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The Potential of European Union Law to Further Advance LGBTQ+ Persons and Same-Sex Couples' Rights

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This chapter considers in light of recent case law, the potential of European Union ('EU') law to further advance LGBTQ+ persons and same-sex couples' rights. The EU system offers numerous opportunities in this respect due to the manifold influences of the EU concept of citizenship resulting in extensive free movement provisions and non-discrimination requirements as further enhanced by strengthening ties between the EU and the Council of Europe. The European Court of Human Rights stresses a lack of consensus on claims for same-sex marriage between its divergent 47 Member States leading to a wide margin of appreciation. In contrast, it is argued that the Court of Justice of the EU gives concerns about subsidiarity less prominence than over-riding EU law imperatives such as free movement of persons and non-discrimination provisions. All of these points, together with more effective EU law enforcement provisions provide impetus and lead to opportunities for the EU further to develop rights for LGBTQ+ persons and same-sex couples. The possible impact of Brexit, where this would affect free movement of persons, means that UK LGBTQ+ persons and same-sex couples would not benefit from the possibilities of future development of EU law.

1. Introduction

Traditionally both the Court of Justice of the European Union ('CJEU') and the European Court of Human Rights ('ECtHR') have been reluctant to recognise LGBTQ+ couples in their varying concepts of 'family life.' The situation is further complicated due to the diversity of responses across Europe to the recognition of same-sex relationships. Whilst 16 European countries (14 within the European Union ('EU')) now recognise same-sex marriage, other European countries recognise civil partnership only, with varying degrees of rights given to each same-sex couple.¹ In contrast seven states within the EU, all in Eastern Europe, continue to

¹ Sixteen European nations have recognised same-sex marriage. As of July 2019 this includes Austria, Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom (excluding Northern Ireland although this will change on 21st October unless a devolved government is re-established) and many more recognise civil partnership (Andorra, Croatia, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Italy, Liechtenstein, Slovenia and Switzerland).

constitutionally define marriage as between partners of the opposite sex only.² This difference in treatment of same-sex couples forms a complex web, made more difficult by the impact of globalisation.³ On a practical basis couples need to know whether their same-sex union will be legally recognised. ⁴ For proponents of same-sex marriage there is also the added motivation of considering which court and type of claim may offer the best prospect of successful recognition of rights.

This chapter argues that in recent years the CJEU has begun to take a leading approach in furthering rights for LGBTQ+ persons and same-sex couples across Europe. The European Convention on Human Rights ('European Convention') is not an EU instrument, but the EU Charter of Fundamental Rights ('EUCFR') provides that ; '[i]n so far as this [EUCFR] contains rights which correspond to rights guaranteed by the [European Convention], the meaning and scope of those rights shall be the same as those laid down by the ... [European Convention].'⁵ and expressly states that '[t]his provision shall not prevent [EU] law providing more extensive protection.'⁶ Two cases demonstrating a trend from the CJEU to offer more extensive protection for LGBTQ+ persons and same-sex couples in the context of both free movement and non-discrimination provisions are discussed throughout this chapter.

² Bulgaria, Croatia, Hungary, Latvia, Lithuania, Poland, and Slovakia. For further discussion see Alina Tryfonidou, 'The EU Top Court Rules that Married Same-Sex Couples Can Move Freely Between EU Member States as "Spouses": Case C-673/16, *Relu Adrian Coman Robert Clabourn Hamilton, Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne*' (2019) *Feminist Legal Studies* 1; Case C-673/16 *Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne* ECLI:EU:C:2018:2.

³ The Centre for Social Justice, "European Family Law: Faster Divorce and Foreign Law" (2009), at 5 explains that there are 350,000 international marriages each year.
www.centreforsocialjustice.org.uk/core/wp-content/uploads/2016/08/CSJEuropeanFamilyLaw.pdf
accessed 31 July 2019.

⁴ See Robert Jackson J in *Estin v Estin*, 334 US 541, 553 (1948) and Barbara Stark, 'When Globalization Hits Home: International Family Law Comes of Age' (2006) 36 *Vanderbilt Journal of Transnational Law* 1551.

⁵ EUCFR, art 52(3),

⁶ *Ibid.*

In *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and others: Case C-673/16 (Coman)* the CJEU confirmed the prior opinion of Advocate General Melchior Wathelet that a same-sex marriage conducted in one EU Member State must be recognised in another for the purposes of free movement and residence rights of the non EU-citizen spouse.⁷ This is the case even where the receiving country, as is the case for Romania, does not recognise same-sex marriage. *Coman* represents a ‘welcome first step,’⁸ in moving away from years of EU stress on subsidiarity and demonstrates the expanding nature of EU citizenship and considerations of who are EU family *members*. In *MB v Secretary of State for Work and Pensions (MB)*, the CJEU determined that provisions of the UK Gender Recognition Act 2004 (GRA) which required transpersons to annul existing marriages in order not only be recognised in their new sex but to access state pension benefits at the age ascribed to their acquired gender was discriminatory on the ground of sex.⁹ The requirement to annul a pre-existing marriage is no longer necessary to obtain a full gender recognition certificate,¹⁰ but that requirement still applied at the time MB came to claim her pension in 2008.¹¹ This had a direct on MB, as the UK state still officially recognised her as male (as she did not wish to annul her pre-existing marriage), she could only claim her pension from the age of 65, as opposed to the age of 60 for women as then stipulated by legislation (prior to state pension reform).¹² The CJEU’s judgment demonstrates a willingness to depart from more restrictive

⁷ See *Coman* (n 2)

⁸ See Tryfonidou (n 2) 1.

⁹ Case C-451/16 *MB v Secretary of State for Work and Pensions* ECLI:EU:C:2018:492, This was found to violate Article 4 of Directive 79/7 on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security.

¹⁰ Gender Recognition Act 2004, Sch 5, amended by the Marriage (Same-Sex Couples) Act 2013, providing the spouse consents.

¹¹ Pre-existing Schedule 5, paragraph 7 Gender Recognition Act 2004 (prior to reform by the Marriage (Same-Sex Couples) Act 2013).

¹² Section 44 of the Social Security Contributions and Benefits Act 1992 read in conjunction with section 122 of that Act and with Schedule 4 paragraph 1 of the Pensions Act 1995 stated that a woman born before 6 April 1950 becomes eligible for the state retirement pension from the age of 60. In contrast, men born before 6 December 1953 become eligible at the age of 65.

case law on this particular point,¹³ but also to reach further expanding understandings of the widening concept of non-discrimination rights to be given to LGBTQ+ persons who are EU citizens.

