

Cape Town, 17 February 2025

Niko Manfred Bögershausen
2084309 (BGRNIK003)
Word Count: 23,374

**HUMAN RIGHTS LAW
(LLM COURSE WORK AND DISSERTATION)**

Assoc. Prof. Amanda Barratt

**The Evolution of Same-Sex Marriage and Recognition in the
European Court of Human Rights: A Critical Analysis**

**The European Court of Human Rights' case law and its impact on
domestic legislation across Europe**

Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the LLM (course work and dissertation) in Human Rights Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM (course work and dissertation) in Human Rights Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation to those regulations.

Cape Town, 15 Feb. 2025

Signed by candidate

Place, date

Signature

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

BIBLIOGRAPHY

Primary Sources

Treaties and International and Regional Instruments

Charter of the Fundamental Rights of the European Union (EU Charter).

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

ETS 117 – Human Rights (Protocol No 7), 22.XI.1984.

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNGA Res 2200A (XXI) (ICESCR).

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

Cases

American

Obergefell v Hodges no 14–556 (2015) (Supreme Court of the United States decision) available at <https://supreme.justia.com/cases/federal/us/576/14-556/case.pdf>.

Austrian

Schalk and Kopf v Austria no B777/03 (2003) (Constitutional Court of Austria decision) available at <https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=29c3ab39-c767-42cf-bd30-6b6e947afca0>

&Position=9351&Sort=2%7CDesc&Abfrage=Vfgh&Entscheidungsart=Undefined&Sammlungsnummer=&Index=&SucheNachRechtssatz=True&SucheNachText=&GZ=&VonDatum=&BisDatum=03.04.2012&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&Result-PageSize=50&Suchworte=.

European

Abdulazis, Cabales and Balkandali v the United Kingdom nos 9214/80, 9473/81 and 9474/81 (1985) (European Court of Human Rights decision).

Abdulaziz v the United Kingdom no 8695/79 (1987) (European Court of Human Rights decision).

Artico v Italy no 6694/74 (1980) (European Court of Human Rights decision).

B and L v the United Kingdom no 36536/02 (2005) (European Court of Human Rights decision).

Burden v the United Kingdom no 13378/05 (2008) (European Court of Human Rights decision).

Chapin and Charpentier v France no 40183/07 (2016) (European Court of Human Rights decision).

Chassagnou v France no 25088/94 (1999) (European Court of Human Rights decision).

Clift v the United Kingdom no 7205/07 (2010) (European Court of Human Rights decision).

DH v the Czech Republic no 57325/00 (2007) (European Court of Human Rights decision).

Di Trizio v Switzerland no 7186/09 (2016) (European Court of Human Rights decision).

E v the United Kingdom no 36571/06 (2012) (European Court of Human Rights decision).

EB v France no 43546/02 (2008) (European Court of Human Rights decision).

Elsholz v Germany no 25735/94 (2000) (European Court of Human Rights decision).

F v Switzerland no 11329/85 (1987) (European Court of Human Rights decision).

Fedotova v Russia nos 40792/10, 30538/14 and 43439/14 (2023) (European Court of Human Rights decision).

Fretté v France no 36515/97 (2002) (European Court of Human Rights decision).

Friend and Countryside Alliance v United Kingdom no 16072/06 (2009) (European Court of Human Rights decision).

Goodwin v the United Kingdom no 28957/95 (2002) (European Court of Human Rights decision).

Hämäläinen v Finland no 37359/09 (2014) (European Court of Human Rights decision).

Handyside v the United Kingdom no 5493/72 (1976) (European Court of Human Rights decision).

Ilgar Mammadov v Azerbaijan no 15172/13 (2019) (European Court of Human Rights decision).

Jaremowicz v Poland no 24023/03 (2010) (European Court of Human Rights decision).

Johnston v Ireland no 9697/82 (1986) (European Court of Human Rights decision).

K and T v Finland no 25702/94 (2001) (European Court of Human Rights decision).

Keegan v Ireland no 16969/90 (1994) (European Court of Human Rights decision).

Koilova and Babulkova v Bulgaria no 40209/20 (2023) (European Court of Human Rights decision).

Lithgow v the United Kingdom no 9006/80 (1986) (European Court of Human Rights decision).

Luczek v Poland no 77782/01 (2007) (European Court of Human Rights decision).

Marckx v Belgium no 6833/74 (1979) (European Court of Human Rights decision).

Niemietz v Germany no 13710/88 (1992) (European Court of Human Rights decision).

Novruk v Russia no 31039/11 (2016) (European Court of Human Rights decision).

O'Donoghue v the United Kingdom no 34848/07 (2010) (European Court of Human Rights decision).

Olbertz v Germany no 37592/97 (1999) (European Court of Human Rights decision).

Oliari v Italy nos 18766/11 and 36030/11 (2015) (European Court of Human Rights decision).

Paradiso and Campanelli v Italy no 25358/12 (2017) (European Court of Human Rights decision).

Pretty v the United Kingdom no 2346/02 (2002) (European Court of Human Rights decision).

Przybyzewska v Poland nos 11454/17 and 9 others (2024) (European Court of Human Rights decision).

Rees v the United Kingdom no 9532/81 (1986) (European Court of Human Rights decision).

SH v Austria no 57813/00 (2010) (European Court of Human Rights decision).

Salduz v Turkey no 36391/02 (2008) (European Court of Human Rights decision).

Schalk and Kopf v Austria no 30141/04 (2010) (European Court of Human Rights decision).

Schwengel v Germany no 52442/99 (2000) (European Court of Human Rights decision).

Tyrer v the United Kingdom no 5856/72 (1978) (European Court of Human Rights decision).

Vallianatos v Greece nos 29381/09 and 32684/09 (2013) (European Court of Human Rights decision).

ZH and RH v Switzerland no 60119/12 (2015) (European Court of Human Rights decision).

German

BVerfGE 105, 313 (345) 35 *Neue Juristische Woche* (2002) pp. 2543–2552 (Constitutional Court of Germany decision).

BVerfGE 124, 199 20 *Neue Juristische Woche* (2010) pp. 1439–1444 (Constitutional Court of Germany decision).

BVerfGE 126, 400 38 *Neue Juristische Woche* (2010) pp. 2783–2789 (Constitutional Court of Germany decision).

BVerfGE 131, 239 20 *Neue Zeitschrift für Verwaltungsrecht* (2010) pp. 1304–1308 (Constitutional Court of Germany decision).

BVerfGE 133, 377 24 *Deutsches Steuerrecht* (2013) pp. 1228–1238 (Constitutional Court of Germany decision).

BVerfGE 2, 380, 401 31 *Neue Juristische Woche* pp. 1137–1139 (1953) (Constitutional Court of Germany decision).

Polish

Judgment of the Supreme Administrative Court of Poland of 25 October 2016 II GSK 866/15 (Supreme Administrative Court of Poland decision) available at http://www.orzeczenia-nsa.pl/wyrok/ii-gsk-866-15/sprawy_ubezpieczen_zdrowotnych_ochrona_zdrowia/33055d0/6.html?q=&_symbol=652&_haslo=Ochrona+zdrowia&_sad=Naczelnny+Sqd+Administracyjny&_skarzony=Prezes+Narodowego+Funduszu+Zdrowia&_okres=2016_10.

Judgment of the Constitutional Tribunal of 11 May 2005 K 18/04 6-7 (Constitutional Tribunal of Poland decision) available at <https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?sprawa=3826>.

Judgment of the Constitutional Tribunal of 9 November 2010 SK 10/08 16 (Constitutional Tribunal of Poland decision) available at <https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?&pokaz=dokumenty&sygnatura=SK%2010/08>.

Constitutions

Constitution of the Federal Republic of Germany of 1949 (*Grundgesetz*).

Constitution of the Weimar Republic of 1919 (*Weimarer Reichsverfassung*).

Constitutions (Translated Versions)

Constitution of Georgia of 1995 with amendments through 2018 English version available at https://www.constituteproject.org/constitution/Georgia_2018.

Constitution of Hungary of 2016 with amendments through 2016 English version available at https://www.constituteproject.org/constitution/Hungary_2016.

Constitution of Montenegro of 2007 with amendments through 2013 English version available at https://www.constituteproject.org/constitution/Montenegro_2013.

Constitution of the Republic of Armenia of 1995 with amendments through 2015 English version available at https://www.constituteproject.org/constitution/Armenia_2015.

Constitution of the Republic of Belarus of 1994 with amendments through 2004 English version available at https://www.constituteproject.org/constitution/Belarus_2004.

Constitution of the Republic of Bulgaria of 1991 with amendments through 2015 English version available at https://www.constituteproject.org/constitution/Bulgaria_2015.

Constitution of the Republic of Croatia of 1991 with amendments through 2013 English version available at https://www.constituteproject.org/constitution/Croatia_2013.

Constitution of the Republic of Latvia of 1922, reinstated in 1991, with amendments through 2016 English version available at https://www.constituteproject.org/constitution/Latvia_2016.

Constitution of the Republic of Lithuania of 1992 with amendments through 2019 English version available at https://www.constituteproject.org/constitution/Lithuania_2019.

Constitution of the Republic of Moldova of 1994 with amendments through 2016 English version available at https://www.constituteproject.org/constitution/Moldova_2016.

Constitution of the Republic of Poland of 1997 with amendments through 2009 available at https://www.constituteproject.org/constitution/Poland_2009.

Constitution of the Republic of Serbia of 2006 English version available at https://www.constituteproject.org/constitution/Serbia_2006.

Constitution of the Russian Federation of 1993 with amendments through 2014 English version available at https://www.constituteproject.org/constitution/Russia_2014.

Constitution of the Slovak Republic of 1992 with amendments through 2017 English version available at https://www.constituteproject.org/constitution/Slovakia_2017.

Constitution of Ukraine of 1996 with amendments through 2019 available at https://www.constituteproject.org/constitution/Ukraine_2019.

Foreign Statutes

Croatian

Same Sex Life Partnership Law of 2014 available at https://www.zakon.hr/z/732/Zakon-o-životnom-partnerstvu-osoba-istog-spola#google_vignette.

Cypriot

Civil Union Law of 2015 (No 184(I)/2015) English version available at https://www.visitcyprus.com/wp-content/uploads/files/weddings/2015_1_184_EN_FINAL.pdf.

German

Civil Code of 1900 (*Bürgerliches Gesetzbuch*).

Civil Partnership Act of 2001 (*Lebenspartnerschaftsgesetz*).

Federal Salaries Act of 1957 (*Bundesbesoldungsgesetz*).

Inheritance Tax and Gift Tax Act of 1906 (*Erbschaftsteuer- und Schenkungsteuergesetz*)

Penal Code of 1871 (*Strafgesetzbuch*).

Transsexuals Act of 1980 (*Transsexuellengesetz*).

Greek

Law 4356/2015 (Civil Partnership, Exercise of Rights, Criminal and Other Provisions) available at https://www.kodiko.gr/nomothesia/document/140974/nomos-4356-2015#google_vignette.

Hungarian

Act XXIX of 2009 on Registered Partnership, on the Amendment of Certain Laws Related Thereto and Necessary to Facilitate the Certification of Partnership available at <https://net.jogtar.hu/jogszabaly?docid=A0900029.TV>.

Italian

Law No 76 of 20 May 2016 available at https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2016-07-28&atto.codiceRedazionale=16G00156&elenco30giorni=false.

Polish

Penal Code of 1997 (as amended) English version available at <https://ihl-databases.icrc.org/en/national-practice/penal-code-1997-amended>.

Draft Laws

German

German Parliament (*Bundestag*) ‘Draft law introducing the right to marriage for persons of the same sex’ *Bundestag* printed paper 18/8 23 October 2013 available at https://www.bundestag.de/resource/blob/383126/e20021ef6056d6d9f240913ac5e47381/b_gesetzentwurf.pdf.

German Parliament (*Bundestag*) ‘Draft law introducing the right to marriage for persons of the same sex’ *Bundestag* printed paper 18/6665 11 November 2015 available at <https://dserver.bundestag.de/btd/18/066/1806665.pdf>.

German Parliament (*Bundestag*) ‘Draft law to abolish the ban on marriage for same-sex couples’ *Bundestag* printed paper 18/5098 10 June 2015 available at https://www.bundestag.de/resource/blob/383128/4d87ee496a8452cbc551f6e45ed15593/d_gesetzentwurf.pdf.

German Parliament (*Bundestag*) ‘Resolution recommendation and report of the Committee on Legal Affairs and Consumer Protection (6th Committee)’ *Bundestag* printed paper 18/12989 28 June 2017 available at <https://dserver.bundestag.de/btd/18/129/1812989.pdf>.

