.[2014] Nonetheless, while it has generally been accepted as a fact that the Courts have taken on certain governance functions,[2015] this development has received ample criticism.[2016] In order to answer the first inquiry, it was therefore not enough to affirm that the Courts, indeed, exert considerable influence – it was also necessary to take a closer look at the normative challenges brought forward against this fact,

[2009] See discussion in Chapter 1, Section 2.

[2010] Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and other Essays on European Integration*; Weiler, 'The Transformation of Europe'; Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance'; Keller and Stone Sweet, 'Assessing the Impact of the ECHR on National Legal Systems'; Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*.

[2011] This has led Keller and Stone Sweet to calling the ECHR "the most effective human rights regime in the world." Stone Sweet and Keller, 'The Reception of the ECHR in National Legal Orders', 3.

[2012] *Karner* App no 40016/98, para 26.

[2013] Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance', 25; Shapiro, 'The European Court of Justice', 326.

[2014] Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance', 25.

[2015] See discussion in Chapter 1, Section 2.

[2016] See, e.g., Bellamy (ed), *Constitutionalism and Democracy*.

namely, that the Courts' behaviour was undemocratic, threatening the separation of powers ("separation of power" objection).[2017]

This thesis has contended that the Courts' taking on of *de facto* governance functions can also be understood as empowering for civil society. After all, courts are spaces where diverse societal groups can negotiate their distinct legal perceptions, engaging in a process of legal meaning creation.[2018] The Courts' role as fora where societal groups can present and argue for their particular views on the laws they are subjected to, establishes the judicial process as a mechanism of democratic participation.[2019] Therefore, a "jurispathic" court[2020] – a court that exercises judicial restraint by refusing to engage in the hermeneutic process of weighing different legal interpretations, as advanced by the parties, against each other – is by no means more democratic than an "active" court.[2021] On the contrary, by being silent it enforces the *status quo* with recourse to unreasoned power (or violence).[2022] In other words: judicial restraint may impose dominant (hegemonic) legal notions, without justification by a substantially reasoned opinion.[2023] Therefore, a court that *seizes* its responsibility as a "mediator" of different legal interpretations carries out a deeply democratic function. This assessment is especially interesting for minority groups with sparse political support; for them, participating in judicial decision-making is a powerful tool to directly participate in a form of policy creation.[2024] These factors establish the Courts as interesting spaces for cause lawyering.

In light of all these considerations, the first inquiry of the research question can be answered in the affirmative.

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[2017] See *supra*, at 11.

[2018] Cover, 'Nomos and Narrative. Foreword to the 1982 Term of the Supreme Court'.

[2019] See discussion in Chapter 1, Section 2.3.1.

[2020] The term "jurispathic" is used by Robert Cover. Cover, 'Nomos and Narrative. Foreword to the 1982 Term of the Supreme Court', 53.

[2021] See discussion in Chapter 1, Section 2.3.1., *supra* at 74.

[2022] Cover, 'Nomos and Narrative. Foreword to the 1982 Term of the Supreme Court', 57.

[2023] See discussion in Chapter 1, Section 2.3.1., *supra* at 75.

[2024] Hunter, 'Lawyering for Social Justice', 1017; Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change'.

## 19.2. Answering the Second Inquiry

The second inquiry of my research asks: *Do European Courts provide procedural spaces for activist (LGBT rights) lawyers?*

It consists of two subsets.

### 19.2.1. Answering the First Subset of the Second Inquiry

The first subset of the second inquiry is an important preliminary investigation in order to answer the second inquiry. It asks, *Do the European Courts provide access to justice for activist (LGBT rights) litigants?*

An evaluation of the Courts' procedural make-up has affirmed that both Courts provide *access to justice* for activist lawyers.[2025] In the context of the CJEU, the doctrine of "direct effect" has importantly enhanced the opportunities for civil society actors to participate in judicial decision-making, especially through preliminary reference procedures.[2026] It is true that litigants cannot address the CJEU directly, but are required to bring litigation in their national contexts, which then can be referred to the CJEU by the respective national court. However, this has not prevented strategic litigation efforts. Elise Muir, for instance, shows that civil society organisations have greatly contributed to the development of EU anti-discrimination law via preliminary references.[2027] Thus, the standing requirements at the CJEU are not an insurmountable obstacle for strategic litigation.

[2025] See discussion in Chapter 2.

[2026] See discussion in Chapter 2, Section 5.2.2.

[2027] Muir, 'Anti-Discrimination Law as a Laboratory for EU Governance of Fundamental Rights at the Domestic Level: Collective Actors as Bridging Devices', 113.

The procedural rules governing the ECtHR enable activist interventions, as well. Unlike the CJEU, the ECtHR can be approached directly by applicants.[2028] It also allows third party interventions, an instrument extensively used by activists.[2029] In fact, third party intervention has significantly grown in the past decades; it is notable that most landmark LGBT rights cases contain such interventions.[2030]

Therefore, the first subset of the second inquiry can be answered in the affirmative. This assessment is an important precondition for this thesis. After all, an evaluation of the progressive impetus and feasibility of "strategic litigation" depends importantly on the assumption that the Courts grant access to LGBT rights advocates.

This assumption does not, strictly speaking, contribute to answering the research question, because "access to justice" is merely a *prerequisite* for strategic litigation approaches, but does not in itself allow any conclusions regarding its emancipatory potential. The finding that litigants can approach the Courts is nonetheless necessary to establish that strategic litigation is at all *possible*. Therefore, concerns that the procedural particularities – especially of the CJEU[2031] – might nip strategic litigation efforts in the bud have been adequately addressed and refuted.[2032]

### 19.2.2. Answering the Second Subset of the Second Inquiry

The second subset of the second inquiry asks: *Are the arguments of (LBGT rights) litigants adequately considered by the judges?*

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[2028] See discussion in Section 6, *supra* at 165.

[2029] Van den Eynde, 'An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights'.

[2030] Ibid, 280.

[2031] See *supra*, at 129.

[2032] This is especially true for the "preliminary reference procedure," see discussion in Chapter 2, Section 5.2.2.

In order for strategic litigation to work, judges need to take the arguments forwarded by litigants into account. Otherwise, litigants would not be able to participate in legal meaning forming during the judicial process. The theoretical part of this dissertation has thus delved deeply into the nature of case law, portraying the approaches of different legal schools of thought on this matter.[2033] It has been argued that critical legal theories both hold the most interesting conclusions, and pose the most fundamental challenges ("law-sceptical objection"),[2034] in this regard.[2035]

*First*, the view of law as "neutral" or "static" is fundamentally flawed.[2036] Law and legal meaning are subject to social realities.[2037] Moreover, law is more than the sum of statutes and court decisions; law also includes its application and usage. Seyla Benhabib describes it as a flexible, discursive body that is at once power and meaning.[2038] While it binds a people normatively, its meaning is not inscribed nor fixed, but constantly re-negotiated.

*Second*, the view of adjudication as purely hierarchical is reductive.[2039] Scholars like Robertson contend that judges cannot act arbitrarily; they have to argue their decision, within the bounds of a complicated apparatus of legal doctrine,[2040] which means that they cannot simply ignore convincing arguments brought forward by litigants; at the very least, they need to address them, even if to reject them. Moreover, civil society actors have in fact successfully contributed to the development of law by way of litigation.[2041] And in fact, this thesis has provided several

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[2033] See discussion in Chapter 1, Section 3.

[2034] See *supra*, at 12.

[2035] See discussion in Chapter 1, Section 3.2.

[2036] See discussion in Chapter 1, Section 3.2.1.

[2037] See discussion in Section 3.2.1., *supra* at 91.

[2038] Seyla Benhabib, *Another Cosmopolitanism* (Oxford University Press 2006), 47-51.