After a brief critique of the traditional position of the EU and the ECtHR regarding treatment of LGBTQ+ persons and same-sex couples, the next sections examine further influences widening CJEU opportunities to act in this respect. Factors of EU citizenship resulting in extensive free movement provisions and non-discrimination requirements, coupled with the prominence of these points in comparison to subsidiary considerations before the CJEU, will be discussed. All demonstrating the possibilities of CJEU expansion of rights for LGBTQ+ persons and same-sex couples. If Brexit impacts on free movement of persons, as it is likely to, UK LGBTQ+ persons and same-sex couples will no longer be able to benefit from expanding EU free movement rights and interventions by the CJEU.

2. Traditional position of the ECtHR and the EU regarding treatment of LGBTQ+ persons and same-sex couples.

The ECtHR has played a major role in the advancement of LGBTQ+ persons rights. ECtHR cases have resulted in judgments requiring contracting states to decriminalise sodomy laws,¹⁴ to require equality in employment as regards sexual orientation¹⁵ and in tenancy conditions for LGBTQ+ persons.¹⁶ Historically, however, the ECtHR did not consider that same-sex relationships could generate 'family life.'¹⁷ Such unions were considered as being relevant in

¹³ Case C-117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004] ECR I-00542 and Case C-243/04, *Sarah Margaret Richards v Secretary of State for Work and Pensions* [2006] ECR I-03585

¹⁴ *Dudgeon v UK* App No 7525/76 (ECtHR, 22 October 1981).

¹⁵ *Smith and Grady v UK* App Nos 33985/96 and 33986/96 (ECtHR, 27 September 1999) and *Lustig-Prean and Beckett v UK* App Nos 31417/96 and 32377/96 (ECtHR, 27 September 1999).

¹⁶ *Karner v Austria* App No 40016/98 (ECtHR, 24 July 2003); *EB v France*, App No. 43546/02 (ECtHR, 22 January 2008).

¹⁷ *X and Y v UK* App No 21830/93 (ECtHR, 22 April 1997); *Simpson v UK* App No 11716/85, (Commission Decision, 14 May 1986); *Kerkhoven and Hinke v The Netherlands* App No 15666/89 (Commission Decision, 19 May 1992) and *Mata Estevez v Spain*, App No 56501/00 (ECtHR, 10 May 2001).

reference to a right to a private life only.¹⁸ This led to much criticism that the traditional position before the ECtHR overtly favoured heterosexual relationships¹⁹ and restricted the ‘evolution’ of LGBTQ+ persons’ rights in Europe.²⁰ The ECtHR has continued to incrementally advance the position of same-sex couples. Same-sex couples are now included within the definition of family life,²¹ advances have been made to protect LGBTQ+ persons’ adoption rights,²² contracting states are required to recognise some form of legal protection for same-sex couples²³ and to recognise same-sex marriages conducted abroad.²⁴ Ultimately, due to concerns about the ‘deep rooted social and cultural connotations’ of marriage,²⁵ leading case law from the ECtHR confirms that a consensus must develop between contracting states, before it is prepared to move forwards on this issue.²⁶ Whilst on other areas of family law the ECtHR also prefers to be deferential towards contracting states and allow them a large margin

¹⁸ Susana Cabellero, ‘Unmarried Cohabiting Couples Before the European Court of Human Rights: Parity with Marriage?’ (2004-2005) 11 *Columbia Journal of European Law* 151, 152.

¹⁹ Helen Stalford, ‘Concepts of Family under EU Law – Lessons from the ECHR’ (2002) 16 *International Journal of Law, Policy and the Family* 410, 411.

²⁰ Paul Johnson, ‘An Essentially Private Manifestation of Human Personality’: Constructions of Homosexuality in the European Court of Human Rights’ (2010) 10 *Human Rights Law Review* 67, 76.

²¹ See *Schalk and Kopf v Austria*, Application No 30141/04, (ECtHR, 24 June 2010), para 94. Described by Connor O’Mahoney, ‘Irreconcilable Differences? Article 8 ECHR and Irish Law on Non-Traditional Families’ (2012) 26 *International Journal of Law Policy and the Family* 31 at 38 as a ‘landmark judgment’ and Elaine Sutherland, ‘A Step Closer to Same-Sex Marriage Throughout Europe’ (2011) 15 *Edinburgh Law Review* 97.

²² See for example *EB v France* (n 16) which concerned single parent adoption in France.

²³ *Oliari v Italy* App Nos 18766/11 and 36030/11 (ECtHR, 21 July 2015).

²⁴ *Orlandi v Italy* App no. 26431/12 (ECtHR, 14 December 2017)

²⁵ *Schalk and Kopf v Austria* (n 21) para 62.

²⁶ *Schalk and Kopf v Austria* (n 21).

of appreciation ('MoA') to determine matters for themselves as informed the national context,²⁷ when considering the quickly advancing case law for LGBTQ+ persons just set out, in contrast same-sex marriage can be regarded as being a 'lex specialis' which requires special consideration.²⁸

Traditionally the CJEU was even stricter than the ECtHR with regards to its treatment of LGBTQ+ persons and same-sex couples. Former case law, rejected inclusion of sexual orientation within the ground of sexual orientation discrimination.²⁹ Only traditional family formats were included within the scope of family life.³⁰ Although free movement provisions referred to spouses and registered partners within the definition of family member, prior to the recent *Coman* case³¹ EU law stressed subsidiarity. Member states were free to determine their own policy with regards to recognition of same-sex unions.³² This ignored not only the

²⁷ For example in relation to abortion see the European Court of Human Rights' judgments in *Paton v UK* App no 8416/78 (ECtHR, 13 May 1980) *Vo v France* App no 53924/00 (ECtHR, 8 July 2004) and *A, B and C v Ireland* App no. 25579/05, (ECtHR, 16 Dec 2010).

²⁸ See US Legal Dictionary, 'Lex Specialis Law and Legal Definition' (*USLegal.com*, n.d.) <<http://definitions.uslegal.com/lex-specialis/>> accessed 31 July 2019. Loveday Hodson, 'A Marriage by any other name? Shalk and Kopf v Austria.' (2011) 11 *Human Rights Law Review* 170 at 177 argues that marriage is being set apart from the other family rights and being treated as an 'untouchable, almost sacred, category.'

²⁹ See, for example, Case C-249/96 *Grant v South West Trains* [1998] ECR I-621, [1998] 1 CMLR 993.. See for discussion Dimitri Kochenov, "On Options of Citizens and Moral Choices of States: Gays and European Federalism" (2009) 33 *Fordham International Law Review* 156, 175.