Secondary Sources

Journal Articles

- Carozza, Paolo G* ‘Subsidiarity as a structural principle of International Law’ (2003) 97(1) *American Journal of International Law* pp. 38–79.
- Dethloff, Nina;*
Alexandra Maschwitz ‘Ehemündigkeit in Europa – Ein Beitrag zur Entwicklung gemeineuropäischer Prinzipien’ 2010 *Das Standesamt* pp. 162–173.
- Doswald-Beck, Louise* ‘The Meaning of the „Right to Respect for Private Life“ under the European Convention on Human Rights’ (1983) 4(3) *Human Rights Law Journal* pp. 283–309.
- Fenwick, Helen;*
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* pp. 544–563.
- Gentile, Giulia;*
Dari Sartori ‘Interim Measures as “Weapons of Democracy” in the European Legal Space’ (2023) 1 *European Human Rights Law Review* pp. 18–31.
- Herdegen, Matthias* ‘Interpretation in International Law’ (2013) 4 *Max Planck Encyclopedia of Public International Law* pp. 260–273.
- Ipsen, Jörn* ‘Ehe für alle – verfassungswidrig?’ (2017) 15 *Neue Zeitschrift für Verwaltungsrecht* pp. 1096–1099.
- Küchler, Helen* ‘Sharing or shifting responsibility? – Bedeutung der neuerlichen Hervorhebung von „Subsidiarität“ und „nationalen Einschätzungsspielräumen“ für die Durchsetzung von Verfassungswerten durch den EGMR’ (2015) 3 *Zeitschrift für Europarechtliche Studien* pp. 347–370.
- Spielmann, Dean* ‘Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation

Doctrine: Waiver or Subsidiarity of European Review’ (2012) 14 *Cambridge Yearbook of European Legal Studies* pp. 381–418.

Wiemann, Rebekka

‘Die Rechtsprechung des EGMR zu sexueller Orientierung’ 2010 *Europäische GRUNDRECHTE-Zeitschrift* pp. 408–414.

Books

Dreier, Horst (ed)

Grundgesetz Kommentar Vol. II 4 ed (2023) Mohr Siebeck Tübingen.

Grabenwarter, Christoph;

EMRK Europäische Menschenrechtskonvention 7 ed (2021) C.H. Beck Munich.

Katharina Pabel (eds)

Häberle, Peter (ed)

Entstehungsgeschichte der Artikel des Grundgesetzes 2 ed (2010) Mohr Siebeck Tübingen.

Jarass, Hans D;
Bodo Pieroth (eds)

Grundgesetz für die Bundesrepublik Deutschland Kommentar 18 ed (2024) C.H. Beck Munich.

Kunz, Raffaella

Richter über internationale Gerichte? (2020) Springer Heidelberg.

Merten, Detlef;
Hans-Jürgen Papier
(eds)

Handbuch der Grundrechte in Deutschland und Europa Vol. IV (2011) C.F. Müller Heidelberg.

Meyer-Ladewig, Jens;
Martin Nettesheim;
Stefan von Raumer
(eds)

EMRK Europäische Menschenrechtskonvention 5 ed (2023) Nomos Baden-Baden.

- Sachs, Michael (ed)* *Grundgesetz Kommentar* 10 ed (2024) C.H. Beck Munich.
- Schabas, William A* *European Convention on Human Rights: A Commentary (Oxford Commentaries on International Law)* (2017) Oxford University Press.
- Scholz, Harald;*
Norbert Kleffmann
(eds) *Praxishandbuch Familienrecht* 45 ed (2024) C.H. Beck Munich.

Internet Articles and Reports

- Associated Press (AP)* ‘Conservative Montenegro registers 1st same–sex partnership’ 25 July 2021 available at <https://ap-news.com/article/government-and-politics-europe-montenegro-756e44d1b649f2282c2c7f0ee488f2b7>, accessed on 9 January 2025.
- Bundeszentrale für politische Bildung (bpb)* ‘Der Europäische Gerichtshof für Menschenrechte’ 31 October 2023 available at <https://www.bpb.de/kurzknapp/hintergrund-aktuell/542276/der-europaeische-gerichtshof-fuer-menschenrechte/>, accessed on 17 December 2024.
- Cambridge Dictionary* LGBTQ+ available at <https://dictionary.cambridge.org/dictionary/english/lgbtq>, accessed on 6 February 2025.
- Committee of Ministers of the Council of Europe* ‘Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe’ 16 March 2022 available at <https://rm.coe.int/0900001680a5ed96>, accessed on 12 January 2025.

- Council of Europe* ‘Details of Treaty No 005’ undated available at <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatyenum=005>, accessed on 1 November 2024.
- Council of Europe* ‘Chart of signatures and ratifications of Treaty 005’ 17 December 2024 available at <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatyenum=005>, accessed on 1 November 2024.
- Council of Europe* ‘Der Europäische Gerichtshof für Menschenrechte’ undated available at <https://www.coe.int/en/web/portal/gerichtshof-fur-menschenrechte>, accessed on 18 December 2024.
- Council of Europe* ‘Member of the Committee of Ministers’ 3 February 2025 available at <https://www.coe.int/en/web/cm/members-cm>, accessed on 6 February 2025.
- Esteve, Camille* ‘Getting Married in Monaco’ *Monaco Tribune Online* 27 September 2023 available at <https://www.monaco-tribune.com/en/2023/09/getting-married-in-monaco/>, accessed on 9 January 2025.
- European Commission* ‘Landmark decision of the Supreme Court regarding rights of same-sex partners in criminal law’ 24 March 2016 available at <https://www.equalitylaw.eu/downloads/3773-poland-landmark-decision-of-the-supreme-court-regarding-rights-of-same-sex-partners-in-criminal-law-pdf-101-kb>, accessed on 15 January 2025.

- European Commission* ‘What is the rule of law?’ undated available at https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/what-rule-law_en, accessed on 12 February 2025.
- European Court of Human Rights (ECtHR)* ‘Interlaken Follow-Up, Principle of Subsidiarity, Note by the Jurisconsult’ 8 July 2010 available at https://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf, accessed on 16 November 2024.
- Garsztecki, Stefan* ‘Analyse: Polen wählt Europa: der schwierige Neuanfang nach dem Wahlsieg der Opposition 2023’ 24 October 2023 available at <https://www.bpb.de/themen/europa/polen-analysen/nr-318/542124/analyse-polen-waehlt-europa-der-schwierige-neuanfang-nach-dem-wahlsieg-der-opposition-2023/>, accessed on 13 January 2025.
- German parliament (Bundestag)* ‘Marriage for persons of the same sex’ 30 June 2017 available at <https://www.bundestag.de/parlament/plennum/abstimmung/abstimmung/?id=486>, accessed on 10 January 2025.
- Ilie, Luiza;
Lincoln Feast* ‘Romania is not ready to uphold same-sex couples’ rights – PM’ *Reuters* 24 November 2023 available at <https://www.reuters.com/world/europe/romania-is-not-ready-uphold-same-sex-couples-rights-pm-2023-11-23/>, accessed on 12 January 2025.

- Jordan, Nuray* ‘Rechtsfragen der Umsetzung von Urteilen des Europäischen Gerichtshofs für Menschenrechte’ (2021) 26 *MenschenRechtsMagazin* available at https://publshup.uni-potsdam.de/opus4-ubp/frontdoor/deliver/index/docId/56918/file/mrm2021-02_S132-148.pdf, accessed on 10 October 2024.
- Kinsch, Patrick* ‘Grund– und Menschenrechte: GRCh und EMRK’ undated available at https://hwb-eup2009.mpipriv.de/index.php/Grund-_und_Menschenrechte:_GRCh_und_EMRK, accessed on 12 December 2024.
- Ministry of Foreign Affairs and International Cooperation of the Italian Republic* ‘Civil Partnerships’ undated available at <https://www.esteri.it/en/servizi-consolari-e-visti/italiani-all-estero/stato-civile/unioni-civili/>, accessed on 9 January 2025.
- Ministry of Interior of the Republic of Cyprus* ‘Political Cohabitation Agreement – Registered Partnerships’ available at <https://www.gov.cy/moi/en/political-cohabitation-agreement-registered-partnerships/>, accessed on 9 January 2025.
- Ministry of Justice of the Czech Republic* ‘Establishment of a registered partnership’ 5 November 2020 available at <https://portal.gov.cz/en/informace/establishment-of-a-registered-partnership-INF-83>, accessed on 9 January 2025.
- POLITICO* ‘Liechtenstein legalizes same–sex marriage in near-unanimous vote’ 17 May 2024 available at <https://www.politico.eu/article/liechtenstein-legalizes-same-sex-marriage-in-near-unanimous-vote/>, accessed on 23 December 2024.

- Pudzianowska, Dorota* ‘Income, troubles and legal family formats in Poland’ (2017) available at <https://www.ined.fr/Xtra-docs/lawsandfamilies/LawsAndFamilies-PL-Section2.pdf>, accessed on 15 January 2025.
- Rapporteur Group on Human Rights* ‘Supervision of the execution of judgments of the European Court of Human Rights: procedure and working methods for the Committee of Ministers’ Human Rights meetings’ 30 March 2016 available at <https://search.coe.int/cm?i=09000016806303a9>, accessed on 6 February 2025.
- Santaló Goris, Carlos* ‘The European Court of Human Rights: Advancing Legal Recognition of Same-Sex Couples across Europe?’ *EIPA* 4 July 2024 available at <https://www.eipa.eu/de/blog-de/the-european-court-of-human-rights-advancing-legal-recognition-of-same-sex-couples-across-europe/>, accessed on 2 February 2025.
- Santocchia, Luca* ‘San Marino approves law on civil unions: “More streamlined than Cirinnà”’ *Euronews* undated available at <https://it.euronews.com/2018/11/16/san-marino-approva-legge-sulle-unioni-civili-piu-snella-rispetto-alla-cirinna>, accessed on 9 January 2025.
- Stafford, George* ‘The Implementation of Judgments of the European Court of Human Rights: Worse Than You Think – Part 2: The Hole in the Roof’ 8 October 2019 available at <https://www.ejiltalk.org/the-implementation-of-judgments-of-the-european-court-of-human-rights-worse->

than-you-think-part-2-the-hole-in-the-roof/, accessed on 10 January 2025.

The Baltic Times

‘Court recognizes another same–sex couple as legitimate family’ 7 August 2022 available at https://www.baltictimes.com/court_recognizes_another_same-sex_couple_as_legitimate_family/, accessed on 9 January 2025.

Your Europe

‘Marriage’ 29 October 2024 available at https://europa.eu/youreurope/citizens/family/couple/marriage/index_en.htm, accessed on 9 January 2025.

TABLE OF CONTENTS

I. INTRODUCTION	1
1. Structure	2
2. Methodology	3
II. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS FRAMEWORK FOR PROTECTING FAMILY LIFE AND NON- DISCRIMINATION	3
1. The European Convention on Human Rights	3
a. Ratification and entry into force	4
b. Structure of the European Convention on Human Rights	4
c. Interpretation of Convention rights	5
d. Position and status of the European Convention on Human Rights in national law	6
2. Article 8 of the ECHR	6
2. Article 12 of the ECHR	8
3. Article 14 of the ECHR	11
a. Unequal treatment without objectively justifiable reasons	12
b. Wide margin of appreciation of the member states	14
III. THE EUROPEAN COURT OF HUMAN RIGHTS AND SAME-SEX MARRIAGE	15
1. The European Court of Human Rights	15
2. Role and responsibilities of the European Court of Human Rights	16
3. Evolution of the jurisprudence of the European Court of Human Rights	18
a. <i>Schalk and Kopf v Austria</i>	18
b. <i>Vallianatos v Greece</i>	24
c. <i>Oliari v Italy</i>	27
d. <i>Chapin and Charpentier v France</i>	30
e. <i>Fedotova v Russia</i>	33
f. <i>Przybylszewska v Poland</i>	37

g. Interim conclusion.....	39
IV. IMPACT ON DOMESTIC LEGISLATION.....	40
1. Domestic response of Germany	43
a. The concept of marriage in the German Constitution	44
b. Parliamentary procedure	44
c. Content of the amendment	45
d. The genesis of Article 6 of the German Constitution	45
e. The case law of the Federal Constitutional Court	46
f. Commentary literature	48
g. Changes in the German Constitution or in opinion?	48
h. The ‘essence’ of marriage	49
2. Domestic response of Poland.....	52
a. The concept of marriage according to the Polish Constitution	52
b. Statutory laws.....	53
c. Legal analysis of the domestic response in Poland	54
V. CHALLENGES AND LIMITATIONS	55
1. Issues of enforcement and effectiveness	55
2. The main problems in the enforcement of European Court of Human Rights judgements	56
3. After-effects of inadequate enforcement.....	60
4. Measures to improve enforcement.....	61
VI. CONCLUSION.....	62

I. INTRODUCTION

One of the biggest developments in the area of human rights is the acceptance of same–sex couples. Advancement of same–sex couples’ legal equality has been greatly aided in recent decades by the European Court of Human Rights. In this minor dissertation, the evolution of the European Court of Human Rights case law in this field is critically analysed, and the impact of these rulings on European state laws is investigated.