[2039] See discussions in Chapter 1, Sections 2.3.1. and 3.2.4.

[2040] Robertson, *The Judge as Political Theorist. Contemporary Constitutional Review*, 21.

[2041] Siegel, 'The Jurisgenerative Role of Social Movements in United States Constitutional Law'; Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*; Alter and Vargas, 'Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy'.

examples in which the CJEU and the ECtHR have seriously considered the arguments forwarded by LGBT rights litigants, in Chapters 4 and 5.[2042]

*Third*, Sections (1) and (3) of the first chapter have addressed the question of "agency" of civil society actors within the judicial system. The very fluidity of law gives these actors the chance to intervene in judicial decision making, for instance, by advancing alternative interpretations of a term ("interpretative interventions") and thus being "not only the *subject* but also the *author of the law*."[2043] Those interventions can be advanced through litigation. The "lawyering for social change movement" and the "cause lawyering" approach have advanced theories on how minority groups can use the courtroom to advance a social change agenda.[2044]

That such approaches can indeed be successful has *lastly* been shown by the US case study in Chapter 6. The experience of the US LGBT rights movement exemplifies the *practicability* of using litigation to advance LGBT rights. US LGBT rights activists have successfully carried out a cause lawyering strategy with a trajectory of roughly two decades and a high level of inner-movement-coordination,[2045] culminating in a major victory at the US Supreme Court.[2046] Their litigation strategy was embedded in a larger campaign and included, *inter alia*, legislative and political lobbying, media work, and awareness raising efforts.[2047]

Summarizing, the second subset of the second inquiry can be answered in the affirmative.

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[2042] See especially the discussions in Chapter 4, Section 13.1.5, and Chapter 5, Section 16.1.4.

[2043] Benhabib, *Another Cosmopolitanism*, 49. Benhabib talks of "democratic iterations." She writes, referring to the work of Frank Michelman and Robert Cover: "The disjunction between law as power and law as meaning can be rendered fruitful and creative in politics through 'jurisgenerative processes.' In such processes, a democratic people, which considers itself bound by certain guiding norms and principles, engages in iterative acts by reapproporiating and reinterprating these, thereby showing itself to be not only the *subject* but also the *author of the laws*." ibid.

[2044] Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change'; Scheingold, 'Constitutional Rights and Social Change: Civil Rights in Perspective'. See especially the comprehensive discussion on "lawyering for social change" in Chapter 1, Section 1.

[2045] See discussion in Section 17.3.

[2046] *Obergefell v Hodges,* 576 U.S. ___ (2015) (USA).

[2047] See discussion in Section 17.3.

## 19.3. Answering the Third Inquiry

The third inquiry of the research question builds on the results of the first and second inquiry, turning to LGBT rights more specifically. It asks: *Can the case law of the European Courts be analysed and utilised in a progressive LGBT-rights enhancing way?*

This question is split up in three subsets.

### 19.3.1. Answering the First Subset of the Third Inquiry

The first subset of the third inquiry is a preliminary evaluation, which informs the second and third subsets of the third inquiry. It asks: *Do European Union law and European human rights law protect LGBT rights?*

Both EU law and the ECHR contain provisions protecting the rights of sexual orientation minorities.[2048] Both Courts have developed these protections by way of adjudication.[2049] While the existence of express LGBT rights protections is not, strictly speaking, necessary for strategic litigation in this area, it was nonetheless expedient to outline the existing provisions as a basis for the following case law analysis (in Chapters 4 and 5). Hence, this preliminary investigation can be answered in the affirmative.

### 19.3.2. Answering the Second Subset of the Third Inquiry

Here, the thesis addresses the Courts' *case law* on LGBT rights. The second subset of the third inquiry asks: *Can the respective case law of the Courts be analysed in an actor-centred way – and does it provide room for activist intervention?*

[2048] See Chapters 4 and 5, Sections 11 and 14 respectively.

[2049] See Chapters 4 and 5.

This subset contains a binary investigation, which has to be discussed in conjunction. As the theoretical part of this thesis has shown, the conceptualisation of law as language[2050] means that progressive interpretation of law *is* a form of activism. Chapter 1, Section 4.1 contains deliberations on "interpretative interventions," which can activate the emancipatory potential of law. A reading of jurisprudence that highlights opportunities for such interventions will put activists in the centre of legal analysis.

However, critical legal theories have also forwarded challenges regarding the fundamental suitability of legal approaches to challenge existing hierarchies ("law-sceptical objection").[2051] Legal framing might compromise the progressive and subversive character of social movement agendas, for instance, by (hetero)normalising LGBT demands.[2052] An example for such concerns is the academic scepticism surrounding the US LGBT movement's quest for marriage equality,[2053] mostly advanced by feminist and queer scholarship. The core of this critique disputes the emancipatory trajectory of fighting for "marriage equality," given the heteronormative connotations of the institution of "marriage."[2054] This criticism thus severly challenges this dissertation's argument that "reinterpreting legal terms" can be a feasible and emancipatory tool for LGBT rights activism, since it doubts whether it is even *possible* to interpret marriage in a progressive, empowering way. (While this critique can also be translated into other contexts – after all, working with law might always be perceived as system-

[2050] See Chapter 1, Section 3.2.

[2051] See *supra*, at 12.

[2052] See, e.g., Goldberg, 'Sticky Intuitions and the Future of Sexual Orientation Discrimination'; Murray, 'Marriage as Punishment'; Mesquita, *Ban Marriage! Ambivalenzen der Normalisierung aus queer-feministischer Perspektive*; Katherine Franke, 'The Domesticated Liberty of Lawrence v. Texas' (2004) 104 Columbia Law Review 1399.

[2053] See, e.g., Warner, 'Normal and Normaller: Beyond Gay Marriage'; Polikoff, 'We Will Get What We Ask For: Why Legalizing Gay And Lesbian Marriage Will Not Dismantle The Legal Structure Of Gender In Every Marriage'; Franke, 'The Politics of Same-Sex Marriage Politics'.

[2054] Katherine M. Franke, 'The Politics of Same-Sex Marriage Politics' (2006) 15 Columbia Journal of Gender and the Law 236; Nancy D. Polikoff, 'We Will Get What We Ask for. Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"' (1993) 79 Virginia Law Review 1535; and others.

conforming, rather than system-transforming[2055] – it is splendidly exemplified by marriage-scepticism within queer and feminist circles).

On this issue, progressive scholars, as I have shown, are divided, as is (to a lesser degree) the LGBT rights movement.[2056] However, in the US at least, the marriage equality movement has led to a deeper conversation about LGBT rights[2057] and might, in fact, have opened the general concept of "marriage" up for discussion.[2058] In this regard, "marriage equality" litigation might have paved the road for further expanding this concept (eventually).[2059] (This particular point will be further discussed *infra*, in Section 20.1.).
In any case, the discussion about "marriage" exemplifies the point made by critical legal theories on the interplay between law and social reality:[2060] Arguably, litigating for "marriage equality" has ultimately led to an increased acceptance of same-sex couples;[2061] and this, in turn, might have enabled the epic win at the US Supreme Court.[2062]

Therefore, the answer to the second subset of the third inquiry can be answered in the affirmative.

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[2055] See discussion in Chapter 1, Section 3.2.4., especially *supra* at 112-116.

[2056] See discussion in Section 17.6.

[2057] Richman, 'Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law', 286-290.

[2058] This was suggested by some of the interviewees, e.g., by Jack Lorenz. Jack Lorenz, Equality California (2014).

[2059] For instance, for other non-traditional family forms, such as polyamorous families or the legal recognition of long-lasting friendships. Indeed, the marriage equality movement might have created doctrinal tools for polyamory activists and others ("spillover" effects), while at the same time, at least in the short term, reinforcing traditional stereotypes about marriage. Hadar Aviram and Gwendolyn M Leachman, 'The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle' (2015) 38 Harvard Journal of Law and Gender 269, 273- 276.