³⁰ For example, Case C-59/85 *Netherlands v Reed* [1987] 2 CMLR 448: the CJEU determined that "spouse" only included an individual in a marital relationship'.

³¹ *Coman* (n 2).

³² Citizenship Directive 2004/ 38 art 2(2) provides that '(f)amily member' means... (b) the partner with whom the Union citizen has contracted a registered partnership on the basis of the legislation of a Member State if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State...' Commentary on Article 9 of the EUCFR provided that 'There is, however, no explicit requirement that domestic laws should facilitate such marriages. International courts and committees have so far hesitated to extend the application of the right to marry to same-sex couples. (...). The position is now transformed following the high profile case of *Coman* (n2).

apparent gender neutrality of the word spouse³³ but the imperative of free movement.³⁴ In one commentator's view this privileged the heterosexual norm.³⁵ Cohabitants, have never been explicitly included within the EU 'family member' definition having to prove their relationship 'duly attested.'³⁶ This latter definition is vague, and does not automatically allow partners to move with their EU citizen partner. Instead, all it requires is for the host Member State to be able to demonstrate thoroughly that they have investigated the personal circumstances concerned.³⁷

The restrictive interpretation of family member had real consequences. Prior to the *Coman* case, non-EU national same-sex spouses, could not relocate with their EU citizen spouse to an EU country which did not recognise their union. Being denied the status of 'family member' also led to being denied the 'plethora of benefits'³⁸ which would otherwise have been accorded to EU citizens and their family members. These included rights to residence,³⁹ recourse to a member state's social assistance scheme,⁴⁰ ensuring equal treatment with host-country

³³ See Kochenov (n 29) at 190. Advocate General Melchior Wathelet's recent Advocate General's Opinion in *Coman* (n 2) endorsed the approach that spouse should be interpreted in a gender-neutral manner.

³⁴ See Stalford (n 19) 419 and also Barbara Cox, 'Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?' (1994) *Wisconsin Law Review* 1033, 1040 which states that Non-recognition of a foreign marriage means that the right to same-sex marriage is a "meagre right indeed."

³⁵ See Kochenov (n 29) 201.

³⁶ Citizenship Directive 2004/38, Article 3(2).

³⁷ Case C-83/11 *Secretary of State for the Home Department v Muhammad Sazzadur Rahman and Others* ECLI:EU:C:2012:519 and Case C-89/17 *Secretary of State for the Home Department v Rozanne Banger* ECLI:EU:C:2018:570.

³⁸ See Stalford (n 19) 427.

³⁹ Citizenship Directive 2004/38, art 14(1).

⁴⁰ *Ibid*, Art 14(3).

nationals,⁴¹ allowing family members to take up employment or self-employment⁴² right of continuous legal residence after 5 years,⁴³ schooling provisions⁴⁴ and protections from non-discrimination.⁴⁵ It is argued that the cases of *Coman* and *MB* demonstrate the willingness to expand free movement and non-discrimination rights for LGBTQ+ persons. There remains a debate as to whether such examples are limited to their particular facts, or whether they can truly be considered as part of trend. The next section looks at the normative understanding of the EU concept of citizenship. Further sections then consider how the relationship of this concept to extensive free movement provisions and non-discrimination requirements as further enhanced by strengthening ties between the EU and the Council of Europe, provides an opportunity to develop rights for LGBTQ+ persons and same-sex couples. Consequently, following Brexit, UK LGBTQ+ persons and same-sex couples where this effects free movement of persons and the remit of the CJEU, would no longer be able to benefit from these expanding EU protections.

3. How should the Concept of EU Citizenship be Understood?

Citizenship is one of the key concepts utilised by the CJEU to justify expansion of rights for EU citizens. The emergence of new populations such as LGBTQ+ persons poses a challenge to existing concepts of citizenship. It is therefore interesting to consider different theoretical considerations of the meaning of citizenship and reflect on this in the EU context. Historically,

⁴¹ Ibid, Art 24.

⁴² Ibid, Art 23.

⁴³ Ibid, Art 16.

⁴⁴ For discussion see John Fairhurst, *Law of the European Union* (9th edn, Pearson Publishing 2012) at 405 who refers to Case C-9/74 *Donato Casagrande v Landeshauptstadt München* [1974] ECR 00773 and Case C-412/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-07091

⁴⁵ Citizens are protected from discrimination on grounds of nationality under Article 18 TFEU. See also Article 19 TFEU allows European Council together with the European Parliament to adopt measures preventing discrimination non the ground of 'sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.' The EU has also adopted the provision of the EUCFR which at art 21(1) which includes 'same-sex orientation' as ground for discrimination.

theorists concentrated on the deep connection between citizenship and equality rights.⁴⁶ Classical theorist T H Marshall considered that citizenship required that ‘all who possess the status are equal with respect to the rights and duties with which the status is endowed.’⁴⁷ This consideration of citizenship as inherently including equality can also be seen in classic constitutional text associated with the French Revolution⁴⁸ and the Irish constitution.⁴⁹ Equality arguments have also been prominent in same-sex marriage cases which have been successful worldwide.⁵⁰ I have argued elsewhere that the connections between citizenship, equality and marriage all led to strong practical and symbolic arguments for proponents of same-sex marriage.⁵¹

The connection between citizenship and equality has been heavily critiqued. Queer and feminist authors have questioned the reality of equality for feminist and LGBTQ+ groups. Following *Coman*, the position of the CJEU determining that free movement and residence

⁴⁶ See for example Nicholas Bamforth, ‘Sexuality and Citizenship in Contemporary Constitutional Argument’ (2012) 10 *International Journal of Constitutional Law* 477; Michel Rosenfeld, ‘Introduction: Gender, Sexual Orientation and Equal Citizenship’ (2012) 10 *International Journal of Constitutional Law* 340 and Connor O’Mahoney, ‘There is No Such thing as a Right to Dignity’ (2012) 10 *International Journal of Constitutional Law* 551.

⁴⁷ Bamforth (n 46) 478 referring to Thomas H Marshall, ‘Citizenship and Social Class’ in Thomas H Marshall and Tom Bottomore (eds) *Citizenship and Social Class* (Pluto Press 1992) 18.