The purpose of this study is to evaluate the influence of this development on national laws in Europe and to present a thorough review of the evolution of the European Court of Human Rights case law regarding the recognition of same–sex partnerships. This work should also contribute to the awareness–building process regarding the significance of legal equality for same–sex couples and offer recommendations for future improvements.

My key thesis, which encapsulates my research paper’s primary contention, is that the legal acceptance of same–sex relationships throughout Europe has been greatly impacted by the European Court of Human Rights’ changing interpretation of Article 8 (right to respect for private and family life) and Article 14 of the European Convention on Human Rights¹ (prohibition of discrimination).

This influence has taken many forms, influencing domestic laws, court rulings, and, in the end, public perceptions of LGBTQ+² individuals. Even while the European Court of Human Rights has made significant progress in promoting same–sex couples’ rights, there are still obstacles in the way of guaranteeing complete and equal recognition for all members of the LGBTQ+ community on the continent. Accordingly, my guiding research question will be: How has the European Court of Human Rights’ interpretation of the European Convention on Human Rights evolved in relation to same–sex marriage and recognition? In this context, however, further questions emerge, such as what impact has the European Court of Human Rights’ case law had on domestic legislation and societal attitudes towards same–sex relationships in European countries and what are the potential challenges and limitations of relying on the European Court of Human Rights to advance LGBTQ+ rights in Europe?

¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

² LGBTQ+ is an initialism for lesbian, gay, bisexual, transgender and queer or questioning. It is an umbrella term. Compare Cambridge Dictionary LGBTQ+ available at <https://dictionary.cambridge.org/dictionary/english/lgbtq>, accessed on 6 February 2025.

1. Structure

The theoretical foundation of the European Convention on Human Rights will be examined in the first chapter of this minor dissertation, with an emphasis on how the Convention's rights are interpreted and how they fit into national legal systems. Article 8 (right to respect for private and family life), Article 12 (right to marry) and Article 14 of the ECHR (prohibition of discrimination) are the particular provisions that will be examined in detail after that.

In the second chapter, this minor dissertation will centre on the development of European Court of Human Rights' rulings regarding same-sex marriage. In order to analyse how the Court has progressively broadened the range of rights granted to same-sex couples, this study will contain important rulings including *Schalk and Kopf v Austria*³, *Vallianatos v Greece*⁴, *Oliari v Italy*⁵, *Chapin and Charpentier v France*⁶, *Fedotova v Russia*⁷ and *Przybyszewska v Poland*⁸.

Additionally, this minor dissertation will investigate in the third chapter how these rulings have affected the domestic legal systems of particular member states, using Poland and Germany as opposing case studies. This research focusses on the difficulties in putting these reforms into effect as well as the degree to which domestic legislation has been altered to conform to European Court of Human Rights' judgments.

In the final chapter, this minor dissertation will conclude by discussing the difficulties and restrictions related to the application of European Court of Human Rights' rulings. It will explore the main barriers to enforcement, such as a lack of political will, insufficient enforcement tools, and resource limitations. The possible consequences of insufficient enforcement, such as deterioration of public confidence and ongoing human rights abuses, will also be examined in the minor dissertation. Finally, the minor dissertation will suggest possible actions to improve enforcement systems' efficacy and ends with some concluding remarks.

³ *Schalk and Kopf v Austria* no 30141/04 (2010) (European Court of Human Rights decision).

⁴ *Vallianatos v Greece* nos 29381/09 and 32684/09 (2013) (European Court of Human Rights decision).

⁵ *Oliari v Italy* nos 18766/11 and 36030/11 (2015) (European Court of Human Rights decision).

⁶ *Chapin and Charpentier v France* no 40183/07 (2016) (European Court of Human Rights decision).

⁷ *Fedotova v Russia* nos 40792/10, 30538/14 and 43439/14 (2023) (European Court of Human Rights decision).

⁸ *Przybyszewska v Poland* nos 11454/17 and 9 others (2024) (European Court of Human Rights decision).

2. Methodology

A research methodology that is essentially legal–dogmatic is used. A thorough examination of national laws, scholarly works, and European Court of Human Rights case law are all included in this research. The following research techniques listed will be implemented: Case law analysis, a methodical review of European Court of Human Rights rulings regarding same–sex marriage and recognition with an emphasis on the legal doctrines and reasoning of the Court, a comparative legal analysis, evaluation of the impact of the European Court of Human Rights’ case law on legal change by comparing national laws in various European nations, and a critical legal analysis as a review of the European Court of Human Rights’ case law that identifies potential drawbacks and difficulties with its treatment of LGBTQ+ rights.

II. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS FRAMEWORK FOR PROTECTING FAMILY LIFE AND NON–DISCRIMINATION

While the European Convention on Human Rights provides a framework for safeguarding family life and non–discrimination, the practical application and interpretation of these rights frequently encounter complex challenges, especially given evolving social norms and the increasing diversity of family structures.

1. The European Convention on Human Rights

A list of fundamental rights and human rights is contained in the Convention for the Protection of Human Rights and Fundamental Freedoms, which is an international law treaty between the Council of Europe’s member states (Convention No 005 of the Council of Europe).⁹ The Strasbourg–based European Court of Human Rights keeps an eye on adherence to this agreement.¹⁰ The 27 members of the European Union and all 46 members of the Council of Europe are parties to the European Convention on Human Rights.¹¹

Every resident of the Council of European nations is protected by the European Convention on Human Rights.¹² A list of fundamental freedoms, including the right to

⁹ Council of Europe ‘Details of Treaty No 005’ undated available at <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatyenum=005>, accessed on 1 November 2024.

¹⁰ Ibid.

¹¹ Council of Europe ‘Chart of signatures and ratifications of Treaty 005’ 17 December of 2024 available at <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatyenum=005>, accessed on 1 November 2024.

¹² Preamble of the ECHR.

life and bodily integrity¹³, the freedom of conscience and religion¹⁴, the right to a fair trial¹⁵, the right to freedom of expression¹⁶, the right to property¹⁷, and the right to vote¹⁸, is based on the United Nations' Universal Declaration of Human Rights. Among other things, it forbids torture and discrimination.¹⁹

a. Ratification and entry into force

The Council of Europe drafted the Convention with ETS No 005, which was signed in Rome on 4 November 1950 and went into effect on 3 September 1953.²⁰ According to international law, only the versions in English and French are legally enforceable.²¹ Only member states of the European Union and the Council of Europe are permitted to sign this so-called closed treaty.²² As time has passed, governments seeking to join the Council of Europe now have to agree to sign and ratify the European Convention on Human Rights as a prerequisite.²³ Consequently, the Convention has gained national legitimacy and been signed by every member state of the Council of Europe.²⁴

b. Structure of the European Convention on Human Rights

Three divisions, each further broken into articles, make up the Convention. The individual human rights included by the Convention are listed in Section I, 'Rights and Freedoms' (Articles 2–18 of the ECHR). Although they, in theory, encompass the traditional rights to freedom, their selection was based on pragmatic factors rather than theoretical ones. This also reflects the fact that the Convention and its supplemental protocols encompass some economic, cultural, and political rights in addition to the traditional rights to freedom. The regulations regarding the composition and compe-

¹³ Article 3 of the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

¹⁴ Article 18 of the UDHR.

¹⁵ Article 10 of the UDHR.

¹⁶ Article 19 of the UDHR.

¹⁷ Article 17 of the UDHR.

¹⁸ Article 21 of the UDHR.

¹⁹ Articles 3 and 14 of the ECHR.

²⁰ Council of Europe 'Details of Treaty No 005' undated available at <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=005>, accessed on 1 November 2024.

²¹ Ibid.

²² Article 59(1), (2) of the ECHR.

²³ Ibid.

²⁴ Council of Europe 'Chart of signatures and ratifications of Treaty 005' 17 December of 2024 available at <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=005>, accessed on 1 November 2024.

tences of the Court are found in Section II, ‘European Court of Human Rights’ (Articles 19–51 of the ECHR). ‘Miscellaneous provisions’ (Articles 52–59 of the ECHR) are included in Section III. Article 53 of the ECHR states that neither the Convention nor any other document to which it is a party may be regarded as limiting or impairing basic freedoms and human rights recognised by the laws of any of the contracting parties. Therefore, the Convention only offers a minimal level of human rights protection, which contracting parties are free to increase.

c. Interpretation of Convention rights

According to Article 32 of the ECHR, the Strasbourg-based European Court of Human Rights interprets each individual’s rights under the Convention. The interpretation is based on the two official language versions, French and English. The interpretation is autonomous, meaning it is not influenced by national legislation.

Because the European Court of Human Rights views the European Convention on Human Rights as a ‘living instrument’, its provisions are construed in light of the social and economic climate of the time they were written, rather than the circumstances that existed at the time they were created.²⁵ As a result, an provision’s protection of human rights may evolve over time. For instance, the rights of the ‘accused person’ – in English, ‘charged with a criminal offence’ or in French, ‘*accusée*’ – are included in Article 6(3) of the ECHR. These days, the European Court of Human Rights interprets this phrase far more widely than only the legal processes. Therefore, even if no court procedures have been started yet, the rights protected in Article 6(3) of the ECHR may also be applicable during the police inquiry.²⁶

The goal of the Convention, according to established European Court of Human Rights case law, is to provide actual and functional rights rather than theoretical ones.²⁷ Consequently, the European Court of Human Rights interprets the Convention in a way that makes its rights effective as well.²⁸

²⁵ *Tyrer v the United Kingdom* no 5856/72 para 31 (1978) (European Court of Human Rights decision).

²⁶ *Salduz v Turkey* no 36391/02 para 50 (2008) (European Court of Human Rights decision).

²⁷ *Artico v Italy* no 6694/74 para 33 (1980) (European Court of Human Rights decision).

²⁸ *Ibid.*

d. Position and status of the European Convention on Human Rights in national law
As a conventional international treaty, the Convention does not control its standing in the legal systems of the contracting parties; instead, it leaves the domestic implementation of its contents to the contracting states (the so-called dualist system).²⁹ The Convention does not govern the home validity or the domestic precedence of the Convention over national law.³⁰ There is a similar difference in the constitutional requirements.

As a result, every signatory state has complied with the European Court of Human Rights' case law. However, the European Court of Human Rights can only enforce restitution in the form of compensation payments against the acting state due to a lack of executive powers.³¹ Due to the dualistic structure, the European Court of Human Rights' rulings have varying binding effects inside the legal systems of the various member states, even while they are binding at the level of international law.³²

2. Article 8 of the ECHR

A basic right to privacy is established by Article 8 of the ECHR. According to Article 8(1) of the ECHR 'everyone has the right to respect for his private and family life, his home and his correspondence'. Therefore, a person's home, family, correspondence, and private life are all expressly protected by this provision. Despite the fact that these domains frequently overlap, taken as a whole, they provide thorough protection for individual liberty, which is crucial for personal growth.³³ Nevertheless, within the scope of rights in the Convention, Article 8 of the ECHR is not a catch-all provision. Its main purpose is to protect individuals against arbitrary government meddling in their personal and family lives.³⁴ Notably, under certain conditions, legal organisations may also be entitled to the privacy protections outlined in Article 8 of the ECHR.³⁵

²⁹ Patrick Kinsch 'Grund- und Menschenrechte: GRCh und EMRK' undated available at https://hwb-eup2009.mpipriv.de/index.php/Grund-_und_Menschenrechte:_GRCh_und_EMRK, accessed on 12 December 2024.

³⁰ Ibid.

³¹ Article 41 of the ECHR.

³² Patrick Kinsch 'Grund- und Menschenrechte: GRCh und EMRK' undated available at https://hwb-eup2009.mpipriv.de/index.php/Grund-_und_Menschenrechte:_GRCh_und_EMRK, accessed on 12 December 2024.

³³ Jens Meyer-Ladewig, Martin Nettesheim & Stefan von Raumer (eds) *EMRK Europäische Menschenrechtskonvention* 5 ed (2023) ch Article 8 margin no 7.

³⁴ Christoph Grabenwarter & Katharina Pabel (eds) *EMRK Europ Menschenrechtskonvention* 7 ed (2021) ch Section 22 margin nos 1–2.

³⁵ Ibid 4.