[2060] See discussion in Chapter 1, Section 3.2.1.

[2061] See discussion in Chapter 6, Section 17.7.; especially *supra*, note 1981.

[2062] *Obergefell v Hodges,* 576 U.S. ___ (2015) (USA).

## 19.3.3. Answering the Third Subset of the Third Inquiry

Building on the second subset, the third subset of the third inquiry asks: *How could an activist reading of the European Courts' LGBT rights case law look like?*

In order to find an activist language for the conceptualisation of case law which would reveal such opportunities, I have devised a "strategic litigation opportunities" framework for analysing the CJEU's and the ECtHR's LGBT rights case law in Chapter 3. This framework creates a particular actor-centred language in order to conceptualise the European High Courts' case law, highlighting the opportunities for activist intervention. This enables a systemic view on case law as a flexible, fluid body of law, subject to constant changes.

In Chapters 4 and 5, case law narratives are presented that span over the course of several years and multiple cases, such as the inclusion of same-sex couples in the ambit of "family life" of Article 8 ECHR,[2063] or the recognition of same-sex partners as "spouses" for the purposes of the EU Citizens' Rights Directive.[2064] Each narrative tells the story of case law developments on particular issues from an activist viewpoint, using the "strategic litigation opportunities" framework as an analytical matrix.

In the case of the CJEU, these narratives relate 1) the inclusion of "sexual orientation discrimination" into the general principle of equal treatment,[2065] especially regarding the development of the prohibition of discrimination against same-sex couples;[2066] 3) the creative use of litigation by an LGBT rights organisation (*ACCEPT*);[2067] and 4) the project to include same-sex spouses in the meaning of "spouse" under the Citizens' Rights Directive (*Coman*).[2068]

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[2063] This was accomplished by *Schalk & Kopf* App no 30141/04. See discussion in Chapter 5, Section 15.2.

[2064] *Coman and Others* (Case C-673/16) [2018]. See also discussion in Chapter 4, Section 12.3.

[2065] See Chapter 4, Section 12.1.

[2066] See Chapter 4, Section 12.1.1.

[2067] See Chapter 4, Section 12.2.

[2068] Citizens' Rights Directive (2004/38/EC) [2004] OJ L 158/77. See Chapter 4, Section 12.3.

In the case of the ECtHR, I have outlined 1) the development of same-sex family rights,[2069] and 2) the struggle for same-sex marriage equality.[2070]

Within these samples, I have defined the following indicators for strategic litigation opportunities: the Courts' use of vague and ambiguous terms, displays of inconsistency, hesitation and disagreement, different constructions of European consensus, the CJEU's requirement that EU law be interpreted uniformly, and finally the recognition of NGOs as experts by the Courts. Moreover, the Courts' case law – when analysed in an actor-centred way – allows for a number of conjectures regarding strategic litigation choices. In this sense, I have argued that it is of paramount importance to choose the right comparator when making claims of disparate treatment in the context of sexual orientation discrimination.[2071] Moreover, I have shown that the Court's recognition of NGOs as experts can equip the arguments of activist lawyers with considerable weight, especially regarding the construction of European consensus.[2072] Lastly, I have argued that a cautious, incremental approach – in other words, not demanding too much, too soon – might sometimes be well-advised, particularly in all matters relating to marriage.[2073]

The results of an application of the "strategic litigation opportunities" to the case law narratives have been discussed at length in Section 13 of Chapter 4, and in Section 16 of Chapter 5, and thus do not need to be repeated here. A contextual discussion of the "strategic opportunities litigation" framework will follow in Section 20.2.

Chapters 3, 4 and 5 thus have provided an answer to the third subset of the third inquiry of the research question.

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[2069] See Chapter 5, Section 15.2.

[2070] See Chapter 5, Section 15.3.

[2071] See Sections 13 (Chapter 4) and 16 (Chapter 5).

[2072] See Sections 13 (Chapter 4) and 16 (Chapter 5).

[2073] See Sections 13 und 16, *supra* at 251 and 355.

Given the above considerations, the main research question - Is strategic litigation at the CJEU and the ECtHR an *emancipatory* and *feasible* approach for the advancement of LGBT rights in Europe? – can be answered in the affirmative.

## 20. Discussion of Findings

> *"Law ... is not merely the formal official rules adopted by legislatures, courts and executives nor solely the procedures of these institutions. Law is also the practices of governance and resistance people develop behind and beyond the public institutions. Those practices may alter formal, public law; they also alter the meaning and shape of law and provide a potentially rich context for social change."*[2074]

Can law be used to change the world?

This thesis has attempted to close in on this question. It has showed how law – and litigation in particular – can indeed be an instrument for progressive change, at least in the area of European LGBT rights.

Without doubt, LGBT rights organisations have long recognised the potential of participation in judicial decision-making at the ECtHR and the CJEU.[2075] Litigation before the ECtHR, but also before the CJEU, has regularly been used by same-sex rights activists.[2076] While this litigation might not necessarily always qualify as strategic litigation within the meaning of this dissertation (given that it is not clear whether it was conducted *primarily* in order to produce social change – although this might well have been the case), it is clear that it has created a solid body of law that enables and even invites strategic litigation. Moreover, the fact that LGBT rights activists have been successful at the CJEU and the ECtHR, points to the fact that going to court is a viable instrument in a social change toolkit.

As most courts, the CJEU and the ECtHR will not become active unless approached by litigants;

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[2074] Martha Minow, 'Law and Social Change' (1993-1994) 62 University of Missouri-Kansas City Law Review 171, 176.

[2075] See also Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*; Helfer and Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe'.

[2076] See, e.g., Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*; Helfer and Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe'.

in this sense, litigants "activate" the Courts.[2077] As Schepel and Blankenburg put it in the context of the CJEU: "The Court of Justice, as other courts, depends on 'demand' for its services, or at least on the ways and means it has to manipulate that demand. It needs to be mobilized."

The claims of litigants set the judicial agenda. Hence, they arguably can be understood as fulfilling a kind of political function: Lawyers before these Courts *de facto* represent more than just their individual clients; the precedents which they achieve will influence a whole group of people who are in a similar situation as their clients. Kelemen points out in the context of the CJEU, "[b]y presenting policy goals as individual rights that private actors and governments are obliged to respect and that national courts are obliged to enforce, the EU can shift the cost of compliance to the private sector and state governments."[2078]

This means that activist lawyers can be understood as civil society advocates. The immense transformative potential that lies in strategic litigation thus allows for wide reaching (political) activism.[2079]

## 20.1. The Emancipatory Potential of Strategic Litigation

Change through the courtrooms is not without risks; engaging in strategic litigation carries a number of potentially problematic implications, such as the risk of creating backlash,[2080] or of advancing assimilative tendencies instead of triggering more comprehensive change ("law-

[2077] Schepel and Blankenburg, 'Mobilizing the European Court of Justice', 12.

[2078] Kelemen, 'American-Style Adversarial Legalism and the European Union', 4.

[2079] A number of scholars have written about the transformative potential of CJEU decisions, for instance: Kelemen, 'Suing for Europe: Adversarial Legalism and European Governance'; Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance'.

[2080] Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* .

sceptical objection").[2081] While these arguments can also be brought forward against other, non-litigation-based strategies,[2082] they deserve a closer examination in the context of this thesis.

The case study of the US context in Chapter 6 has provided an example of a solid, long-term litigation project. Of course, it might be difficult to discern which part of its success was actually due to extra-legal strategies, such as media work, political lobbying or consciousness-raising.[2083] However, the ultimate accomplishment that won same-sex marriage was, in fact, a court case: the US Supreme Court decision in *Obergefell*.[2084] In this sense, the study suggests that strategic litigation – when done correctly – can, indeed, work. Thus, it creates a fitting backdrop to assess the theoretical premises for strategic litigation advanced by this thesis in light of the "law-sceptical objection."