⁴⁸ Rosenfeld (n 46) 340. Who explains that citizenship acquired its “its distinct modern meaning as equal citizenship at the time of the French Revolution”

⁴⁹ Constitution of Ireland, art.40(1). O’Mahoney, ‘There Is No Such thing as a Right to Dignity’ (n 46), 554-555 who refers to the Irish constitution which states that “[a]ll citizens shall, as human persons be held equal before the law.” He also refers to *Ghaidan v Godin-Mendoza* *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557 where Baroness Hale states that “[d]emocracy is founded on the principle that each individual has equal value”.

⁵⁰ See for example *Goodridge v Department of Public Health*, 798 NE 2d 941 (Mass 2003); *Loving v Virginia*, 388 US 1 (1967) and *Obergefell v Hodges* 576 US (2015).

⁵¹ Frances Hamilton, ‘The Differing Treatment of Same Sex Couples by European Union Law and the European Convention on Human Rights: The European Union Concept of Citizenship’ (2015) 2 *Journal of International and Comparative Law* 87.

rights (essential elements of EU citizenship) should also include non-EU citizen same-sex spouses,⁵² could lead to criticism by those who dispute the appropriateness of same-sex marriage as a goal.⁵³ Many feminists would question the need for marriage for LGBTQ+ persons on the basis that over the course of history it has been an institution which has raised concerns as being 'deeply oppressive to, women as a class'.⁵⁴ On this view if one of the driving forces for change behind LGBTQ+ movements is egalitarianism, same-sex marriage is seen as deeply 'inappropriate'.⁵⁵ Some queer theorists would also reject same-sex marriage as a goal due to concerns about 'dominative heteronormative assumptions' not being questioned.⁵⁶ This includes concerns that same-sex marriage is trying to incorporate LGBTQ+ persons into the mainstream,⁵⁷ and that the advent of same-sex marriage is interrupting LGBTQ+ persons unique interpretation of family life.⁵⁸ Queer theorists consider that same-sex marriage could result in LGBTQ+ persons being de-sexualised⁵⁹ and losing their unique LGBTQ+ identity.⁶⁰ Ultimately, on this view the EU requirement in *Coman* of member state

⁵² *Coman* (n 2).

⁵³ For example, see, Lisa Duggan., 'Beyond Same-Sex Marriage' (2008) 9 *Studies in Gender and Sexuality* 155.

⁵⁴ Rosemary Auchmuty, 'Same Sex Marriage Revived: Feminist Critique and Legal Strategy' (2004) 14 *Feminist and Psychology* 101, 104. See also, Yvonne Zylan, *States of Passion, Identity and Social Construction of Desire* (OUP 2011) 204.

⁵⁵ *Auchmuty* (n 54) 104.

⁵⁶ Lisa Duggan, 'The New Homonormativity: The Sexual Politics of Neoliberalism' in Dana Nelson and Russ Castronovo (Eds) '*Materializing Democracy: Toward a Revitalized Cultural Politics*' (Duke University Press 2002) 175.

⁵⁷ Diane Richardson, 'Desisting Sameness? The Rise of Neoliberal Politics of Normalisation' (2005) 37 *Antipodes* 519.

⁵⁸ Jyl Josephson, 'Citizenship, Same-Sex Marriage and Feminist Critiques of Marriage' (2005) 3 *Perspectives on Politics* 269 at 273 referring to Mark Warner, *The Trouble With Normal: Sex, Politics, and the Ethics of Queer Life* (Free Press 1999).

⁵⁹ *Richardson* (n 57).

⁶⁰ *Duggan* (n 53).

recognition of same-sex marriage for free movement and residency purposes, contributes to the creation of 'sexual hierarchies'⁶¹ and actually prevents the citizenship of LGBTQ+ persons being fully realised.⁶² Instead queer theorists prefer a more 'thoroughgoing resistance to regimes of the normal.'⁶³ They reject labels and statuses such as same-sex marriage and civil partnership and argue that the multifarious ways in which LGBTQ+ persons have built their own relationships should be celebrated.⁶⁴ The attractiveness of ever advancing models of family life cannot be denied. Such theoretical perspectives continue to be of immense value in questioning what the role of law should be in this area. Beresford also acknowledges the role which queer theory has played in destabilizing heterosexual norms.⁶⁵ Yet queer and feminist theorists are often divided amongst themselves, with Beresford arguing that queer theory has become synonymous with white gay men, thus denying its origins and becoming distinctly anti-feminist, failing to fully acknowledge patriarchy and rendering lesbian women invisible, consequently failing to acknowledge and accommodate the lived experience of women.⁶⁶ Therefore any recommendation of a wholesale change in society by queer theorists may be disputed, is academic in nature and does not fit with the EU's inherently practical and rights based approach.

Other authors would look to different interpretations of citizenship. Moving away from contested understandings of equality, this would instead consider wider conceptions of citizenship to include considerations of responsibilities towards the wider community and social processes through which individuals and social groups engage in claiming, expanding

⁶¹ Brian Heaphy, Carol Smart and Anna Einarsdottir, *Same Sex Marriages: New Generations, New Relationships* (Palgrave MacMillan 2013) 132.

⁶² Josephson (n 58).

⁶³ Mark Warner (Ed), *Fear of a Queer Planet: Queer Politics and Social Theory*, (University of Minnesota Press 1993) 7.

⁶⁴ Duggan (n 53).

⁶⁵ Sarah Beresford, 'The Age of Consent and the Ending of Queer Theory' (2014) 3 *Laws* 759

⁶⁶ Beresford (n 65).

or losing rights.⁶⁷ This view of citizenship includes the drive to question what it means to be included and to belong.⁶⁸ On this view citizenship would be understood as granting legal, political and social rights, and conferring membership, identity, values and rights of participation and assuming a body of common political knowledge.⁶⁹ This has led to a sociologically informed definition of citizenship in which the emphasis is less on legal rules and more on normal practices, meanings and identities.⁷⁰ In turn citizens in a democracy should have membership status and ascribe to an identity and set of values usually involved as practising a degree of participation in political life and understanding relevant laws, documents, structures and process of governance in the political unit.⁷¹ Werbner and Yuval-Davis argue that citizenship is no longer understood simply in terms of 'the formal relationship between the individual and the state' but as 'a more total relationship inflected by identity, social positioning, cultural assumptions, institutional practices and a sense of belonging'.⁷² This accords with the EU's aspiration to engage with citizens in a 'more meaningful and direct way'⁷³ and for EU citizens to feel a sense of belonging to the EU.⁷⁴ This is arguably of essential importance in a Brexit era.