In order to promote the unrestricted development of each person's unique personality, Article 8(1) of the ECHR ensures the right to respect for private life. The European Court of Human Rights has construed 'private life' broadly, including connections with others as well as personal space.³⁶ Article 8 of the ECHR does not, however, safeguard all social connections; rather, a link to personal growth is necessary.³⁷

According to case law, personal life management, privacy, and bodily autonomy are the three main facets of private life that are protected by Article 8 of the ECHR.³⁸ These components are interdependent, with bodily autonomy and privacy being necessary for the unrestricted growth of personal lifestyle choices.³⁹

The right to respect for family life is protected by Article 8 of the ECHR, which necessitates the existence of a family first.⁴⁰ The article protects partnerships within the framework of marriage, even in the absence of traditional family structures, but it does not grant the right to start a family.⁴¹ Article 8 of the ECHR does not require a formal union in order for a connection to be recognised as a family, and the legality of a relationship does not prevent its acceptance.⁴² The idea of 'actual family life' is em-

³⁶ Ibid 6; *Niemietz v Germany* no 13710/88 para 29 (1992) (European Court of Human Rights decision).

³⁷ *Friend and Countryside Alliance v the United Kingdom* no 16072/06 para 42 ff (2009) (European Court of Human Rights decision).

³⁸ Definition approaches at Louise Doswald-Beck 'The Meaning of the „Right to Respect for Private Life“ under the European Convention on Human Rights' (1983) 4(3) *HRLJ* 283; Christoph Grabenwarter & Katharina Pabel (eds) *EMRK Europ Menschenrechtskonvention* 7 ed (2021) ch Section 22 margin no 6.

³⁹ Christoph Grabenwarter & Katharina Pabel (eds) *EMRK Europ Menschenrechtskonvention* 7 ed (2021) ch Section 22 margin no 6.

⁴⁰ *Marckx v Belgium* no 6833/74 para 31 (1979) (European Court of Human Rights decision); *Abdulaziz, Cabales and Balkandali v the United Kingdom* nos 9214/80, 9473/81 and 9474/81 para 62 (1985) (European Court of Human Rights decision); *Fretté v France* no 36515/97 para 32 (2002) (European Court of Human Rights decision); *EB v France* no 43546/02 para 41 (2008) (European Court of Human Rights decision); *Paradiso and Campanelli v Italy* no 25358/12 para 141 (2017) (European Court of Human Rights decision).

⁴¹ Ibid.

⁴² Christoph Grabenwarter & Katharina Pabel (eds) *EMRK Europ Menschenrechtskonvention* 7 ed (2021) ch Section 22 margin no 16.

phased by the Court instead of making differences between married and single couples.⁴³ The existence of a familial link for the purposes of Article 8 of the ECHR depends on a number of factors, including cohabitation, the length of the relationship, mutual commitment, and shared obligations, including childrearing.⁴⁴

Previous rulings have established that the commitment and shared life of same-sex partners fall under the protection of ‘private life’.⁴⁵ This implies that homosexual couples in stable relationships have the right to form a family.⁴⁶ It is important to note that long-term cohabitation is not a prerequisite for recognizing a stable partnership.⁴⁷

2. Article 12 of the ECHR

The right to be married and start a family is protected under Article 12 of the ECHR. This suggests that the institution of marriage must be recognised by law in each member state. Beyond this point, this article does not provide protection for already-married couples or families.⁴⁸ This kind of protection is covered by Article 8 of the ECHR.⁴⁹

⁴³ *Marckx v Belgium* no 6833/74 para 31 (1979) (European Court of Human Rights decision); *Johnston v Ireland* no 9697/82 para 55 (1986) (European Court of Human Rights decision); *Keegan v Ireland* no 16969/90 para 44 (1994) (European Court of Human Rights decision); *Elsholz v Germany* no 25735/94 para 43 (2000) (European Court of Human Rights decision); *K and T v Finland* no 25702/94 para 150 (2001) (European Court of Human Rights decision); *Novruk v Russia* no 31039/11 para 85 (2016) (European Court of Human Rights decision).

⁴⁴ Christoph Grabenwarter & Katharina Pabel (eds) *EMRK Europ Menschenrechtskonvention* 7 ed (2021) ch Section 22 margin no 16.

⁴⁵ *Schalk and Kopf v Austria* no 30141/04 para 90 (2010) (European Court of Human Rights decision); *Vallianatos v Greece* nos 29381/09 and 32684/09 (2013) (European Court of Human Rights decision); *Oliari v Italy* nos 18766/11 and 36030/11 (2015) (European Court of Human Rights decision); Christoph Grabenwarter & Katharina Pabel (eds) *EMRK Europ Menschenrechtskonvention* 7 ed (2021) ch Section 22 margin no 16.

⁴⁶ *Schalk and Kopf v Austria* no 30141/04 para 94–5 (2010) (European Court of Human Rights decision); *Vallianatos v Greece* nos 29381/09 and 32684/09 (2013) (European Court of Human Rights decision); Rebekka Wiemann ‘Die Rechtsprechung des EGMR zu sexueller Orientierung’ 2010 *EuGRZ* 408 ff; 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 *EHRLR* 548 ff; Christoph Grabenwarter & Katharina Pabel (eds) *EMRK Europ Menschenrechtskonvention* 7 ed (2021) ch Section 22 margin no 16.

⁴⁷ *Vallianatos v Greece* nos 29381/09 and 32684/09 (2013) (European Court of Human Rights decision); *Oliari v Italy* nos 18766/11 and 36030/11 (2015) (European Court of Human Rights decision); Christoph Grabenwarter & Katharina Pabel (eds) *EMRK Europ Menschenrechtskonvention* 7 ed (2021) ch Section 22 margin no 16.

⁴⁸ Jens Meyer-Ladewig, Martin Nettesheim & Stefan von Raumer (eds) *EMRK Europäische Menschenrechtskonvention* 5 ed (2023) ch Article 12 margin no 1.

⁴⁹ *Ibid.*

According to the strict interpretation of Article 12 of the ECHR by the European Court of Human Rights, member states are not required to allow same-sex marriage.⁵⁰ Although in certain situations Article 12 of the ECHR supersedes Article 8 of the ECHR, its influence on the Court's rulings concerning same-sex couples has been minimal.⁵¹

Article 16 of the UDHR serves as the foundation for this clause. Its language bears a striking resemblance to Article 23(2) of the International Covenant on Civil and Political Rights⁵². A comparable clause can also be found in the Charter of Fundamental Rights of the European Union.⁵³

Pursuant to Article 12 of the ECHR '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'. Consequently, the right to marry a person of the other sex is granted by Article 12 of the ECHR. As of right now, same-sex marriage is not covered.⁵⁴ States are not required to permit same-sex marriages to continue following gender reassignment,⁵⁵ even if the European Court of Human Rights currently acknowledges that people who have had gender reassignment can marry a spouse of the opposite sex in their new gender identity.⁵⁶ The European Court of Human Rights initially rigidly read Article 12 of the ECHR, which meant that it exclusively applied to couples of the opposite sex.⁵⁷ Its position has changed, though, and it now concedes that the article may not apply just to heterosexual partnerships, leaving member states

⁵⁰ Christoph Grabenwarter & Katharina Pabel (eds) *EMRK Europ Menschenrechtskonvention* 7 ed (2021) ch Section 22 margin no 83.

⁵¹ Jens Meyer-Ladewig, Martin Nettesheim & Stefan von Raumer (eds) *EMRK Europäische Menschenrechtskonvention* 5 ed (2023) ch Article 12 margin no 1.

⁵² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁵³ Article 7 of the Charter of the Fundamental Rights of the European Union (EU Charter).

⁵⁴ *Schalk and Kopf v Austria* no 30141/04 paras 60 ff (2010) (European Court of Human Rights decision); confirmed in *Chapin and Charpentier v France* no 40183/07 paras 36–7 (2016) (European Court of Human Rights decision); Christoph Grabenwarter & Katharina Pabel (eds) *EMRK Europ Menschenrechtskonvention* 7 ed (2021) ch Section 12 margin no 4.

⁵⁵ *Schalk and Kopf v Austria* no 30141/04 paras 60 ff (2010) (European Court of Human Rights decision); confirmed in *Chapin and Charpentier v France* no 40183/07 paras 36–7 (2016) (European Court of Human Rights decision).

⁵⁶ *Goodwin v the United Kingdom* no 28957/95 paras 97 ff (2002) (European Court of Human Rights decision); Jens Meyer-Ladewig, Martin Nettesheim & Stefan von Raumer (eds) *EMRK Europäische Menschenrechtskonvention* 5 ed (2023) ch Article 12 margin no 4.

⁵⁷ *Rees v the United Kingdom* no 9532/81 (1986) (European Court of Human Rights decision); *Hämäläinen v Finland* no 37359/09 (2014) (European Court of Human Rights decision); Jens Meyer-Ladewig, Martin Nettesheim & Stefan von Raumer (eds) *EMRK Europäische Menschenrechtskonvention* 5 ed (2023) ch Article 12 margin no 4.

to make that determination.⁵⁸ The European Court of Human Rights has recognised an increasing trend among its member states to recognise same–sex marriage.⁵⁹ However, this does not impose an obligation on other nations to do the same. In the event that a member state decides to legalise same–sex unions, it must comply with the regulations of Article 12 of the ECHR.⁶⁰ There are questions over whether this approach is compatible with the text’s obvious limitations given the indirect enlargement of the scope of Article 12 of the ECHR.⁶¹ Even if it is politically advantageous, this interpretation could need further support to make sense of the article’s clear language.⁶²

The implementation of the rights described in Article 12 of the ECHR is at the discretion of each individual nation.⁶³ However, any regulations they create must be just and sensible. By its laws, the government cannot alter the fundamental meaning of the right guaranteed by Article 12 of the ECHR.⁶⁴ Adults have the fundamental right to freely decide whether or not to get married, and if they do, with whom.⁶⁵ It is up to the member states to establish laws governing marriage, such as who can get married, how, and when. These regulations may address issues such as procedures, legal capacity, and age restrictions.⁶⁶ While nations may outlaw incest and polygamy,⁶⁷ governments cannot force people to get married,⁶⁸ and unduly onerous laws, such as those that prohibit marriage between specific relatives,⁶⁹ may be unjust. The Article makes sure that the proper procedures are followed when determining whether or not a person can get married. Nonetheless, there is no special protection for the freedom to marry in accordance with religious law.⁷⁰

⁵⁸ *Chapin and Charpentier v France* no 40183/07 paras 36–7 (2016) (European Court of Human Rights decision); Jens Meyer-Ladewig, Martin Nettesheim & Stefan von Raumer (eds) *EMRK Europäische Menschenrechtskonvention* 5 ed (2023) ch Article 12 margin no 4.

⁵⁹ *Ibid.*

⁶⁰ *Schalk and Kopf v Austria* no 30141/04 para 61 (2010) (European Court of Human Rights decision).

⁶¹ Jens Meyer-Ladewig, Martin Nettesheim & Stefan von Raumer (eds) *EMRK Europäische Menschenrechtskonvention* 5 ed (2023) ch Article 12 margin no 4.

⁶² *Ibid.*

⁶³ *Rees v the United Kingdom* no 9532/81 paras 49 ff (1986) (European Court of Human Rights decision).

⁶⁴ Jens Meyer-Ladewig, Martin Nettesheim & Stefan von Raumer (eds) *EMRK Europäische Menschenrechtskonvention* 5 ed (2023) ch Article 12 margin no 6.

⁶⁵ *Ibid.* 7.

⁶⁶ *Ibid.*

⁶⁷ *Johnston v Ireland* no 9697/82 (1986) (European Court of Human Rights decision).

⁶⁸ Nina Dethloff and Alexandra Maschwitz ‘Ehemündigkeit in Europa – Ein Beitrag zur Entwicklung gemeineuropäischer Prinzipien’ 2010 *StAZ* 162.

⁶⁹ *F v Switzerland* no 11329/85 para 40 (1987) (European Court of Human Rights decision); *B and L v the United Kingdom* no 36536/02 paras 34 ff (2005) (European Court of Human Rights decision).

⁷⁰ *ZH and RH v Switzerland* no 60119/12 para 44 (2015) (European Court of Human Rights decision).

Unlike Articles 8 to 11 of the ECHR, Article 12 of the ECHR does not specifically list restrictions on the freedom to marry.⁷¹ This implies that member states have a great deal of latitude in governing marriage. Not only will the European Court of Human Rights consider whether marriage limits are necessary in a democratic society, but it will also consider other rights. Rather, it will ascertain whether a limitation is unreasonable or capricious.⁷² A careful balancing of interests is necessary for this.⁷³ Although member states are allowed certain latitude, they cannot fully restrict the ability of individuals who are of legal age to be married.⁷⁴ Marriage laws must be understandable, easily accessible, and safeguard the fundamental components of the right. People should be able to appeal rulings that prevent them from being legally allowed to get married. The prohibition of fictitious marriages for immigration-related reasons is one instance of this extensive latitude.⁷⁵ For this reason, member states have the authority to look into and reject marriages that seem questionable. The right to marry is essentially fiercely protected, but member states are allowed to have some discretion in how it is carried out as long as it does not violate the fundamental tenets of the right.