As held before, viewing law as fluid and flexible (a perspective held by critical legal theories)[2085] allows for a conceptualisation of legal categories and adjudication as a playing field for activist intervention. This perspective can have empowering effects: As this thesis has related, the US organisation LAMBDA Legal conducted an in-depth comparative evaluation of State and federal law[2086] to understand where litigation would make the most sense.[2087] This evaluation included a collection of organisations, courts, judges, lawyers, academics, media workers, and others, who had a pro-LGBT mind-set.[2088] Apart from being a great example of an activist-centred analysis, this evaluation has allowed activists to draw conclusive inferences for future strategic choices. By looking at law (including case law) with a purposive lens, activists have thus re-designed law and adjudication as a terrain of intervention opportunities, with the courts as arenas for social

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[2081] See *supra*, at 12. See also Eskridge Jr, 'Channeling Identity-Based Social Movements and Public Law', 459-467.

[2082] Scott Cummings and Douglas NeJaime have demonstrated how the backlash thesis often rests on erroneous assumptions. Cummings and NeJaime, 'Lawyering for marriage equality'.

[2083] See Chapter 6, Section 17.3.

[2084] *Obergefell v Hodges,* 576 U.S. ___ (2015) (USA).

[2085] See discussion in Chapter 1, Section 3.2.

[2086] See discussion in Chapter 6, Section 17.3.

[2087] Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014).

[2088] Ibid.

change efforts. Similarly, ILGA-Europe has conducted an analysis of national and European law, identifying gaps in LGBT rights protection to be (possibly) addressed by strategic litigation.[2089]

Indeed, understanding law and jurisprudence as *fluid*[2090] – and conceiving of strategic litigation as a long-term effort – also takes the bite out of the backlash thesis.[2091] Case law, as the samples from the European High Courts also have shown,[2092] is not linear;[2093] the same is true for societal progress at large. Just as a loss in court has not diminished the impetus of LGBT rights advocacy (and has sometimes even produced positive side-effects),[2094] popular backlash against single court victories does not automatically mean that the progress of LGBT rights has come to a halt. In fact, US opinion polls today show a very high acceptance of same-sex marriage.[2095] Therefore, neither initial losses, nor instances of popular backlash,[2096] have ultimately stymied the development of LGBT rights in the USA.

Interestingly, the concern about "backlash"[2097] hardly figured in European activists' deliberations on whether to initiate litigation.[2098] As Nigel Warner (ILGA-Europe) put it in the context of LGBT rights litigation in Eastern Europe,

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[2089] Email by Nigel Warner, 24 September 2018.

[2090] A view which critical legal approaches endorse. See discussion in Chapter 1, Section 3.2.

[2091] Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* .

[2092] See Chapters 4 and 5.

[2093] Shannon Minter, NCLR – National Center for Lesbian Rights USA (2014).

[2094] NeJaime, 'Winning Through Losing'.

[2095] See *supra* note 1981.

[2096] See discussion in Chapter 6, Section 17.2.

[2097] See discussion on backlash in Chapter 6, Section 18.2.

[2098] An exception was, for instance, *Schalk & Kopf* App no 30141/04; both Graupner and Wintemute warned Austrian LGBT organisation HOSI against filing this case, albeit less for fear of backlash than of generating a negative precedent for same-sex marriage. However, both contend that the case was ultimately a success. Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014); Robert Wintemute, King's College London (2014).

> "[w]e have studied Eastern Europe ... and litigation is not a thing on its own, you've got to change attitudes on the ground. Backlash is right there, and it's been activated all the time, it will happen, and it happened as soon as people started mobilizing in Eastern Europe in the mid-2000s. ... There has to be change on the ground ... and what's inhibiting change on the ground is hate speech, hate crimes, the violations of freedom of expression, all those things."[2099]

In other words, the advancement of LGBT rights will always produce backlash (albeit arguably in some regions more than in others); this is, in fact, also a lesson learned from the US context.[2100] And in fact, as Nigel Warner described, the ECHR and its enforcement by the ECtHR can be a powerful resource for activists on the ground, in order to challenge restrictive national laws impeding their substantial rights, which are the basis for any effective activism.[2101]

Moreover, if (case) law is not viewed as fixed, but ever-changing, this flexible character allows for attempts to change law in a favourable direction[2102] – for instance, by contributing alternative interpretations of terms such as "family" or marriage."[2103] The US LGBT rights movement has been highly successful in this regard. "Legal story telling" – creating compelling narratives and presenting sympathetic clients – was seen as paramount to winning a case.[2104] Great emphasis was put on framing an issue in a way that people could relate to. The meaning of "marriage" or

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[2099] Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014).

[2100] See discussion of U.S. experience in Chapter 6, Section 18.2.

[2101] A lot of LGBT cases that reach the ECtHR from Eastern Europe actually deal with free speech or freedom of assembly of LGBT groups or individuals. See, e.g., *MC & CA v Romania* App no 12060/12 (ECtHR, 12 April 2016), regarding ill treatment of participants of a gay rights march by the police; *Baczkowski & Others* App no 1543/06, concerning the refusal of authorities to grant permission to an LGBT rights organisation for a march in support of gay rights; *Identoba & Others v Georgia* App no 73235/12 (ECtHR, 12 May 2015), regarding ill treatment of LGBT activists by members of religious groups; *Bayev & Others* Apps nos. 67667/09, 44092/12 and 56717/12, regarding Russian legislation banning the promotion of homosexuality; and many others.

[2102] See discussion in Chapter 1, Section 4.

[2103] See discussion in Chapter 1, Sections 3.2.1., 3.2.2., 4.1. and Chapter 3. See also discussion in Chapter 6, Section 17.6.

[2104] See discussion in Chapter 6, Section 17.6.

"family" was not only discussed in legal terms, but staged in what Jennifer Pizer called the "theatre of law"[2105] – by presenting personal stories, emotional comparisons, and convincing arguments to make judges (as well as the public) grasp that, as Pizer put it, "these gay people are the same as straight people in all the ways that matter in this context."[2106]

This orchestration of "terms" such as family or marriage can be understood as a fascinating form of "interpretative intervention,"[2107] and the US LGBT rights movement has, in fact, been very efficient in re-defining these terms, both in the legal and in the public arena (which, after all, influence each other, as critical legal theories contend.)[2108]

Closely connected to this is the question of whether legal approaches have ultimately fortified heteronormative notions, or contributed to their deconstruction ("law-sceptical objection").[2109] As pointed out previously, this debate is best exemplified by the concerns surrounding the US LGBT movement's fight for marriage equality: To propagate the inclusion of same-sex couples in an inherently heteronormative institution such as marriage would fortify the exclusionary character of marriage as the most legitimate relationship form, thus robbing the LGBT movement of its subversive impetus[2110] and further marginalizing other non-traditional constellations, such as polyamorous relationships.[2111]

However, the struggle for marriage equality is not *inherently* a reinforcement of heteronormative notions (although it *can* be).[2112] It could also be understood as one step in a larger fight, which

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[2105] Jennifer C. Pizer, Lambda Legal – Defense and Education Fund USA (2014). See discussion in Chapter 6, Section 17.6.

[2106] Ibid.

[2107] See discussion in Chapter 1, Section 4.1.

[2108] See discussion in Chapter 1, Section 3.2.

[2109] See *supra*, at 12.

[2110] Warner, 'Normal and Normaller: Beyond Gay Marriage'.

[2111] See discussion in Chapter 6, Section 17.4, *supra* at 397.