⁶⁷ Ruth Lister, 'Why Citizenship: Where, How and Why Children' (2007) 8 *Theoretical Inquiries in Law* 693 and Engin F. Isin and Bryan S Turner, 'Citizenship Studies: An Introduction' in Engin F. Isin, and Bryan Turner (eds) *Handbook of Citizenship Studies* (Sage, 2002).

⁶⁸ Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Stanford University Press 2007).

⁶⁹ See Kathleen Knight Abowitz and Jason Harnish, 'Contemporary Discourses of Citizenship' (2006) 76 *Review of Educational Research* 653 and Kate Nash, 'Between Citizenship and Human Rights' (2004) 43 *Sociology* 1067 at 1067 referring to Katherine Culliton-Gonzalez, 'Born in the Americas: Birthright Citizenship and Human Rights' (2012) 25 *Harvard Human Rights Journal* 127.

⁷⁰ Ruth Lister (n 67) 699.

⁷¹ Penelope Enslin, 'Education and Democratic Citizenship: In Defence of Cosmopolitanism' in Mal Leicester, Celia Modgil and Sohan Modgil (eds), *Politics, education and citizenship* (Falmer Press 2000)

⁷² Pnina Werbner and Nira Yuval-Davis, 'Introduction: Women and the New Discourse of Citizenship in Pnina Werbner and Nira Yuval-Davis (Eds) *Women, Citizenship and Difference* (Zed, 1999).

⁷³ *Stalford* (n 19) 413. See, Hamilton (n 51).

⁷⁴ See Nash (n 69) at 1068 referring to Craig Calhoun, *Nations Matter: Culture, History and the Cosmopolitan Dream* (Routledge 2007).

If citizenship is seen as having a 'long history of evolution,'⁷⁵ always being an aspirational ideal which is '...less than complete,'⁷⁶ one of the driving forces of change is the need to accommodate new populations.⁷⁷ This article grapples with the question as to how the EU concept of citizenship is gradually being extended to include otherwise 'disenfranchised' LGBTQ+ groups.⁷⁸ The *Coman* case would therefore support movement towards those who view marriage as having a constitutional nature and involving 'participation in the public order.'⁷⁹ For proponents of same-sex marriage, a right to marriage would on this view be considered as a 'right central to citizenship.'⁸⁰ Recognition of same-sex marriage allows a choice for those who view this as a 'gold-standard.'⁸¹ This accords with research from Pew which demonstrates growing public opinion in favour of same-sex marriage across liberal

⁷⁵ Gershon Shafir and Alison Brysk, 'The Globalization of Rights: From Citizenship to Human Rights' (2006) 10 *Citizenship Studies* 275, 279.

⁷⁶ Lydia Morris, 'Citizenship and Human Rights: Ideals and Actualities (2012) 63 *British Journal of Sociology* 39 referring to David Lockwood, 'Civil Integration and Class Formation' (1996) 47 *British Journal of Sociology* 531, 536.

⁷⁷ Shafir and Brysk (n 75) 279 referring to Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (OUP 1995).

⁷⁸ Shafir and Brysk (n 75) 279.

⁷⁹ Bamforth (n 46) 481 referring to Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Harvard University Press 2002) 1.

⁸⁰ See Bamforth (n 46), Jeffrey Weeks, 'The Sexual Citizen' (1998) 15 *Theory, Culture and Society* 38, David Bradley, 'Comparative Law, Family Law and Common Law' (2003) 33 *Oxford Journal of Legal Studies* 127; Kochenov (n 29).

⁸¹ See Sue Wilkinson in her Witness Statement contained in *Wilkinson v Kitzinger* [2006] EWHC 2022 (*Fam*), para 6.

democracies worldwide,⁸² the result of the Republic of Ireland referendum,⁸³ leading cases⁸⁴ and the changing position of gay rights movements to adopt a more positive view towards same-sex marriage.⁸⁵ In contrast authors have commented that denying access to marriage provides LGBTQ+ persons 'partial citizenship' status only.⁸⁶ Equally the *MB* case, extending non-discrimination rights to LGBTQ+ persons claiming state pension benefits, would support views of inclusive citizenship, on both a 'social and legal' level.⁸⁷ Following Brexit, UK same-sex couples would not be able to benefit from advances in rights connected to EU citizenship. The next section considers the impact of further expansion of non-discrimination rights before the EU.

4 . Expanding Non-Discrimination Rights for LGBTQ+ Persons

Although the EU and the Council of Europe were set up for very different purposes, with the ECtHR being a recognised world leading human rights court and the EU primarily concentrating on economic rights, recent years have seen the EU working closely with the

⁸² See Pew Research Centre, 'Attitudes on Same-Sex Marriage' (14 May 2019) <www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/> accessed 31 July 2019. Pew Research Centre has surveyed public opinion on same-sex marriage since 2001 and documents increasing support for this.

⁸³ In a referendum held on 22nd May 2015, with a 60% turnout, 62% voted in favour of same-sex marriage and 38% voted against.

⁸⁴ See, eg, *Goodridge v Department of Public Health* (n 50) *Loving v Virginia* (n 50) and *Obergefell v Hodges* (n 50).

⁸⁵ See Zylan (n 54) 205 referring to Evan Wolfson, 'Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique' (1994) 21 *New York University Review of Law and Social Change* 567, 611.

⁸⁶ Bamforth (n 46) 483 referring to Richardson (n) at 88. See also Angela Harris, '*Loving before and after the Law*' (2008) 76 *Fordham Law Review* 2821, 2822 and *Kochenov* (n 28) 163.

⁸⁷ Cossman (n 68) 27.

Council of Europe.⁸⁸ The European Convention does have a 'significant impact' on the EU.⁸⁹ It is part of the agreement under the Lisbon Treaty, for the EU to accede to the ECHR⁹⁰ and it is part of the accession criteria for applicant EU member states to comply with human rights.⁹¹ The *Coman* and *MB* cases⁹² are just some of many recent instances of 'judicial borrowing' between the institutions.⁹³ The joint focus of both the EU and the ECHR on non-discrimination provisions,⁹⁴ has given both organisations a common goal.⁹⁵ Previously the

⁸⁸ See the 'Memorandum of Understanding between the Council of Europe and the European Union' (CM(2007)74, 10 May 2007) prepared at the 117th Session of the Committee of Ministers (Strasbourg), <[https://wcd.coe.int/ViewDoc.jsp?Ref=CM\(2007\)74&Language=lanEnglish](https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2007)74&Language=lanEnglish)> accessed 31 July 2019. See also, for comment, Tony Joris and Jan Vandenberghe, 'The Council of Europe and the European Union: Natural Partners or Uneasy Bedfellows?' (2008-2009) 15 *Columbia Journal of European Law* 1, 3.