3. Article 14 of the ECHR

Several international accords and declarations uphold the idea of equality as a fundamental human right. This idea is upheld by the International Covenant on Civil and Political Rights⁷⁶, the International Covenant on Economic, Social, and Cultural Rights⁷⁷, and the Universal Declaration of Human Rights⁷⁸. Equal rights are also covered under the Charter of Fundamental Rights of the European Union, where Article 20 of the EU Charter defines equality as a general principle and Article 21 of the EU Charter forbids discrimination. Furthermore, the principle of equality of arms in legal processes is intimately linked to a specific clause included in Protocol No 7 of the

⁷¹ Jens Meyer-Ladewig, Martin Nettesheim & Stefan von Raumer (eds) *EMRK Europäische Menschenrechtskonvention* 5 ed (2023) ch Article 12 margin no 10.

⁷² *Jaremwicz v Poland* no 24023/03 para 50 (2010) (European Court of Human Rights decision).

⁷³ *B and L v the United Kingdom* no 36536/02 paras 34 ff (2005) (European Court of Human Rights decision).

⁷⁴ Jens Meyer-Ladewig, Martin Nettesheim & Stefan von Raumer (eds) *EMRK Europäische Menschenrechtskonvention* 5 ed (2023) ch Article 12 margin no 11.

⁷⁵ *O'Donoghue v the United Kingdom* no 34848/07 para 63 (2010) (European Court of Human Rights decision).

⁷⁶ Article 2(1) of the ICCPR.

⁷⁷ Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNGA Res 2200A (XXI) (ICESCR).

⁷⁸ Article 2(1) of the UDHR.

European Convention on Human Rights⁷⁹ concerning spouses. Human rights law is essentially based on the equality concept, with a number of national and international legal frameworks offering particular anti-discrimination safeguards. Article 14 of the ECHR 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.

a. Unequal treatment without objectively justifiable reasons

Two requirements must be met in order to prove discrimination under Article 14 of the ECHR: Unfair treatment and no good reason.⁸⁰ Unfair Treatment requires that individuals with comparable circumstances have received disparate treatment.⁸¹ It is crucial to remember that not every variation in treatment constitutes discrimination.⁸² Occasionally, distinct situations call for distinct regulations. ‘No good reason’ indicates that it is not fair or logical to treat people differently. If the government treats people differently, it must have a legitimate basis and apply fairness in its implementation.⁸³ It is up to the government to demonstrate that its disparate treatment is just and reasonable.⁸⁴ They do, however, have some latitude in determining what is just. If the government’s actions are reasonable and equitable, the Court will review them.⁸⁵

To put it simply, in order to establish discrimination, the applicant must demonstrate that he or she was treated differently from others in a comparable circumstance and that the government is unable to explain this difference in treatment. Finding out if people are receiving different treatment is the first step towards determining whether discrimination is occurring.⁸⁶

⁷⁹ ETS 117 – Human Rights (Protocol No 7) 22.XI.1984.

⁸⁰ Jens Meyer-Ladewig, Martin Nettesheim & Stefan von Raumer (eds) *EMRK Europäische Menschenrechtskonvention* 5 ed (2023) ch Article 14 margin no 9.

⁸¹ *Clift v the United Kingdom* no 7205/07 para 66 (2010) (European Court of Human Rights decision).

⁸² Jens Meyer-Ladewig, Martin Nettesheim & Stefan von Raumer (eds) *EMRK Europäische Menschenrechtskonvention* 5 ed (2023) ch Article 14 margin no 9.

⁸³ *Pretty v the United Kingdom* no 2346/02 para 87 (2002) (European Court of Human Rights decision).

⁸⁴ Jens Meyer-Ladewig, Martin Nettesheim & Stefan von Raumer (eds) *EMRK Europäische Menschenrechtskonvention* 5 ed (2023) ch Article 14 margin no 9.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

A rule may adversely impact a specific set of individuals even if it appears fair at first glance.⁸⁷ This is known as ‘indirect discrimination’.⁸⁸ For instance, since more women work part-time, regulations pertaining to full-time employment may unfairly disadvantage them.⁸⁹ It constitutes discrimination if these regulations give part-timers an unfair advantage when it comes to benefits like pensions.⁹⁰ A rule may occasionally specifically target a group, such as expectant mothers. It is obvious that this is discrimination. The government must provide evidence for the fairness of a rule if it unjustly impacts a particular group of individuals.⁹¹ This is not like the norm, where the individual alleging discrimination must provide evidence to support their claims.⁹² In other words, discrimination can occur even when a law appears to be neutral if it ends up harming a specific group more than others.

Even when a policy appears neutral, it may be discriminatory. A policy may disproportionately hurt a certain group even while everyone is treated equally under it.⁹³ This is another example of ‘indirect discrimination’ in practice.⁹⁴ Standardised school entry tests, for instance, may lead to a disproportionate number of Roma children being placed in special education groups, even if all students took the same test.⁹⁵ Importantly, the policy has discriminatory implications even though it is neutral in and of itself. Specifically, direct discrimination is when a policy singles out a specific population; this is not the same as that.⁹⁶ Treating people with significant cognitive disabilities differently from people without such impairments in terms of reporting requirements is an example of direct discrimination through equal treatment.⁹⁷ In short, discrimination of any kind, whether direct or indirect, is illegal, and judges must now take into account a policy’s impact on other groups in addition to its external design.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ *Di Trizio v Switzerland* no 7186/09 para 66 (2016) (European Court of Human Rights decision).

⁹⁰ Ibid.

⁹¹ Jens Meyer-Ladewig, Martin Nettesheim & Stefan von Raumer (eds) *EMRK Europäische Menschenrechtskonvention* 5 ed (2023) ch Article 14 margin no 9.

⁹² Ibid.

⁹³ Ibid 10.

⁹⁴ *DH v the Czech Republic* no 57325/00 para 184 (2007) (European Court of Human Rights decision).

⁹⁵ Jens Meyer-Ladewig, Martin Nettesheim & Stefan von Raumer (eds) *EMRK Europäische Menschenrechtskonvention* 5 ed (2023) ch Article 14 margin no 9.

⁹⁶ Ibid 10.

⁹⁷ *E v the United Kingdom* no 36571/06 paras 58, 61 (2012) (European Court of Human Rights decision).

Member states have some flexibility in deciding how to treat people differently.⁹⁸ This is called a ‘margin of appreciation’. The amount of flexibility depends on the specific situation.⁹⁹ This is similar to the flexibility member states have when limiting other rights, like the rights to privacy, family life, freedom of expression, and religion.¹⁰⁰ Essentially, while there are limits on how member states can treat people differently, they have some room to make their own decisions.

b. Wide margin of appreciation of the member states

In situations where there is a lack of consensus among nations regarding morality and legal norms, courts grant governments greater discretion in making decisions.¹⁰¹ This often also applies to social and economic initiatives.¹⁰² It was not discriminatory, for instance, to alter the pensions of East German government employees in order to offset the unjust advantages they had previously enjoyed.¹⁰³ It was considered a reasonable solution to an old issue.¹⁰⁴ Basically, governments have more freedom to make decisions, even if those policies have differing effects on various people, when there is ambiguity or when they are attempting to right historical wrongs.¹⁰⁵

A more stringent test is applied by the European Court of Human Rights to the justification of treatment disparities based on gender, sexual orientation, nationality, or place of birth.¹⁰⁶ These qualities are seen to be especially significant and should be given additional protection. For example, it would take a very good reason to deny

⁹⁸ Jens Meyer-Ladewig, Martin Nettesheim & Stefan von Raumer (eds) *EMRK Europäische Menschenrechtskonvention* 5 ed (2023) ch Article 14 margin no 11.

⁹⁹ *Lithgow v the United Kingdom* no 9006/80 para 177 (1986) (European Court of Human Rights decision); *Olbertz v Germany* no 37592/97 (1999) (European Court of Human Rights decision); *Chassagnou v France* no 25088/94 para 91 (1999) (European Court of Human Rights decision).

¹⁰⁰ Jens Meyer-Ladewig, Martin Nettesheim & Stefan von Raumer (eds) *EMRK Europäische Menschenrechtskonvention* 5 ed (2023) ch Article 14 margin no 11.

¹⁰¹ *Fretté v France* no 36515/97 para 41 (2002) (European Court of Human Rights decision): Exclusion of adoption by homosexuals does not violate Article 14 of the ECHR; this is judged differently today – margin nos 8, 19; *SH v Austria* no 57813/00 paras 68–9 (2010) (European Court of Human Rights decision): Prohibition of egg donation and different treatment of in vitro and in vivo fertilisation violates Article 14 of the ECHR. A wide margin is still assumed today with regard to the facilitation of same-sex marriage with the consequence that the exclusion of this does not constitute a violation of Article 14 of the ECHR.

¹⁰² *Burden v the United Kingdom* no 13378/05 para 60 (2008) (European Court of Human Rights decision).

¹⁰³ *Schwengel v Germany* no 52442/99 (2000) (European Court of Human Rights decision).

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Luczek v Poland* no 77782/01 para 48 (2007) (European Court of Human Rights decision); *Abdulaziz v the United Kingdom* no 8695/79 (1987) (European Court of Human Rights decision).

someone the capacity to vote due to a disability.¹⁰⁷ The court is essentially saying that disparities in treatment based on particular personal traits must be supported by extremely strong arguments.¹⁰⁸

III. THE EUROPEAN COURT OF HUMAN RIGHTS AND SAME-SEX MARRIAGE

This chapter examines the European Court of Human Rights' pivotal role in establishing the legal foundation for same-sex marriage recognition in Europe. I will look at the role of the European Court of Human Rights, the European Court of Human Rights' interpretation of important human rights articles, assess seminal cases, and investigate how its jurisprudence has changed in response to shifting social views.

It is critical to comprehend the legal foundation upon which the European Court of Human Rights renders its decisions regarding same-sex marriage before examining particular cases. Here, two articles in particular are relevant: Article 8 and Article 12 of the ECHR.

1. The European Court of Human Rights

In order to guarantee adherence to the European Convention on Human Rights, the member states of the Council of Europe founded the European Court of Human Rights in Strasbourg in 1959.¹⁰⁹ Concerning abuses of the rights acknowledged in the European Convention on Human Rights, the European Court of Human Rights makes decisions on complaints from individuals, groups of individuals, and states.¹¹⁰ Since 1998, the European Court of Human Rights has operated as a permanent court. Following the exhaustion of domestic legal options, citizens can immediately address it with grievances.¹¹¹

¹⁰⁷ Jens Meyer-Ladewig, Martin Nettesheim & Stefan von Raumer (eds) *EMRK Europäische Menschenrechtskonvention* 5 ed (2023) ch Article 14 margin no 13.

¹⁰⁸ *Ibid.*

¹⁰⁹ Council of Europe 'Der Europäische Gerichtshof für Menschenrechte' undated available at <https://www.coe.int/en/web/portal/gerichtshof-fur-menschenrechte>, accessed on 18 December 2024.

¹¹⁰ Bundeszentrale für politische Bildung (bpb) 'Der Europäische Gerichtshof für Menschenrechte' 31 October 2023 available at <https://www.bpb.de/kurz-knapp/hintergrund-aktuell/542276/der-europaeische-gerichtshof-fuer-menschenrechte/>, accessed on 17 December 2024.

¹¹¹ Council of Europe 'Der Europäische Gerichtshof für Menschenrechte' undated available at <https://www.coe.int/en/web/portal/gerichtshof-fur-menschenrechte>, accessed on 18 December 2024.

In numerous sectors, governments have changed their laws and administrative procedures as a result of the Court's rulings, which are legally obligatory on the member states involved.¹¹² As a result of the Court's case law, the Convention is a dynamic tool for addressing new issues and strengthening democracy and the rule of law in Europe.¹¹³

When it comes to human rights matters, the European Court of Human Rights is the last option for 680 million people across 46 nations.¹¹⁴ The ability to litigate for and enforce their human rights is thereby guaranteed to citizens of Council of Europe member states.

2. Role and responsibilities of the European Court of Human Rights

The European Court of Human Rights is tasked with guaranteeing 'compliance with the obligations' of the contracting parties under the Convention, as stated in Article 19 of the ECHR. Its responsibility is to interpret and apply the Convention in accordance with Article 32 of the ECHR. For this goal, a variety of methods are offered.