[2112] See, for instance, criticisms by scholars regarding the construction of "marriage" by plaintiff representatives during the California marriage equality cases, particularly *Perry v Schwarzenegger,* 704 F. Supp. 2d 921 (N.D. Cal. 2010) (USA): Murray, 'Marriage as Punishment', 3; Franke, 'Court of Appeals Prop 8 Ruling: Treating Marriage as a License, not a Sacrament', 465.

ultimately might lead to a deeper discussion of the underlying assumptions and premises of "marriage" – including a challenge and re-negotiation of the distributive logic behind marriage.[2113]

For one, to present the question of same-sex marriage as a "yes or no" question is an over-simplification. As Scott Cummings and Douglas NeJaime point out,

> "scholars have documented how movement lawyers in fact have developed multiple techniques to advance not just marriage, but a range of relationship recognition regimes. For instance, Thomas Keck has argued that marriage litigation produced the very possibility for legislatively enacted nonmarital relationship litigation. Litigation introduced the concept of civil unions and cast nonmarital regimes as a moderate, compromise position, which advocates actively pursued in state legislatures."[2114]

Indeed, the marriage equality campaign seems to have inspired a deeper discussion about the basic underlying assumptions of marriage.[2115] After all, marriage provides certain relationship forms with tangible, state-sponsored benefits – and at one point, "tradition" and "the sanctity of marriage" might not be justification enough to bestow certain benefits on some interpersonal relationships and not on others.[2116] The fact that the meaning of "marriage" has been extensively negotiated at court in the past years might possibly open up interesting roads to further expand

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[2113] See Chapter 5, Section 18.3.

[2114] Cummings and NeJaime, 'Lawyering for marriage equality', 1246, citing Keck, 'Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights', 152.

[2115] See Chapter 6, Section 17.4., *supra* at 398.

[2116] This is especially true in the context of other non-traditional family forms, such as polyamorous families or the legal recognition of long-lasting friendships. Indeed, the marriage equality movement might have created doctrinal tools for polyamory activists and others ("spillover" effects), while at the same time, at least in the short term, reinforcing traditional stereotypes about marriage. Aviram and Leachman, 'The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle', 273- 276.

its reach to include other non-traditional partnerships, such as polyamorous relationships or other non-traditional interpersonal constellations.[2117]

In this sense, the debate on "marriage equality" might be a very effective frame for fundamental discussions about state regulation of interpersonal constellations – simply because *it is* the most popular example of a state regulated interpersonal constellation. As long as marriage exists (and it probably will be around for quite some time to come), it will be regarded as the epitome of a state-sanctioned relationship. As such, it exerts normative influence beyond marriage itself, impacting our perception of relationships in general.[2118] Alternatives to marriage will therefore be understood as exactly that – alternatives to the "norm" of how to live together. This means that no fundamental discussion can ignore marriage and the principles it rests on. While the heteronormativity of the institution of marriage can – and has been[2119] – explored, the problem cannot be solved by merely creating alternatives to marriage (such as civil unions), because marriage will still broadcast its normative force on the general public's views on interpersonal relationships. Marriage itself needs to be questioned – and the option of abolishing it, as advertised by some scholars,[2120] is academically interesting, but not realistic. Therefore, challenging its content and eroding its premises – such as its opposite-sex-requirement – might be a worthwhile exercise, which could create a slippery slope for the challenge of other premises, as well.

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[2117] Ibid. By presenting an overview of 50 years of adjudication, Kimberly Richman discusses how the law creates and shapes meanings, definitions and identities in the context of LGBT family rights adjudication, thus de-constructing and re-constructing concepts such as "parent," "family," etc. Richman, 'Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law', 286-290. This kind of negotiation might have the potential to destabilise traditional meanings of such concepts, thus opening them up to progressive constructions (possibly including friendships, etc.).

[2118] Michael Warner (a critic of marriage) writes: "...marrying should be considered as an ethical problem. It is a public institution, not a private relation, and its meaning and consequences extend far beyond what a marrying couple could intend. The ethical meaning of marrying cannot be simplified to a question of pure motives, conscious choice, or transcendent love. Its ramifications reach as far as the legal force and cultural normativity of the institution." Warner, 'Normal and Normaller: Beyond Gay Marriage', 138.

[2119] Herz and Johansson, 'The Normativity of the Concept of Heteronormativity'; Warner, 'Normal and Normaller: Beyond Gay Marriage'.

[2120] Mesquita, *Ban Marriage! Ambivalenzen der Normalisierung aus queer-feministischer Perspektive.*

This actually echoes a *concern* of conservative Supreme Court Justice Scalia, expressed in his dissent in *Lawrence v. Texas*,[2121] the 2003 US Supreme Court decision that abolished sodomy laws in the US:

> "Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behaviour is 'immoral and unacceptable' constitutes a rational basis for regulation [citing cases relying on *Bowers*[2122]]. ... State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of Bower's validation of laws based on moral choices. Every single one of these laws is called into question by today's decision."

While Scalia meant this observation as a warning, the quintessence of it – the notion that questioning moral norms of social behaviour could lead to even more questions – might be accurate.[2123] Translated to marriage, this means that questioning one of its underlying notions might, in the long run, enable other challenges, as well.[2124]

Therefore, leading such a conversation – also (or especially) in the judicial arena – might well be considered emancipatory.

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[2121] *Lawrence v Texas,* 539 U.S. 558 (2003) (USA).

[2122] *Bowers v Hardwick,* 478 U.S. 186 (1986) (USA).

[2123] Of course, law will always be infused with (cultural and moral) values; for a comprehensive account of the interplay of law and culture, see, e.g., Ayelet Shachar, *Multicultural Jurisdictions* (Cambridge University Press 2001).

[2124] This "slippery slope" has actually already been opened, as some argue, by the U.S. Supreme Court's decision *Loving v. Virginia*, which abolished state prohibition of different-race marriages. *Loving v Virginia,* 388 U.S. 1 (1967) (USA). See, e.g.,: Nancy C. Marcus, 'Beyond Romer and Lawrence: The Right to Privacy Comes Out of the Closet' (2006) 15 Columbia Journal of Gender and Law 355, 424, 425; Mark Strasser, 'Loving, Baehr, and the Right to Marry: On Legal Argumentation and Sophisticated Rhetoric' (2000) 24 Nova Law Review 769; William N Eskridge Jr, 'Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition' (2000) 31 McGeorge Law Review 641, 657. Critical: Lynn D. Wardle and Lincoln C. Oliphant, 'In Praise of Loving: Reflections on the "Loving Analogy" for Same-Sex Marriage' 51 Howard Law Journal 117. In fact, the Supreme Court cited *Loving* multiple times in its *Obergefell* decision; in this sense, *Loving* might well have contributed, on the long run, to same-sex marriage. *Obergefell v Hodges,* 576 U.S. ___ (2015) (USA), paras 2, 3, 4, 7, 8, 11, 12, 13, 15, 16, 18, 19, 21.

## 20.2. The "Strategic Litigation Opportunities" Framework as an Exercise in Emancipatory Activism

The "Strategic Litigation Opportunities" Framework is an analytical tool for conceptualising the CJEU's and the ECtHR's LGBT rights case law in an actor-centred way, drawing from the theoretical considerations advanced in this thesis. Changing the perspective by understanding law not only as a normative top-down structure, but as a playing field full of opportunities, is *per se* an emancipatory endeavour. It restores the agency of civil society actors – as addressees of such an investigation – accentuating the opportunities within the case law for proactive engagement in judicial decision-making, instead of portraying them as being merely *subjected* to law.

I have highlighted the following indicators for strategic litigation opportunities:
1) The Courts' use of vague and ambiguous terms,
2) Displays of inconsistency, hesitation and disagreement,
3) Different constructions of European consensus,
4) The CJEU's requirement that EU law be interpreted uniformly, and
5) The recognition of NGOs as experts by the Courts.