⁸⁹ See Chapter by *Tryfonidou* in this edited collection.

⁹⁰ TEU art.6(2) provides that "[t]he Union shall access to the European Convention for the Protection of Human Rights and Fundamental Freedoms". In addition, the fundamental rights of the ECHR are incorporated into the EUCFR, which from 1 December 2009 has the same legal status as the treaties.

⁹¹ See, European Commission, 'Conditions for membership' <http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm> accessed 31 July 2019.

⁹² *Coman* (n 2) and *MB* (n 9).

⁹³ See for discussion Janneke Gerards, "The Prism of Fundamental Rights" (2012) 8 *European Constitutional Law Review* 173, 192.

⁹⁴ Andrea Eriksson, "European Justice: Broadening the Scope of European Non-Discrimination Law" (2009) 7 *International Journal of Constitutional Law* 731 at 733 argues that other recent cases show the CJEU is inclined to extend non-discrimination provisions referring to Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] 2 CMLR 32 [63]; Case C-147/08 *Jurgen Romer v Freie und Hansestadt Hamburg* [2011] ECR I-03592 and Case C-303/06 *Coleman v Attridge Law and Steve Law* [2008] ECR I-05603

⁹⁵ Carmelo Danisis, 'How Far Can the European Court of Human Rights Go in the Fight against Discrimination? Defining New Standards in Its Non-Discrimination Jurisprudence' (2011) 9 *International Journal of Constitutional Law* 793 and Marta Cartabia, 'The European Court of Human Rights: Judging Non-Discrimination' (2011) 9 *International Journal of Constitutional Law* 808.

CJEU's approach to LGBTQ+ persons and same-sex couples was undermined by the continued emphasis on subsidiarity.⁹⁶ Recent case law as exemplified by *MB* and *Coman*⁹⁷ together with recent legislation from the EU,⁹⁸ demonstrates that the CJEU is expanding its non-discrimination principles where LGBTQ+ persons and same-sex couples are concerned. Perhaps previous predictions that the CJEU is engaging in a 'rights revolution'⁹⁹ are coming to fruition.

The EUCFR has given additional prominence to human rights considerations in an EU context. Sexual orientation is set out as a protected discrimination characteristic,¹⁰⁰ thereby arguably 'creat[ing] a completely new crosscutting fundamental right.'¹⁰¹ This allows the CJEU an opportunity to provide more 'extensive protection' to human rights than the ECtHR.¹⁰² The European Convention drafted in the 1950s does not specifically refer to sexual orientation as a protected ground of discrimination. Under Article 14 European Convention non-discrimination is a conditional right only.¹⁰³ Litigants have to bring their case under the ambit

⁹⁶ Jakob Cornides, 'Three case studies on 'Anti-Discrimination'' (2012) 23 *European Journal of International Law* 517, 522. See also *Kochenov* (n 28).

⁹⁷ *MB* (n 9) and *Coman*. (n 2).

⁹⁸ This includes for example Citizenship Directive 2004/38, the Charter of Fundamental Rights of the European Union 2000/C 364/01 and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ L 303.

⁹⁹ Mark Dawson, Elise Muir and Monica Claes, 'Enforcing the EU's Rights Revolution; the Case of Equality' (2012) 3 *European Human Rights Law Review* 276.

¹⁰⁰ The EUCFR art.21(1) provides that "[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited".

¹⁰¹ *Cornides* (n 96) 531.

¹⁰² EUCFR, Art 52(3)..

¹⁰³ Article 14 European Convention provides that '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,

of another human rights article together with an alleged breach of Article 14. Cases concerning LGBTQ+ rights before the ECtHR have therefore been commonly framed under Article 8 right to a private life,¹⁰⁴ in combination with Article 14. Whilst the ECtHR now recognises LGBTQ+ persons as falling within the family life definition before the ECtHR¹⁰⁵ and more prominence has been placed on equality arguments,¹⁰⁶ the continued status of article 14 as a conditional right, makes claims to the ECtHR more complex. If free standing non-discrimination Protocol 12 of the European Convention were to be ratified, this would greatly improve the position of litigants before the ECtHR. Currently, this is only ratified by 20 out of 47 ECHR contracting states and the UK is not a signatory.¹⁰⁷

Both *Coman* and *MB* are examples of cases where the CJEU has been prepared to take a leading role, as compared to the equivalent stance of the ECtHR.¹⁰⁸ In the *Coman* judgment, limited reference to human rights arguments was made by the CJEU.¹⁰⁹ The influential Advocate General Opinion of Melchior Wathelet, prior to the CJEU judgment in *Coman* saw more reference to human rights arguments. His conclusion that spouse should be interpreted in a 'gender neutral' manner¹¹⁰ was made by reference to ECtHR case law.¹¹¹ ECtHR case

language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status...'

¹⁰⁴ See for example *Dudgeon v UK* (n 14) and *ADT v UK* App No 35765/97 (ECtHR 31 July 2000) at para 37, where the court emphasised the fact that the 'activities... were genuinely private.'

¹⁰⁵ *Schalk v Kopf* (n 21), para 94.

¹⁰⁶ See, eg, *Karner* (n 16); *EB v France* (n 16); *Schalk v Kopf* (n 21).

¹⁰⁷ https://www.coe.int/en/web/conventions/full-list/conventions/treaty/177/signatures?p_auth=EaXL7y0f

¹⁰⁸ *Coman* (n 2) and *MB* (n 9).

¹⁰⁹ *Coman* (n 2) para 49 and 50.

¹¹⁰ *Coman* (n 2) Opinion of AG Melchior Wathelet, para 49.

¹¹¹ *Ibid* at paragraph 59 – 67.

law was used as authority for LGBTQ+ persons' right to family life,¹¹² prohibition of discrimination against LGBTQ+ persons¹¹³ and a requirement that contracting states should provide 'couples [with] legal recognition and the legal protection of their relationships.'¹¹⁴ In reality, Melchior Wathelet's interpretation goes further than that actually provided by the ECtHR. Firstly, as stated above, Article 14 is a conditional right, reliance on which depends upon falling within the ambit of another alleged breach of human rights. It is also debatable as to what concrete result *Oliari v Italy*¹¹⁵ provide to same-sex couples. Fenwick and Hayward argue, that *Oliari v Italy* should be confined to the facts where same-sex couples were socially accepted on the ground.¹¹⁶ This claim is now being tested by a Russian same-sex couple.¹¹⁷ Finally, *Oliari v Italy*¹¹⁸ did not require any conditions to be attached to the legal framework to be provided to same-sex couples. This may result in minimal legal protection. *Schalk and Kopf v Austria* is still authority for the ECtHR not requiring Council of Europe contracting states to recognise same-sex marriage.¹¹⁹

¹¹² *Ibid* at paragraphs 62 – 63 referring to among other cases *Schalk and Kopf v Austria* (n 21) at para 94.