In addition to evaluating individual cases, the Court is in charge of guaranteeing a consistent minimum level of protection throughout Europe.¹¹⁵ The European Court of Human Rights' interpretation of Convention rights is especially pertinent in this regard. It employs unique procedures throughout the process. To enable an interpretation that aligns with contemporary social circumstances and, thus, ensures effective legal protection, emphasis should be placed on the dynamic–evolutionary and consensus–based approaches of interpretation.¹¹⁶ As a result, the European Convention on Human Rights is evolving into a 'living instrument'.¹¹⁷

Together with the state obligation outlined in Article 1 of the ECHR, the European Court of Human Rights' duties include defending the liberties and rights of those

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ *Bundeszentrale für politische Bildung (bpb)* 'Der Europäische Gerichtshof für Menschenrechte' 31 October 2023 available at <https://www.bpb.de/kurz-knapp/hintergrund-aktuell/542276/der-europaeische-gerichtshof-fuer-menschenrechte/>, accessed on 17 December 2024.

¹¹⁵ Nuray Jordan 'Rechtsfragen der Umsetzung von Urteilen des Europäischen Gerichtshofs für Menschenrechte' (2021) 26 *MenschenRechtsMagazin* 133 available at https://publishup.uni-potsdam.de/opus4-ubp/frontdoor/deliver/index/docId/56918/file/mrm2021-02_S132-148.pdf, accessed on 10 October 2024.

¹¹⁶ Ibid.

¹¹⁷ Helen Küchler 'Sharing or shifting responsibility? – Bedeutung der neuerlichen Hervorhebung von „Subsidiarität“ und „nationalen Einschätzungsspielräumen“ für die Durchsetzung von Verfassungswerten durch den EGMR' (2015) 3 *ZEuS* 362–3.

under its jurisdiction. One of the core tenets of the Convention system, the idea of subsidiarity, is described in its interaction.¹¹⁸ Although subsidiarity has many different meanings within the framework of the Convention, it essentially implies that the contracting states are required to preserve the rights outlined in the Convention, which serves as the foundation for the link between national and international human rights protection.¹¹⁹ ‘Subsidiary’ specifically refers to the role of the European Court of Human Rights.¹²⁰

A rigorous division of labour is advocated by the European Convention on Human Rights. It makes a distinction between the domains of domestic and international law, as well as between the Committee of Ministers and the European Court of Human Rights.¹²¹ As a result, the judgment’s execution becomes both a domestic and a political issue.¹²²

The doctrine of the so-called margin of appreciation,¹²³ the concept of subsidiarity and established case law both contribute to the latitude that nations have in carrying out their responsibilities.¹²⁴ Depending on the kind of right and the specifics of each case, its scope varies.¹²⁵ The margin of appreciation is based on the idea that each state body is often better equipped to evaluate circumstances that fall under their purview.¹²⁶ This is because they are better familiar with the pertinent systemic concerns and feel the closest to what is occurring.¹²⁷ It aims to maintain a consistent minimum

¹¹⁸ European Court of Human Rights (ECtHR) ‘Interlaken Follow-Up, Principle of Subsidiarity, Note by the Jurisconsult’ 8 July 2010 margin nos 2 ff available at https://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf, accessed on 16 November 2024.

¹¹⁹ William A Schabas *European Convention on Human Rights: A Commentary* (2017) 74.

¹²⁰ Nuray Jordan ‘Rechtsfragen der Umsetzung von Urteilen des Europäischen Gerichtshofs für Menschenrechte’ (2021) 26 *MenschenRechtsMagazin* 133–4 available at https://publishup.uni-potsdam.de/opus4-ubp/frontdoor/deliver/index/docId/56918/file/mrm2021-02_S132-148.pdf, accessed on 10 October 2024.

¹²¹ Nuray Jordan ‘Rechtsfragen der Umsetzung von Urteilen des Europäischen Gerichtshofs für Menschenrechte’ (2021) 26 *MenschenRechtsMagazin* 134 available at https://publishup.uni-potsdam.de/opus4-ubp/frontdoor/deliver/index/docId/56918/file/mrm2021-02_S132-148.pdf, accessed on 10 October 2024; Raffaella Kunz *Richter über internationale Gerichte?* (2020) 34.

¹²² *Ibid.*

¹²³ Dean Spielmann ‘Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review’ (2012) 14 *CYELS* 383.

¹²⁴ *Handyside v the United Kingdom* no 5493/72 paras 47 ff (1976) (European Court of Human Rights decision); William A Schabas *European Convention on Human Rights: A Commentary* (2017) 78.

¹²⁵ William A Schabas *European Convention on Human Rights: A Commentary* (2017) 81.

¹²⁶ Dean Spielmann ‘Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review’ (2012) 14 *CYELS* 383.

¹²⁷ *Ibid.*

level of human rights while balancing cultural, social, political, and legal diversity.¹²⁸ Tensions are easily raised by such a purpose.¹²⁹

The opposite of the subsidiarity principle is the effectiveness principle.¹³⁰ It makes it clear that subsidiarity is restricted and guarantees that the Convention is applied in a way that effectively upholds the rights.¹³¹

The Convention makes no specific reference to the principles. However, the Interlaken Process resulted in the determination that the margin of appreciation and the subsidiarity concept should both be included in the Convention's Preamble.¹³²

3. Evolution of the jurisprudence of the European Court of Human Rights

In the following, I will give a chronological overview of ground-breaking judgements that show the development of case law from non-recognition to more equal rights. Throughout the years, the European Court of Human Rights has heard cases contesting some member states' refusal to recognise same-sex couples legally. The most notable judgements are *Schalk and Kopf v Austria*, *Vallianatos v Greece*, *Oliari v Italy*, *Chapin and Charpentier v France*, *Fedotova v Russia* and *Przybyszewska v Poland*.

a. *Schalk and Kopf v Austria*

aa. The circumstances of the case

In September 2002, the applicants – a same-sex male couple living in Vienna – wanted to tie the knot.¹³³ But in December 2002, the Vienna municipal office (*Magistrat*) re-

¹²⁸ Paolo G Carozza, 'Subsidiarity as a structural principle of International Law' (2003) 97(1) *AJIL* 40.

¹²⁹ Nuray Jordan 'Rechtsfragen der Umsetzung von Urteilen des Europäischen Gerichtshofs für Menschenrechte' (2021) 26 *MenschenRechtsMagazin* 134 available at https://publishup.uni-potsdam.de/opus4-ubp/frontdoor/deliver/index/docId/56918/file/mrm2021-02_S132-148.pdf, accessed on 10 October 2024.

¹³⁰ Helen Küchler 'Sharing or shifting responsibility?' – Bedeutung der neuerlichen Hervorhebung von „Subsidiarität“ und „nationalen Einschätzungsspielräumen“ für die Durchsetzung von Verfassungswerten durch den EGMR' (2015) 3 *ZEuS* 362; Matthias Herdegen 'Interpretation in International Law' (2013) 4 *MPEPIL* margin nos 30–1.

¹³¹ Nuray Jordan 'Rechtsfragen der Umsetzung von Urteilen des Europäischen Gerichtshofs für Menschenrechte' (2021) 26 *MenschenRechtsMagazin* 134 available at https://publishup.uni-potsdam.de/opus4-ubp/frontdoor/deliver/index/docId/56918/file/mrm2021-02_S132-148.pdf, accessed on 10 October 2024.

¹³² *Ibid* 134–5.

¹³³ *Schalk and Kopf v Austria* no 30141/04 para 8 (2010) (European Court of Human Rights decision).

jected their plea, citing Article 44 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*), as justification.¹³⁴ This article only allowed marriages between people of the opposing sex.¹³⁵ The municipal office made a decision that was consistent with previous case law.¹³⁶ Legal invalidity resulted from previous court rulings that declared same-sex marriages null and void.¹³⁷ Additionally, citing related case law from the Austrian Administrative Court (*Verwaltungsgerichtshof*) that similarly ruled same-sex couples unsuitable for marriage, the Vienna regional governor supported the municipal office's judgement in April 2003.¹³⁸

This section essentially describes the first legal obstacle that the same-sex couple must overcome in order to have their marriage recognised in Austria. The passage emphasises the legal system in place at the time, which limited marriage to heterosexual couples.

The applicants believed that appealing to the Constitutional Court (*Verfassungsgerichtshof*), Austria's highest court, would be the best course of action.¹³⁹ They argued that the refusal to marry violated their fundamental rights, in particular their right to a private and family life.¹⁴⁰ They believed that their right to form a family was also violated by their inability to get married.¹⁴¹ The applicants also contended that being married should not be prohibited by discrimination on the basis of their sexual orientation.¹⁴² The European Convention on Human Rights is incorporated into Austrian state legislation. Consequently, the applicants' suit explicitly referenced Articles 12 (right to marry), 8 (right to private and family life), and 14 of the ECHR (prohibition of discrimination). Their disagreement centred on how the idea of marriage is evolving.¹⁴³ They noted that producing children is no longer the primary goal of marriage,¹⁴⁴ unlike when the Austrian Civil Code was draughted in 1812.¹⁴⁵ Today's society views marriage as a more comprehensive commitment that includes every facet of one's

¹³⁴ Ibid 9.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid 10.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid 11.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

life.¹⁴⁶ They maintained that same–sex couples should not be prevented from marrying, particularly in light of the European Convention on Human Rights’ position that sexual orientation distinctions call for compelling reasons.¹⁴⁷ They also emphasised the fact that other European nations had either progressed towards legal equality for same–sex partnerships or had permitted same–sex marriage.¹⁴⁸

The Austrian Constitutional Court dismissed the applicants’ case on the law’s ban on same–sex unions in a ruling dated 12 December 2003.¹⁴⁹ The Court’s argumentation was based on two main ideas: Article 12 of the ECHR and the limited scope of equality.¹⁵⁰ The Court argued that the notion of marriage should not be expanded beyond its conventional focus on procreation, neither the equality principle of the Austrian Constitution nor Article 12 of the ECHR, which specifically mentions ‘men and women’, require it.¹⁵¹ Essentially, the Court contended that one of the distinguishing qualities of marriage is the biological potential for procreation. The Court recognised that same–sex partnerships are covered by Article 8 of the ECHR, which protects private life and forbids discrimination¹⁵². The Court did stress that this recognition does not entail a need for marriage laws to be changed.¹⁵³ The Court further argued that it was outside the purview of this case to look into any potential legal disparities in the

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ *Schalk and Kopf v Austria* no B777/03 (2003) (Constitutional Court of Austria decision) available at [https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=29c3ab39-c767-42cf-bd30-6b6e947afca0&Position=9351&Sort=2%7CDesc&Abfrage=Vfgh&Entscheidungsart=Undefined&Sammlungsnummer=&Index=&SucheNachRechtssatz=True&SucheNachText=&GZ=&VonDatum=&BisDatum=03.04.2012&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=50&Suchworte=.](https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=29c3ab39-c767-42cf-bd30-6b6e947afca0&Position=9351&Sort=2%7CDesc&Abfrage=Vfgh&Entscheidungsart=Undefined&Sammlungsnummer=&Index=&SucheNachRechtssatz=True&SucheNachText=&GZ=&VonDatum=&BisDatum=03.04.2012&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=50&Suchworte=)

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Compare also Article 14 of the ECHR.