These indicators, I have argued, can provide anchor points for activist interventions:
1) Interpretative interventions
2) Choosing the right comparator
3) Providing expertise
4) Applying an incremental approach, particularly in connection with same-sex marriage.

Of course, this type of analysis is not restricted to strategic litigation in the area of LGBT rights and could in theory be applied to other areas, as well. However, several indicators, as well as the "strategic litigation activities" I have presented, might be particularly relevant to LGBT rights (such as the Courts' reliance on *European consensus*). After all, certain issues (particularly connected to marriage) are considered to be highly controversial by both Courts. And as I have

shown, the Courts tend to refer to *European conse*nsus in such instances.[2125] The same might be true for the Courts' recognition of LGBT NGOs as experts. Moreover, the choice of the right comparator will be particularly significant in discrimination contexts. Likewise, an incremental litigation approach is specifically relevant in the area of same-sex rights connected to marriage, as I have argued.

The "strategic litigation opportunities" framework presented in this thesis is furthermore tailored to litigation before the CJEU and the ECtHR. While the latter three strategic litigation opportunity indicators address specificities of these Courts, the first two indicators might also translate to other strategic litigation contexts, particularly where courts adhere to precedent.

Rachel Cichowski and Alec Stone Sweet have discerned two (or rather, three) general elements enabling strategic litigation:

> "Bodies of legal norms and principles do not apply themselves directly to resolve legal disputes. Instead, the judge uses her discretion to classify fact contexts, interpret norms, and adapt rules to situations. Rule interpretation and application entail choice; choice entails law making; and the law that judges make will shape the behaviour of those they govern, if (1) judges justify their decisions with reasons, and (2) potential litigants regard these reasons as possessed of some authoritative, prospective value. When combined with some minimally robust conception of precedent, the exercise of judicial discretion will gradually institutionalize as a stable set of discursive practices that enable the continuous adaptation of rules to situations. In any case, we have good reason to expect that, if judicial discretion expands, creative law-making will ensue; and, as law-making proceeds, judges will use precedent both to help justify their powers and to organize markets for litigation, on a sectorial basis."[2126]

[2125] See discussion in Chapter 3, Section 8.2.

[2126] Cichowski and Stone Sweet, 'Participation, Representative Democracy, and the Courts', 194. See also discussion in Chapter 1, Section 3.2.

This coincides with the findings of this thesis. Both the CJEU and the ECtHR tend to adhere to precedent.[2127] The "strategic litigation opportunities framework" has identified "inconsistency" with previous case law as an indicator for a litigation opportunity,[2128] and activists have used this opportunity by holding the Court to its own standards.[2129]

Moreover, the requirement that "judges justify their decisions with reasons" identified by Cichowski and Stone Sweet resonates with Robertson's account that judges act like appliers of political theory.[2130] As pointed out above, this provides spaces for activist intervention, since arguments of litigants will have to be addressed. Moreover, the "strategic litigation opportunities" framework has shown that particularly short and formalistic opinions are often a sign of inconsistency and/or hesitation[2131] (at times – in the context of the ECtHR – accompanied by a number of dissents),[2132] allowing room for activist intervention.

However, these are not *exclusive* features of CJEU and ECtHR jurisprudence.

Lastly, the "strategic litigation opportunities" framework is meant to provide an activist reading of the Courts' case law – which is not to say, however, that non-strategic litigation might not profit from some of the recognitions presented here, as well.

However, the main reason for constructing a "strategic litigation opportunities" framework and applying it to the Courts' case law was not to pinpoint the differences between litigation and

[2127] See discussion in Chapter 1, Section 2.

[2128] See Chapter 3, Section 8.3.; Chapter 4, Section 13.1.3; Chapter 5, Section 16.1.3.

[2129] See *supra*, at 368.

[2130] Robertson, *The Judge as Political Theorist. Contemporary Constitutional Review*, 21.

[2131] See Chapter 3, Section 8.3.; Chapter 4, Section 13.1.3; Chapter 5, Section 16.1.3.

[2132] E.g., in *Cossey* App no 10843/84: Dissenting Opinion of Judge Martens, App no 10843/84; Joint partly dissenting opinion by Judges MacDonald and Spielmann, App no 10843/84; Joint dissenting opinion by Judges Palm, Foighel and Pekkanen, App no 10843/84. In *Sheffield & Horsham* App nos 22985/93 and 23390/94: Joint Partly Dissenting Opinion of Judges Bernhardt, Vilhjálmsson, Spielmann, Palm, Wildhaber, Makarczyk and Voicu, *Sheffield & Horsham* App nos 22985/93 and 23390/94; Partly Dissenting Opinion of Judge Casadevall, *Sheffield & Horsham* App nos 22985/93 and 23390/94; Dissenting Opinion of Judge Van Dijk, *Sheffield & Horsham* App nos 22985/93 and 23390/94; Declaration of Judge Wildhaber (dissenting), *Sheffield & Horsham* App nos 22985/93 and 23390/94. See also discussion in Chapter 5, Section 15.3.1.

strategic litigation, between European and national litigation, or between LGBT rights litigation and strategic litigation in other areas. This framework is also not meant to deliver a ready-made tool for LGBT rights activists wishing to address the CJEU and the ECtHR by way of strategic litigation.

The aim of presenting an actor-centred, partisan reading of the Courts' case law was to provide a practical example in answer to the third subset of the third inquiry of the research question, namely: *How could an activist reading of the European Courts' LGBT rights case law look like?*[2133]

In this sense, the framework, as well as the case law samples it is applied to, proves a theoretical point. Chapter 1 has argued that strategic litigation could, in fact, carry emancipatory potential, in line with critical legal theories (and in particular with feminist and queer critiques). The "separation of powers" objection[2134] and the "law-sceptical objection"[2135] have presented tough challenges to this notion that needed to be addressed.[2136] Furthermore, it was necessary to establish (as a preliminary consideration) that activist lawyers have a chance to gain access to the Courts, which was done in Chapter 2. And while Chapter 6 has provided a best-practice example regarding the US LGBT movement's marriage equality campaign, the question of whether such an approach could be translated to the European context remained open.

Against this backdrop, the "strategic litigation opportunities" framework has provided an example of how law-sceptical critical legal theory assessments can be aligned with the more optimistic "lawyering for social change" approach, by translating typical critical legal theory concepts (such as the "fluidity of law," or the construction of "law as language")[2137] into a practical context. In this sense, the "strategic litigation opportunities" framework complements the theoretical part of this thesis with a practical illustration of an activist, partisan, and bottom-

[2133] See *supra*, at 18.

[2134] See *supra*, at 11.

[2135] See *supra*, at 12.

[2136] See particularly Section 20.2.

[2137] See discussion in Chapter 1, Section 3.2.

up analysis of case law. It shows that (and how) minority groups (particularly LGBT minority groups) can indeed participate in judicial meaning forming before the CJEU and the ECtHR, and that such an approach can, in fact, be reconciled with critical legal theory.

## 20.3. LGBT Rights Litigation in Europe

In the area of LGBT rights, activists have approached both Courts time and again.[2138] While it is difficult to evaluate the *strategic nature* of litigation solely based on activist participation, it seems safe to assume, however, that CJEU cases like *Maruko*[2139] and *Coman*,[2140] and ECtHR cases like *Dudgeon*,[2141] *X & Others*[2142] and *Taddeucci*[2143] likely qualify as strategic litigation (based on the available information provided, *inter alia*, by the interviews),[2144] since they were meant to contribute to the development of EU and ECHR LGBT law and policy, and/or to trigger national law change.