¹¹³ *Ibid* at paragraphs 64 -65 referring to, among other cases, *Taddeucci and McCall v. Italy* App No 51362/09 (ECtHR, 30 June 2016) para 93.

¹¹⁴ *Ibid* at paragraph 62 referring to *Oliari v Italy* (n 23).

¹¹⁵ *Oliari v Italy* (n 23).

¹¹⁶ For comment see Helen Fenwick and Andy Hayward, 'Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically' (2017) 6 *European Human Rights Law Review* 545.

¹¹⁷ See *Irina Borisovna Fedotova and Irina Vladimironova Shipitko v Russia* App No 40792/10 (ECtHR, Communicated on 2 May 2016)

¹¹⁸ *Oliari v Italy* (n 23).

¹¹⁹ *Schalk and Kopf v Austria* (n 21).

The CJEU ruling in *MB*,¹²⁰ is also progressive as compared to the comparative position of the ECtHR. The ECtHR has continued to allow contracting states an MoA in relation to the specific challenge around the legal recognition of acquired gender being condition upon annulment of that person's marriage.¹²¹ Whilst more recent case law has seen the ECtHR finding violations of Article 8 in relation to state requirements concerning gender assignment regarding where the applicant is required to be compulsorily sterilised¹²² or required to wait lengthy periods,¹²³ there remains nothing to prevent ECtHR contracting states putting in place other onerous pre-conditions prior to recognizing the gender sex reassignment. If and where Brexit were to affect the remit of the CJEU this would mean that UK based LGBTQ+ persons would no longer be able to benefit from such far reaching judgments of the CJEU.

5. Subsidiarity Concerns at the European Union Level

Due to concerns about a lack of consensus the ECtHR does not require contracting states to legalise same-sex marriage.¹²⁴ This leads the ECtHR to provide a wide MoA, otherwise known as a 'latitude of deference or error...'¹²⁵ to contracting states on this issue. The main purpose of the MoA doctrine is to respect the 'social identity'¹²⁶ or moral values¹²⁷ of individual

¹²⁰ See *MB* (n 9) which found a violation of Article 4 of Directive 79/7 which prohibits all forms of discrimination on the ground of sex in relation to accessing state pension benefits.

¹²¹ See *Hamalainen v Finland*, App No. 37359/09 (ECtHR, 16 July 2014).

¹²² *A. P. Garçon and Nicot v France* App Nos. 79885/12, 52471/13 and 52596/13 (ECtHR, 6 April 2017).

¹²³ *S.V. v Italy* App no. 55216/08 (ECtHR, 11 October 2018) (only available in French).

¹²⁴ See *Schalk and Kopf v Austria* (n 21) para 57, *Hamalaninen v Finland* (n 121) para 39 and *Chapin and Charpentier v France* App No 40183/07 (ECtHR, 9 June 2016).

¹²⁵ Petra Butler, "Margin of Appreciation – a Note towards a Solution for the Pacific" (2008–2009) 39 *Victoria University of Wellington Law Review* 687 referring to Howard C Yourow, *Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Brill 1996) at 13.

¹²⁶ Niamh Nic Shuibhne, 'Margins of Appreciation; National Values, Fundamental Rights and EC Free Movement Law (2009) 34 *European Law Review* 230, 230.

¹²⁷ For discussion, see, Jeffrey Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law (2004-2005)* 113 *Columbia Journal of European Law* 119.

countries. Whilst universalists would always consider that human rights should have prominence,¹²⁸ regionalists consider that on issues concerning moral and cultural values, contracting states should be free to determine their own policies.¹²⁹ The European Convention itself enshrines subsidiarity under Art 1 which places the prime duty to protect human rights on individual contracting states.¹³⁰ These concerns are exacerbated at present as the ECtHR is adjudicating in a very nationalistic context. There are many criticisms about relying on consensus as a deciding factor. It is argued that the consensus doctrine ignores the interests of minority groups,¹³¹ and allows contracting states to determine matters without thorough going legal analysis and scrutiny.¹³² Despite ECtHR statements observing a movement towards consensus, it remains unclear when this will be reached.¹³³

Subsidiarity is of course a pressing concern for the EU as well. Political pressures have increased following Brexit, However, arguably the EU has greater opportunity to act in this area. The Council of Europe has 47 extremely divergent contracting states,¹³⁴ including

¹²⁸ See Eyal Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' (1998-1999) 31 *New York University Journal of International Law and Politics* 843 who argues at 843 that human rights bodies have a 'duty to set universal standards.'

¹²⁹ This was recently re-emphasised in the Council of Europe, 'High Level Conference on the Future of the European Court of Human Rights (Brighton Declaration)' (19-20 April 2012) B12 <http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> accessed 31 July 2019.

¹³⁰ See European Convention, Art 1.

¹³¹ See Helen Fenwick, 'Same Sex Unions and the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority Via Consensus Analysis' (2016) 3 EHRLR 248, 270.

¹³² See for discussion *Brauch* (n 127) 137

¹³³ *Oliari v Italy* (n 23) para 163.

¹³⁴ See the Council of Europe, '47 Member States' <www.coe.int/en/web/portal/country-profiles>.accessed 31 July 2019.

countries such as Russia where gay propaganda laws are still in force.¹³⁵ In comparison the EU member states are more homogeneous, (although divides should not be ignored).¹³⁶ The CJEU gives concerns about subsidiarity less prominence than over –riding EU law imperatives such as free movement of persons and non-discrimination provisions. The EU states are increasingly bound together through the EU concept of an ‘ever closer’ union.¹³⁷ One of the ‘core objectives’ of the EU is free movement of persons,¹³⁸ enabling all member state nationals the power to move freely between Member States.¹³⁹ *Coman* saw the CJEU stressing the importance of free movement provisions, as opposed to subsidiarity concerns. The Latvian government had submitted a public-interest consideration on the basis of the ‘fundamental nature of the institution of marriage’¹⁴⁰ arguing that a restriction of the free movement of EU citizens¹⁴¹ was justified ‘on ground of public policy and national identity’,¹⁴² Although this public concern was treated with respect¹⁴³ ultimately the CJEU determined that it had to give way to the free movement imperative.¹⁴⁴ In *MB* the UK government referred to ECtHR case law to

¹³⁵ See *Fenwick* (n131) 270 and Paul Johnson, ‘Homosexual Propaganda’ in the Russian Federation: Are They in Violation of the European Convention on Human Rights?’ (2015) 3 *Russian Law Journal* 37

¹³⁶ For instance, with Eastern European countries. See (n 2).