¹⁵³ *Schalk and Kopf v Austria* no B777/03 (2003) (Constitutional Court of Austria decision) available at [https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=29c3ab39-c767-42cf-bd30-6b6e947afca0&Position=9351&Sort=2%7CDesc&Abfrage=Vfgh&Entscheidungsart=Undefined&Sammlungsnummer=&Index=&SucheNachRechtssatz=True&SucheNachText=&GZ=&VonDatum=&BisDatum=03.04.2012&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=50&Suchworte=&Dokumentnummer=JFR_09949690_03B00277_2_01.](https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=29c3ab39-c767-42cf-bd30-6b6e947afca0&Position=9351&Sort=2%7CDesc&Abfrage=Vfgh&Entscheidungsart=Undefined&Sammlungsnummer=&Index=&SucheNachRechtssatz=True&SucheNachText=&GZ=&VonDatum=&BisDatum=03.04.2012&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=50&Suchworte=&Dokumentnummer=JFR_09949690_03B00277_2_01)

laws now in place regarding same–sex partnerships.¹⁵⁴ Furthermore, the Court declined to recommend legislation on issues pertaining to constitutional law or legal policy.¹⁵⁵ As a result, the Court rejected the applicants’ case as being without merit.¹⁵⁶

bb. Judgment of the European Court of Human Rights

(a) The European Court of Human Rights rejects same–sex marriage claim under Article 12 of the ECHR

The European Court of Human Rights’ ruling on Austria’s alleged violations of Article 12 of the ECHR is examined in this section. According to the wording of the provision, ‘men and women of marriageable age have the right to marry and to found a family’. The applicants contended that same–sex couples were not necessarily precluded from marriage by this phrasing.¹⁵⁷ On the other hand, the European Court of Human Rights unanimously rejected their petition for two main reasons: Specific use of language of Article 12 of the ECHR and historical context.¹⁵⁸ The Court emphasised that ‘men and women’ are specifically mentioned in Article 12 of the ECHR as having the right to marry.¹⁵⁹ The French translation (*‘l’homme et la femme’*) stressed this idea even more.¹⁶⁰ Despite the petitioners’ claims for a broader interpretation, the Court found that this phrase was deliberate.¹⁶¹ The Court made note of the fact that other significant articles of the Convention discussed rights using broader terminology such as ‘everyone’ or ‘no one’.¹⁶² This was contrary to the exact wording of Article 12 of the ECHR, the Court declared.¹⁶³ The Court also took into account the historical background of the Convention’s adoption in the 1950s, a time when marriage was widely seen as a union of individuals of different sexes.¹⁶⁴ Based on the precise wording, the conflicting phrasing elsewhere in the Convention, and the historical context, the Court effectively rejected the claim that the right to same–sex marriage is protected by Article 12 of the ECHR.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ *Schalk and Kopf v Austria* no 30141/04 para 55 (2010) (European Court of Human Rights decision).

¹⁵⁸ Ibid 57–8.

¹⁵⁹ Ibid 54.

¹⁶⁰ Ibid.

¹⁶¹ Ibid 55.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

(b) Article 14 of the ECHR and 8 of the ECHR combined: No right to same–sex marriage

The petitioners contended that Article 14 of the ECHR (prohibition of discrimination) and Article 8 of the ECHR (right to respect for private and family life) might offer a right to same–sex marriage even if Article 12 of the ECHR did not.¹⁶⁵

The European Court of Human Rights disagreed.¹⁶⁶ The Court underlined that these rights should not conflict with one another and that the Convention should be read as a whole.¹⁶⁷ As the Court concluded that Article 12 of the ECHR does not require nations to allow same–sex marriages, neither can Article 14 of the ECHR nor the more expansive Article 8 of the ECHR.¹⁶⁸

The applicants further claimed that their rights had been violated by same–sex couples' lack of legal recognition prior to 2010.¹⁶⁹ While noting that most nations still had not recognised same–sex couples, the European Court of Human Rights acknowledged a growing tendency in Europe towards this direction.¹⁷⁰ They saw this as an 'evolving right' that was up for debate.¹⁷¹ This allows nations to have some discretion (margin of appreciation) in determining when to enact new laws.¹⁷² Austria was not at the forefront of this trend, but their method was deemed acceptable by the European Court of Human Rights in the case of the Austrian Registered Partnership Act of 2010.¹⁷³

Regarding this portion of the ruling, the judges Rozakis, Jebens and Tulkens disapproved.¹⁷⁴ They contended that Austria ought to have provided a rationale for their differential treatment of same–sex and opposite–sex couples, given that their circumstances were comparable, and that discrimination based on sexual orientation requires substantial evidence.¹⁷⁵ Without offering a strong justification for the disparity

¹⁶⁵ Ibid 65.

¹⁶⁶ Ibid 110.

¹⁶⁷ Ibid 109.

¹⁶⁸ Ibid 101.

¹⁶⁹ Ibid 102.

¹⁷⁰ Ibid 105.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid 106.

¹⁷⁴ Joint dissent of judges Rozakis, Jebens and Tulkens of *Schalk and Kopf v Austria* no 30141/04 para 10 (2010) (European Court of Human Rights decision).

¹⁷⁵ Ibid 8.

in treatment, they thought Austria's reliance on the margin of appreciation was insufficient.¹⁷⁶ The margin of appreciation should not be used if there is not any explanation.¹⁷⁷ They believe that the existence or lack of a unified strategy among European nations should not be the determining issue.¹⁷⁸ The Court shall only take the margin of appreciation into account if the national authorities provide justification for their strategy.¹⁷⁹

(c) A landmark shift: European Court of Human Rights recognizes same-sex relationships as 'family life' (*obiter dictum*)

This section outlines an important shift in the European Court of Human Rights' perspective on same-sex relationships. Article 8 of the ECHR recognised same-sex relationships as a kind of 'family life' for the first time, according to the Court.¹⁸⁰ Prior to this decision, even for long-term cohabiting couples, the European Court of Human Rights recognised same-sex relationships as a part of 'private life' but not 'family life'.¹⁸¹ The privileges granted to same-sex couples were restricted by this differentiation. In the past, the Court used the lack of agreement among European nations on same-sex partnerships to support this distinction.¹⁸² This allowed nations to choose their margin of appreciation while addressing the problem.¹⁸³ Nonetheless, the Court observed that societal perceptions on same-sex couples are rapidly changing.¹⁸⁴ Such partnerships were now legally recognised in several European member states, and some legislation of the European Union were beginning to incorporate same-sex couples in the concept of family.¹⁸⁵ The European Court of Human Rights came to the conclusion that it was no longer reasonable to preserve the distinction between same-sex and different-sex couples in terms of 'family life' in light of this shifting landscape.¹⁸⁶ According to them, the applicants' steady, de facto partnership qualified as 'family life' under Article 8 of the ECHR because it was comparable to a relationship

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ *Schalk and Kopf v Austria* no 30141/04 para 94 (2010) (European Court of Human Rights decision).

¹⁸¹ Ibid 90.

¹⁸² Ibid 97.

¹⁸³ Ibid 96.

¹⁸⁴ Ibid 96–7.

¹⁸⁵ Ibid 27, 105.

¹⁸⁶ Ibid 109.

of a different sex.¹⁸⁷ It is important to remember that this acceptance of same–sex partnerships as ‘family life’ was based on an *obiter dictum*.¹⁸⁸ This indicates that the Court made a comment that was not crucial to the case’s outcome. Even nevertheless, this remark marks a substantial change in the European Court of Human Rights’ understanding of Article 8 of the ECHR and opens the door for further legal improvements for same–sex couples, even though it has no direct bearing on the result.

The right to marry is also guaranteed by Article 9 of the EU Charter, which was recognised by the Court. In contrast to Article 12 of the ECHR, Article 9 of the EU Charter does not specify the sex of persons eligible for marriage. The Court hinted that it might no longer see Article 12 of the ECHR – which restricts it to marriage between a man and a woman – as an absolute restriction in light of this expanded right.¹⁸⁹ The European Court of Human Rights implied that Article 12 of the ECHR might not be totally inapplicable to the applicants’ complaint about their inability to marry as a same–sex couple by taking into account the Charter of the European Union.¹⁹⁰ This raises the possibility that same–sex couples may someday be granted the ability to marry under Article 12 of the ECHR.¹⁹¹ But it is crucial to keep in mind that this is yet another *obiter dictum*. It has no direct bearing on how this particular case turns out. It provides an important indication of how the European Court of Human Rights interprets the marital rights of same-sex couples.

b. *Vallianatos v Greece*

aa. The circumstances of the case

The case involves three sets of same–sex couples from Greece.¹⁹² The seventh applicant is a not–for–profit association providing psychological and moral support to gays and lesbians.¹⁹³ Law No 3719/2008, which established civil unions as a legal type of relationship other than marriage, went into effect in Greece in November 2008.¹⁹⁴ A social reality was mirrored in the creation of civil unions, which gave heterosexual

¹⁸⁷ Ibid 94.

¹⁸⁸ Ibid 94–9.

¹⁸⁹ Ibid 61.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² *Vallianatos v Greece* nos 29381/09 and 32684/09 para 8 (2013) (European Court of Human Rights decision).

¹⁹³ Ibid.

¹⁹⁴ Ibid 9.

couples the opportunity to register their partnership within a more accommodating legal framework than marriage offered.¹⁹⁵ Unmarried couples in de facto unions gave birth to more children throughout time; these children now make up around 5 per cent of all births in the nation.¹⁹⁶

According to the explanatory report on Law No 3719/2008, religious marriages continue to be the most advantageous choice for couples looking to start a family with the greatest possible legal, financial, and social protections.¹⁹⁷ Article 8 of the ECHR, which safeguarded non-marital partnerships from the perspective of the right to private and family life, was also cited in the report.¹⁹⁸ The National Human Rights Commission referred to the concept of family life, which evolved in line with social mores.¹⁹⁹

The Minister of Justice said during the parliamentary debate on 11 November 2008 that society was not yet ready to accept same-sex cohabitation.²⁰⁰ Several speakers emphasised that Greece would be breaking its international commitments and Articles 8 and 14 of the ECHR by excluding same-sex couples.²⁰¹ On 27 September 2010, the National Human Rights Commission reiterated its position on the discriminatory nature of Law No 3719/2008 and recommended drafting legislation extending the scope of civil unions to include same-sex couples.²⁰²

bb. Judgment of the European Court of Human Rights

The government stated that the complaints were unfounded, as the couples did not suffer the direct and immediate consequences of the ban on entering into civil partnerships.²⁰³ The government maintained that the claimants were free to manage maintenance, inheritance, and other issues through a will or contract and that the harm they claimed to have suffered was entirely fictitious.²⁰⁴ The European Court of Human Rights rejected this claim, ruling that the law forbade the spouses from organising their

¹⁹⁵ Ibid 10.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid 12.

²⁰⁰ Ibid 14.

²⁰¹ Ibid.

²⁰² Ibid 15.

²⁰³ Ibid 37–8.

²⁰⁴ Ibid.

union in a way that conformed to the legal arrangements set forth by the law.²⁰⁵ They were regarded as ‘victims’ as they had a real personal interest in seeing the law ‘brought to an end’.²⁰⁶

However, the Court decided that the non-profit group that supported homosexuals was not considered a direct or indirect ‘victim’, and as a result, their claim was rejected.²⁰⁷ Because the claimants might have contested the law’s legitimacy by commencing a domestic action for compensation, the Court likewise dismissed the government’s assertion that the plaintiffs had not exhausted domestic remedies.²⁰⁸ Even if it had been successful, the Court reasoned, Greece would not have needed to amend the Act since a monetary award ‘would not appear capable of remedying their grievances’.²⁰⁹

The couples claimed that they had experienced discrimination based on their sexual orientation in their personal and family life, which was against Article 14 of the ECHR in conjunction with Article 8 of the ECHR.²¹⁰ The Court emphasised that the claim was based on the passing of an allegedly discriminatory legislation rather than the assertion that Greece had not complied with any affirmative requirements under the Convention.²¹¹

As the Court pointed out, same-sex couples were in a similar position to different-sex couples in terms of their need for legal recognition and protection of their relationship, so it rejected the government’s argument that the ability to have biological children justified limiting civil unions to different-sex couples.²¹² The requirement for ‘particularly convincing and weighty reasons’ to justify the law’s discriminatory treatment of individuals based on their sexual orientation was maintained by the Court.²¹³

Legislation that ‘indirectly strengthens the institution of marriage’ by promoting the notion that two people would choose to get married ‘purely on the basis of a

²⁰⁵ Ibid 80–1.

²⁰⁶ Ibid 47.

²⁰⁷ Ibid 48.

²⁰⁸ Ibid 53, 59.

²⁰⁹ Ibid 54.

²¹⁰ Ibid 71.

²¹¹ Ibid 70.

²¹² Ibid 82–4.

²¹³ Ibid 77.

mutual commitment entered into by two individuals, independent of outside constraints or of the prospect of having children’ is permissible, according to the Court.²¹⁴ Family protection ‘in the traditional sense’ was later recognised by the Court as ‘a weighty and legitimate reason which might justify a difference in treatment’ in principle.²¹⁵

Additionally, the Court decided that protecting the child’s interests might be a legitimate objective.²¹⁶ In light of these goals, the Court then looked into whether the distinction in this case was reasonable.²¹⁷

The measure went beyond the achievement of the government’s stated objectives and was principally designed to grant legal recognition to a certain kind of non-marital relationship.²¹⁸ Importantly, although the government had drawn attention to the situation of different-sex marriages with children, the statute did not apply just to arrangements including children.²¹⁹ The Court ruled that the government had failed to provide a rationale for treating same-sex and different-sex couples, who were not parents, differently.²²⁰ The Court also affirmed that civil unions were important to the petitioners as formal partnerships, regardless of the legal ramifications.²²¹ In addition, the legal status offered by the civil union aroused the curiosity of same-sex couples, as same-sex couples were not allowed to marry under Greek law.²²²

The European Court of Human Rights determined that there had been a violation of both Article 14 of the ECHR in conjunction with Article 8 of the ECHR as the Greek government’s arguments for passing the law were insufficient to justify the exclusion of same-sex couples.²²³

c. *Oliari v Italy*

The European Court of Human Rights rendered a historic decision in 2015 that represented a major advancement for LGBTQ+ rights. Six men in committed, long-term relationships were involved in the *Oliari v Italy* lawsuit because they were not allowed

²¹⁴ Ibid 83.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Ibid 84.