In the US, strategic litigation has produced tangible results,[2145] especially in the area of civil and LGBT rights (as shown by the case study in Chapter 6). The success of the US LGBT cause lawyering strategy was in great part due to the fact that the LGBT movement worked together in

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[2138] Holzhacker, 'Transnational Strategies of Civil Society Organizations Striving for Equality and Nondiscrimination: Exchanging Information on New EU Directives, Coalition Strategies and Strategic Litigation'. In the context of the ECtHR, see, e.g., Johnson, *Going to Strasbourg. An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights*, 153-167, 179-182.

[2139] *Maruko* (Case C-267/06) [2008] ECR I-1757.

[2140] *Coman and Others* (Case C-673/16) [2018].

[2141] *Dudgeon* App no 7525/76.

[2142] *X & Others* App no 19010/07.

[2143] *Taddeucci* App no 51362/09.

[2144] Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014); Robert Wintemute, King's College London (2014); Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014). See also Johnson, *Going to Strasbourg. An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights*.

[2145] To just name a few successful cases: *Brown v Board of Education,* 347 U.S. 483 (1954) (USA); *Lawrence v Texas,* 539 U.S. 558 (2003) (USA); *Perry v Schwarzenegger,* 704 F. Supp. 2d 921 (N.D. Cal. 2010) (USA); *Obergefell v Hodges,* 576 U.S. ___ (2015) (USA).

a cohesive, coordinated manner.[2146] Applying the "social movement" definition of Della Porta and Diani,[2147] the US LGBT movement is made up of a number of LGBT rights organisations and other actors fighting for LGBT rights, united by the common purpose of advancing the legal, political interests of LGBT minorities. Within the movement, there is not always agreement on the approaches that should be used, nor on the precise interim goals that should be strived for. As Jacquot and Vitale write, "all interest groups ... constitute political arenas in which actors must formally and informally negotiate the political, cultural and social meaning and orientation of their collective action."[2148] In the context of the US LGBT movement, these negotiations have included, *inter alia*, the question of whether to adopt "marriage equality" as an objective,[2149] or whether (and to what extent) litigation should be used in order to advance the movement's causes.[2150]

In Europe, on the other hand, there is a multiplicity of local, national and sometimes trans- or internationally operating organisations and individuals who fight for LGBT rights. The European movement is more fragmented in comparison with the US movement, particularly regarding the level of the level of organisation across different European states[2151] and the cooperation and coordination within the movement,[2152] which might be partly due to the diversity of languages and legal traditions within Europe.[2153] Moreover, the LGBT movement in Europe is certainly not

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[2146] See discussion in Chapter 6, Section 17.3.

[2147] According to this definition, social movements as "dense informal networks of collective actors involved in conflictual relations with clearly identified opponents, which share a distinct collective identity, using mainly protests as their modus operandi." Della Porta and Diani, *Social Movements. An Introduction*, 20, 21.

[2148] Jacquot and Vitale, 'Law as a Weapon of the Weak? A Comparative Analysis of Legal Mobilization by Roma and Women's Groups at the European Level', 589.

[2149] See Chapter 6, Section 17.4.

[2150] See Chapter 6, Section 17.2.

[2151] Matthew Evans, AIRE Centre, London, GB (2014); Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014); Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014).

[2152] Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014); Robert Wintemute, King's College London (2014); Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014).

[2153] Matthew Evans, AIRE Centre, London, GB (2014); Adam Weiss, European Roma Rights Centre (ERRC) (2014); ibid; Robert Wintemute, King's College London (2014).

congruent with the US LGBT movement regarding its (financial and personal) resources.[2154] Given that the US LGBT rights movement's success depended importantly on the creation and execution of a cohesive, long-term strategy,[2155] there might still be room for development for the European LGBT rights movement.

While the European LGBT rights movement thus differs from the US LGBT rights movement regarding its degree of cohesion and coordination,[2156] the availability of resources,[2157] the existence of a coherent, long-term cause lawyering strategy,[2158] or the lack of accompanying, non-legal measures, such as coordinated media work or consciousness raising,[2159] there have been attempts to introduce a more systemic approach towards strategic litigation, specifically by ILGA-Europe.[2160] At the present time, these attempts mostly consist in offering a "support network" for national lawyers and LGBT rights NGOs willing to undertake strategic litigation;[2161] however, this approach might be well suited for the European context, given the multiplicity of legal systems and languages and the limited resources available for strategic litigation (compared to the US LGBT rights movement). Furthermore, most LGBT rights cases reaching the CJEU and the ECtHR have displayed a high amount of activist participation.[2162]

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[2154] Robert Wintemute, King's College London (2014); Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014); Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014).

[2155] See Chapter 6, Section 18.1.

[2156] See discussion in Chapter 1, Section 1.2.

[2157] This was seen as a problem for most European LGBT rights activists I interviewed. See, e.g., Matthew Evans, AIRE Centre, London, GB (2014); Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014).

[2158] See discussion in Section 1.2., *supra* at 51.

[2159] While some activists were more invested in media work than others – e.g., Helmut Graupner – there was doubt as to whether European media work was even possible. Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014); Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014).

[2160] See discussion in Chapter 1, Section 1.2, *supra* at 53.

[2161] Email by Nigel Warner, 25 September 2018.

[2162] See non-exhaustive list of LGBT rights cases with activist participation, *supra* at 55.

### 20.3.1. CJEU or ECtHR? Choosing a Forum for Strategic LGBT Rights Litigation

An interesting question in this regard is whether the CJEU or the ECtHR provides the most promising forum for strategic litigation on LGBT rights.

So far, the CJEU has looked to the ECHR in a number of cases in order to establish "general principles of law" which it considers to be inherent in EU law. Moreover, the CJEU increasingly discusses ECtHR case law in its own rulings.[2163] Interestingly, as some scholars have also noted, the ECHR and EU anti-discrimination jurisprudence seem to mutually influence each other.[2164]

Given that both Courts monitor each other closely, it is arguable that a case won before one Court will also have effects on the other Court. Furthermore, both Courts understand themselves as the ultimate authorities to interpret the respective legal texts they base their judgments on (in the case of the CJEU, this is EU law, in the case of the ECtHR, it is the ECHR).

Given the somewhat similar developments of the Courts' respective anti-discrimination jurisprudence in the ambit of same-sex families (despite slightly different approaches) – and taking also in mind the reliance of both Courts on each others' judgments in the area of LGBT rights[2165] – cause lawyering approaches that address *both* courts might be promising for civil society advocacy groups trying to improve the situation of gays and lesbians. With a positive decision by one court, the probability of the *other* court to be sympathetic seems to increase.

It is also interesting to observe how European LGBT rights activists chose the forum for their litigation strategies. Firstly, the choice of forum should inform the correct *framing* of an LGBT rights issue. Finding the right legal arguments was considered of the highest importance – especially when addressing the CJEU.[2166] As activist lawyer Adam Weiss put it,

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[2163] See *supra*, note 1214.

[2164] Craig and de Búrca, *EU Law: Text, Cases, and Materials*, 855.

[2165] This was shown by the analysis of the case law samples. See discussion in Chapters 4 and 5.

[2166] Adam Weiss, European Roma Rights Centre (ERRC) (2014); Robert Wintemute, King's College London (2014).

> "It's easier to articulate injustice in terms of the European Convention on Human Rights, than it is under European Union law. But I think that people are missing a trick here. Because if you can get your grievance heard under European Union law, the mechanisms are much stronger and the laws are much more specific."[2167]

While the ECtHR was generally described as the *more obvious* addressee for LGBT rights efforts (since, after all, LGBT issues are often framed as human rights issues),[2168] activists also described disadvantages of litigating before the ECtHR, such as high costs and the usually long duration of proceedings.[2169]

In fact, the popularity of the CJEU for LGBT advocacy seems to increase,[2170] particularly since the CJEU arguably affords more extensive protection to civil unions under EU law (in the area of employment anti-discrimination law), than the ECtHR does under the ECHR.[2171] Moreover, the area of EU free movement rights might provide interesting routes for future litigation, particularly in the context of transnational recognition of same-sex marriages and civil unions.[2172]

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[2167] Adam Weiss, European Roma Rights Centre (ERRC) (2014).