¹³⁷ The Preamble to the TEU which states that the signatories are ‘Resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity.’

¹³⁸ See *Tryfonidou* (n 2) 2.

¹³⁹ TFEU, Art 20..

¹⁴⁰ *Coman* (n 2) para 42.

¹⁴¹ TFEU, Art 20 and 21.

¹⁴² Article 4(2) TEU states that: “[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government as discussed in *Coman* (n 2) at para 42.

¹⁴³ *Coman* (n 2) para 43.

¹⁴⁴ *Coman* (n 2) para 44 referring to Case C-438/14 *Bogendorff von Wolffersdorff* ECLI:EU:C:2016:401, paragraph 67.

emphasise the MoA given Member States to ‘make recognition of a change of gender conditional on the annulment of the person’s marriage.’¹⁴⁵ The CJEU conceded this discretion to Member States but stated that in so doing they had to continue to comply with EU principles of non-discrimination.¹⁴⁶ Once again, the CJEU (in contrast to the position of the ECtHR) were prepared to over-rule subsidiarity concerns in favour of other pressing issues, here non-discrimination.

The EU also has far more effective enforcement mechanisms than the European Convention system. Whilst Article 46 European Convention gives ECtHR judgments binding force,¹⁴⁷ this primarily depends upon contracting states complying with ECtHR judgments under supervision from the Committee of Ministers. In practice this means that many ECtHR judgments from the ECtHR remain unenforced.¹⁴⁸ Arguably, this could deter the ECtHR from making far reaching judgments, due to concerns that judgments may not be observed. In contrast the CJEU has stronger enforcement methods. Not least the principles of EU supremacy,¹⁴⁹ and state liability.¹⁵⁰

6. Conclusion

Traditionally the CJEU was even stricter than the ECtHR system in refusing to recognise non-conventional family types. This chapter has demonstrated that EU law has much potential to further advance LGBTQ+ persons and same-sex couples’ rights. Whilst the normative meaning of citizenship remains contested, with some feminist and queer theorists questioning the reality of equality for their component citizens and disaffection with the recognition of

¹⁴⁵ See UK government’s argument at *MB* (n 9) para 24 referring to *Hämäläinen v. Finland* (n 121).

¹⁴⁷ European Convention, Art 46.

¹⁴⁸ See, for discussion, Ginger Hervey, ‘Europe’s human rights court struggles to lay down the law’ (*Politico*, 20 September 2017) <www.politico.eu/article/human-rights-court-ilgar-mammadov-azerbaijan-struggles-to-lay-down-the-law/> accessed 31 July 2019.

¹⁴⁹ See *Tryfonidou* (n 2) for discussion.

¹⁵⁰ The state liability principle was established in Case C-6/90 and C-9/90 *Francovich v. Italy* [1991] ECR I-5357.

same-sex marriage,¹⁵¹ the EU concept of citizenship is to offer an ever expanding array of practical rights, to include emerging groups such as LGBTQ+ persons and same-sex couples. EU citizenship has commonly been utilised by the EU to justify expansion of rights to EU citizens, and provide a plethora of benefits.¹⁵² Of prominence here are expanding free movement and non-discrimination rights. The *Coman* and *MB* case studies demonstrate the potentiality of these concepts to further rights for LGBTQ+ persons and same-sex couples.¹⁵³ In *Coman*, subsidiarity concerns were over-ridden in preference for the principle of free movement.¹⁵⁴ Similarly in *MB*, non-discrimination rights were given prominence as opposed to Member States public policy concerns.¹⁵⁵

All of these factors point towards the CJEU being well placed to bring forwards development of rights for LGBTQ+ persons and same-sex couples. However, both the *Coman* case and the *MB* case were strictly confined to their facts.¹⁵⁶ The CJEU observed clearly in *Coman*, that the case did not result in a requirement of member States to legalise same-sex marriage, but rather for Member States to allow free movement and residence rights for non-EU citizen spouses of same-sex marriages conducted in other Member States.¹⁵⁷ The *MB* case was strictly confined to the facts of non-discrimination in relation to state retirement pension provisions.¹⁵⁸ In addition, as Noto La Diega's chapter demonstrates that there is a different and varied experience across the EU following *Coman*, with some Eastern European states currently reacting against this judgment.¹⁵⁹ Still it seems that the CJEU has many opportunities to act to further LGBTQ+ persons and same-sex couple's rights. The inherent symbolic value

¹⁵¹ *Duggan* (n 53).

¹⁵² *Stalford* (n 19).

¹⁵³ *Coman* (n 2) and *MB* (n 9).

¹⁵⁴ *Coman* (n 2).

¹⁵⁵ *MB* (n 9).

¹⁵⁶ *Coman* (n 2) and *MB* (n 9).

¹⁵⁷ *Coman* (n 2).

¹⁵⁸ *MB* (n 9).

¹⁵⁹ *Noto La Diega*

of the *Coman* judgment,¹⁶⁰ which is also present in *MB* cannot be ignored.¹⁶¹ This contrasts with the position before the ECtHR where concerns about a lack of consensus, among a more divergent group of 47 Council of Europe states, still retains dominance. Ties between the EU and the Council of Europe are increasing in strength and following the EUCFR have become increasingly prominent. The free standing non-discrimination ground in the EUCFR¹⁶² together with the possibility that the EU can give human rights more 'extensive protection'¹⁶³ than the equivalent position before the ECtHR, are slowly coming to fruition. If as anticipated, one of the consequences of Brexit is to affect free movement of persons, this means that UK same-sex couples will have to continue to rely on whatever rights their country of destination sees fit to grant them. Further if Brexit impacts on the remit of the CJEU, this will mean that UK same-sex couples will miss out on developments in this regard in relation to expanding non-discrimination law.

¹⁶⁰ Tryfonidou (n 2) referring to *Coman* (n 2).

¹⁶¹ *MB* (n 9).

¹⁶² EUCFR, Art 21.

¹⁶³ EUCFR, Art 52(3).

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