[2168] Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014).

[2169] Ibid; Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014).

[2170] Adam Weiss, European Roma Rights Centre (ERRC) (2014); Robert Wintemute, King's College London (2014).

[2171] See discussion of the CJEU's treatment of same-sex couples in comparison to (married) different-sex couples, Chapter 4, Section 16.

[2172] Robert Wintemute, King's College London (2014); Adam Weiss, European Roma Rights Centre (ERRC) (2014). The recent *Coman* case also points into this direction. *Coman and Others* (Case C-673/16) [2018].

## 20.4. Concluding Observations

As shown by the US case study, litigation can produce societal and political side effects, such as creating consciousness and publicity for LGBT rights issues, and/or exerting pressure on a political level,[2173] which in turn can positively influence the outcome of litigation.

This is also true for the European context. Activists have developed a number of tactics in order to educate both the public and judges regarding current debates on LGBT issues, including training seminars (often conducted by fellow judges), conferences, (national) media campaigns, and others.[2174] In fact, apart from the obvious advantages of winning a case (such as positively contributing to the development of ECtHR and CJEU case law and remedying an unfavourable national legal situation), activists identified a number of additional benefits when initiating litigation: Proceedings put pressure on national courts and legislators (even before a decision was reached)[2175] and generated publicity and awareness for LGBT rights issues,[2176] sometimes even across borders.[2177]

As Helmut Graupner, director of *Rechtskomitee* LAMBDA pointed out,

> "judges, they know what's going on, they are not sitting in a closed room with closed windows, they are part of society, and if there's a political discussion, and there is pressure, by the media for instance, then judges get with the times, you could say."[2178]

Another activist exemplified this idea by an example on the ECtHR:

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[2173] See discussion in Chapter 6.

[2174] Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014); Matthew Evans, AIRE Centre, London, GB (2014); Adam Weiss, European Roma Rights Centre (ERRC) (2014).

[2175] Robert Wintemute, King's College London (2014); Nigel Warner, ILGA-Europe – European Region of the Lesbian, Gay, Bisexual, Trans* and Intersex* Association, London, GB (2014); Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014).

[2176] Robert Wintemute, King's College London (2014).

[2177] Graupner described how the Hungarian Constitutional Court reacted to the "age of consent" litigation in Austria and before the ECtHR by deciding a similar case with in the same vein as the Austrian Constitutional Court. See *infra*, notes 2181 and 2182. Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014).

[2178] Ibid.

> "I was [talking to an ECtHR] judge ... about execution of judgments ... He was very friendly, and he said 'I'm very interested, could you send me good material on these issues?' ... He was interested to learn, and I think it's interesting because you've got a collegial structure [in Strasbourg], you've got all these judges, they've got to live in Strasbourg, they've got to be there together, and they are talking to each other."[2179]

Graupner, who was involved in a number of LGBT rights cases before the ECtHR,[2180] also emphasised the positive national implications in Austria of Strasbourg litigation in the context of "age of consent cases" – cases challenging different age limits for consensual sexual activity between homosexual and heterosexual partners.[2181] The Austrian Criminal Code was amended – following a judgment by the Austrian Constitutional Court[2182] – before the ECtHR decided the cases. Graupner:

> "We went to the [Austrian] Constitutional Court before Strasbourg decided, but we wouldn't ever have won without Strasbourg. They [judges at the Austrian Constitutional Court] knew, of course, that Strasbourg would be in favour [of abolishing different age limits] with a very high probability."[2183]

There is also a point to be made that in areas where scientific and other academic research is rapidly evolving, and where societal changes are particularly diverse and hard to categorize, the Courts are faced with difficult, complex dilemmata, especially when existing legal materials do not reflect lived reality anymore. Arguably, civil society groups not only have the opportunity, but the responsibility to assist the Courts in creating workable concepts that reflect the diversity and complexity of present day realities.

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[2179] Due to its sensitivity, this quote shall remain anonymous (the respective audio file is in possession of the author).

[2180] Such as, *inter alia*, *Karner* App no 40016/98; *X & Others* App no 19010/07.

[2181] Age levels for homosexual sexual activity was higher, and (criminal) penalties more severe. *L & V v Austria* App nos 39392/98 and 393829/98 (ECtHR, 9 January 2003); *SL v Austria* App no 45330/99.

[2182] VfGH 21.06.2002, VfSlg 16565/2002 (AUT).

[2183] Helmut Graupner, Rechtskomitee LAMBDA, Vienna, Austria (2014).

Concluding, it remains to say that law *can* be a hegemonic tool that power-holders apply in elitist institutions, as some have suggested.[2184] But it can also be a strategic instrument in the struggle for societal justice, as this dissertation has shown. Courts do not operate in a vacuum; in order to act, they usually need to be approached by litigants first. Moreover, judges may only decide on the issue at hand and after considering the arguments brought forward by the parties. This means that the structure of the judicial process itself already requires a certain amount of citizen participation. If one furthermore believes that the adversarial process is not a mere camouflage tactic to justify pre-conceived decisions *ex post facto*, without actually taking into account party submissions and legal argument before reaching a verdict[2185] – then there is space for social change advocates to intervene and promote their agendas and thus, take part in judicial decision-making.

[2184] Lorde, *Sister Outsider*.

[2185] This became salient in the "indeterminacy debate" of the 1980s. See *supra* note 344.

## 21. Outlook – Interesting Areas for Further Inquiry

While writing this dissertation, I have become aware of the lack of legal research concerning the contributions of the LGBT movement to the development of law in Europe. While US scholars have started to advance such narratives,[2186] for Europe, it is mostly social scientists that have attended to this particular question.[2187] It seems to me that such accounts could be an important contribution to legal literature, particularly because they would effectively challenge the common perception of adjudication as a top-down process. An interesting research project could thus consist in tracing activist participation in LGBT rights case law.

An in-depth comparison of the European and US LGBT rights movement and their respective litigation strategies could be another follow-up project for this dissertation. In this work, I have only referred to the US situation by way of a best practice example; however, there a more detailed comparison might provide interesting insights.

Finally, the "strategic litigation opportunities" framework presented in this dissertation is, as I have pointed out previously,[2188] mostly meant to be an exemplary model to show what an actor-centred, activist reading of case law can look like, and that such an undertaking can indeed reveal interesting opportunities for activist intervention. It would be interesting to contrast this analysis with further social scientific research, for instance, by examining the precise intentions of activist lawyers in all of the cases provided in the case law samples (which I have only done in passing, since *de facto* activist participation was not the main focus of my work and would have gone way beyond its scope), or by investigating the opinions and motivations of the judges

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[2186] Cummings and NeJaime, 'Lawyering for marriage equality'; Eskridge Jr, 'Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States'; NeJaime, 'Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage'.

[2187] van der Vleuten, 'Transnational LGBTI Activism and the European Courts: Constructing the Idea of Europe'; Jacquot and Vitale, 'Law as a Weapon of the Weak? A Comparative Analysis of Legal Mobilization by Roma and Women's Groups at the European Level'; Ayoub and Paternotte, 'L'International Lesbian and Gay Association (ILGA) et l'expansion du militantisme LGBT dans une Europe unifiée'; Jacquot and Vitale, 'Law as a Weapon of the Weak? A Comparative Analysis of Legal Mobilization by Roma and Women's Groups at the European Level'; Börzel, 'Participation Through Law Enforcement: The Case of the European Union'; and others.

[2188] *Supra* at 175.

who delivered the judgments in the samples I related.

Another interesting legal and/or sociological area of research could concern the national implementation of European LGBT rights cases.

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