²¹⁸ Ibid 86.

²¹⁹ Ibid.

²²⁰ Ibid 89.

²²¹ Ibid 91.

²²² Ibid.

²²³ Ibid 92.

to be married or form any kind of civil union.²²⁴ The European Court of Human Rights ruled in favour of the applicants, holding that Italy had breached their right to respect for their private and family lives as guaranteed by the European Convention on Human Rights by refusing to grant legal recognition to same–sex couples.²²⁵

aa. The circumstances of the case

The case included three same–sex couples who the Italian government had refused to grant marriage licenses to.²²⁶ At the time, Italian law only permitted marriages between people of the opposite sex.²²⁷ The Italian Constitutional Court, which reasoned that it is necessary to distinguish between marriage and other types of union, supported this legal position.²²⁸

Although the Constitutional Court recognised that same–sex couples should have legal recognition, it was the responsibility of the Italian government to pass laws that specifically addressed the rights of same–sex couples.²²⁹ This opinion was later supported by the highest court in Italy, the Court of Cassation, which said that although it was problematic that same–sex couples were not recognised by the law, this did not mean that human rights laws were violated.²³⁰ The Court did acknowledge, nevertheless, that heterosexual and homosexual couples needed legal options.²³¹

Italy did not recognise civil unions for heterosexual or homosexual couples.²³² The Court did, however, take note of a recent development in Italy wherein certain local authorities started to permit cohabitation agreements between same–sex couples.²³³ Although these agreements covered money issues and mutual assistance, they were not recognised by the law.²³⁴

²²⁴ *Oliari v Italy* nos 18766/11 and 36030/11 paras 10–11 (2015) (European Court of Human Rights decision).

²²⁵ *Ibid* 187–8.

²²⁶ *Ibid* 12.

²²⁷ *Ibid* 13.

²²⁸ *Ibid*.

²²⁹ *Ibid* 45.

²³⁰ *Ibid*.

²³¹ *Ibid*.

²³² *Ibid* 39–42.

²³³ *Ibid*.

²³⁴ *Ibid*.

The applicants claimed that by preventing them from getting married or forming a civil union, Italian legislation and court rulings discriminated against them because of their sexual orientation.²³⁵ They claimed that this infringed upon their rights as guaranteed by Articles 8, 12, and 14 of the ECHR.²³⁶ These provisions, in turn, ensure the right to marry, forbid discrimination, and safeguard private and family life. The applicants contended that the Italian government had not provided evidence for its decision to treat same–sex couples differently than heterosexual couples.²³⁷

bb. Judgment of the European Court of Human Rights

By taking into account more recent political and legal changes, the European Court of Human Rights broadened the scope of its investigation beyond Italian domestic law. It looked at pertinent documents from the Council of Europe, which urged its member states to grant same–sex couples legal recognition.²³⁸ The European Court of Human Rights also examined the European Union’s Charter of Fundamental Rights, which safeguards the freedom to get married and start a family without facing prejudice because of one’s sexual orientation.²³⁹ Notably, the European Court of Human Rights referenced the historic *Obergefell v Hodges*²⁴⁰ decision from the Supreme Court of the United States, which made same–sex marriage lawful across the country.²⁴¹ This citation emphasised the expanding global movement in favour of legalising same–sex partnerships.

The European Court of Human Rights established that stable same–sex couples fall under the definition of ‘family life’ under Article 8 of the ECHR, building on its earlier findings in instances like *Schalk and Kopf* and *Vallianatos*.²⁴² Though cohabitation agreements were common, the Court acknowledged that they did not offer same–sex couples enough protection.²⁴³ In addition, the Court noted – using data and

²³⁵ Ibid 110.

²³⁶ Ibid 3.

²³⁷ Ibid 110.

²³⁸ Ibid 166.

²³⁹ Ibid 62.

²⁴⁰ *Obergefell v Hodges* no 14–556 (2015) (Supreme Court of the United States decision) available at <https://supreme.justia.com/cases/federal/us/576/14-556/case.pdf>.

²⁴¹ *Oliari v Italy* nos 18766/11 and 36030/11 para 65 (2015) (European Court of Human Rights decision).

²⁴² Ibid 178–9.

²⁴³ Ibid.

citing pertinent Council of Europe documents – an increasing trend in European nations towards the legal recognition of same-sex couples.²⁴⁴ The Supreme Court of the United States’ judgement in *Obergefell*, which legalised same-sex marriage across the country, was cited by the Court in support of its conclusion.²⁴⁵

The Court brought attention to a disparity that exists between same-sex couples’ everyday lives and the legal reality in Italy.²⁴⁶ These couples were developing strong, devoted connections even though same-sex arrangements, such as marriage or civil unions, were not recognised by Italian law.²⁴⁷ The Court stressed that there was a gap in legal covering because these couples did not have any legal rights.²⁴⁸ The European Court of Human Rights came to the conclusion that, given the large number of homosexual and bisexual people in Italy, the state is obliged to grant legal recognition to same-sex couples.²⁴⁹

The European Court of Human Rights explained that same-sex couples are not inherently entitled to the freedom to marry under Article 12 of the ECHR.²⁵⁰ Article 14 of the ECHR forbids discrimination, however it must be applied in tandem with another important clause.²⁵¹ Article 14 of the ECHR cannot be used to establish this right because Article 12 of the ECHR does not require same-sex marriage.²⁵²

d. *Chapin and Charpentier v France*

aa. The circumstances of the case

The case involves two male applicants, born in 1970 and 1973, who were married in May 2004 in Plassac, France.²⁵³ The civil registry services of the municipality of Bègles published the marriage banns on 25 May 2004, but the public prosecutor at the County Court in Bordeaux (*Tribunal de Grande Instance de Bordeaux*) notified the civil registrar and the applicants of his opposition to the marriage.²⁵⁴ Despite this op-

²⁴⁴ Ibid.

²⁴⁵ Ibid 65.

²⁴⁶ Ibid 173–4.

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ Ibid 189–94.

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ *Chapin and Charpentier v France* no 40183/07 para 10 (2016) (European Court of Human Rights decision).

²⁵⁴ Ibid 11.

position, the Mayor of Bègles finalised the marriage and recorded it in the civil register.²⁵⁵ On 22 June 2004, the public prosecutor filed a summons for the applicants to appear before the County Court in Bordeaux (*Tribunal de Grande Instance de Bordeaux*) to request the annulment of the marriage.²⁵⁶

The Court granted the request, finding that under French law, the difference of sex is a condition for the existence of marriage and concluded that this condition did not violate Articles 8, 12 and 14 of the ECHR.²⁵⁷ The Court noted that while the evolution of morals or the respect for the principle of equality could lead to a redefinition of marriage, this issue required political debate and intervention by the legislature.²⁵⁸ Therefore, the Court annulled the marriage of the applicants and ordered the judgment to be noted in the margin of their birth certificates and marriage certificate.²⁵⁹

By decision of 19 April 2005, the Bordeaux Court of Appeal upheld the judgment, confirming that under French law, the difference of sex is a condition for the existence of marriage.²⁶⁰ The Court then examined this condition in light of Articles 8, 12 and 14 of the ECHR and noted that French legislation allowed ‘many possibilities of living as a couple, with or without children’, while guaranteeing equal protection for all.²⁶¹ The Court of Appeal added that the specificity, not discrimination, arises from the fact that only couples of different sexes are potentially fertile, and that the legislator has taken this biological reality into account, determining its forms by incorporating the couple and its foreseeable consequence, the children, into a specific institution called ‘marriage’.²⁶²

The applicants filed for cassation, relying on Articles 8, 12, and 14 of the ECHR and invoked the relevant case law of the Court.²⁶³ By judgment of 13 March 2007, the Court of Cassation rejected the appeal, stating that ‘according to French law, marriage is the union of a man and a woman’ and that this principle was not contradicted by any provision of the European Convention on Human Rights or the Charter

²⁵⁵ Ibid 13.

²⁵⁶ Ibid 14.

²⁵⁷ Ibid 15.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

²⁶⁰ Ibid 16.

²⁶¹ Ibid.

²⁶² Ibid 17.

²⁶³ Ibid 19.

of Fundamental Rights of the European Union, whose binding effect was not recognised in France.²⁶⁴

bb. Judgment of the European Court of Human Rights

(a) Article 12 of the ECHR in conjunction with Article 14 of the ECHR

In *Schalk and Kopf*, the Court acknowledged that Article 12 of the ECHR applied to the applicants' challenge, relying inter alia on Article 9 of the EU Charter.²⁶⁵ In this instance, the Court came to the same result.

The Court concluded in *Schalk and Kopf* that although the institution of marriage had changed significantly after the Convention's ratification, there was no European agreement to allow same-sex marriage.²⁶⁶ The applicant's case was found to fall under Article 12 of the ECHR, but the decision whether or not to allow same-sex marriage was left to the national laws of the contracting states.²⁶⁷ The Court came to the conclusion that the respondent government was not required by Article 12 of the ECHR to allow same-sex marriages. The Court restated its findings in *Oliari and Hämäläinen*.²⁶⁸ As little time had elapsed since then, the Court saw no reason not to reach the same conclusion in the present case.²⁶⁹

The Court further stated that the applicants were free to get married because same-sex couples were now able to marry in France thanks to the Law of 17 May 2013.²⁷⁰ Therefore, there had been no breach of Article 12 of the ECHR in conjunction with Article 14 of the ECHR.²⁷¹

(b) Article 8 of the ECHR in conjunction with Article 14 of the ECHR

The Court reaffirmed that the member states had considerable leeway (the 'margin of appreciation') about the precise status granted by alternate modes of legal recognition and that they were still allowed to restrict marriage to opposite-sex couples under Article 14 of the ECHR in conjunction with Article 8 of the ECHR.²⁷² Article 515-1 of the French Civil Code, which granted the civil partners a range of rights and duties

²⁶⁴ Ibid 20.

²⁶⁵ Ibid 31.

²⁶⁶ Ibid 36.

²⁶⁷ Ibid.

²⁶⁸ Ibid 37.

²⁶⁹ Ibid 39.

²⁷⁰ Ibid.

²⁷¹ Ibid 40.

²⁷² Ibid 48.

with regard to tax, property, and social protection, gave the applicants the opportunity to enter into a civil partnership ('PACS') at the pertinent time.²⁷³

The current circumstance could be distinguished from the cases of *Oliari*, where Italian law did not grant same-sex couples any kind of legal recognition, and *Vallianatos*, where Greek law restricted civil unions to opposite-sex couples. The Court restated that it did not perceive any indication that the respondent state had gone beyond its margin of appreciation and that it was not obligated to render a comprehensive decision on the distinctions between marriage and the PACS, which typically matched the pattern seen in other member states.²⁷⁴

The Court also stated that the applicants were free to be married since same-sex couples were now able to marry in France according to the Law of 17 May 2013.²⁷⁵ Consequently, there had been no breach of Article 8 of the ECHR in conjunction with Article 14 of the ECHR.²⁷⁶

e. *Fedotova v Russia*

aa. The circumstances of the case

The case revolves around six applicants who formed three same-sex couples and submitted notices of marriage to their local register office departments.²⁷⁷ The first couple, Ms I Fedotova and Ms I Shipitko, was rejected by the Tverskoy Department of the Register Office in Moscow on 12 May 2009, while the other two couples were rejected by the Fourth Department of the Register Office in St Petersburg on 28 June 2013.²⁷⁸ The authorities referenced Article 1 of the Russian Family Code, which defines marriage as a 'voluntary marital union between a man and a woman'.²⁷⁹

These rulings were contested by the applicants in domestic courts. In the Tverskoy District Court of Moscow, Ms I Fedotova and Ms I Shipitko challenged the denial of their marriage notice, claiming that it was in compliance with the Russian Family Code and that the rejection infringed upon their rights under the Russian Constitution and Articles 8 and 12 of the ECHR.²⁸⁰ The Tverskoy District Court, however, rejected

²⁷³ Ibid 25.

²⁷⁴ Ibid 51.

²⁷⁵ Ibid 39.

²⁷⁶ Ibid 52.

²⁷⁷ *Fedotova v Russia* nos 40792/10, 30538/14 and 43439/14 para 1 (2023) (European Court of Human Rights decision).

²⁷⁸ Ibid 24.

²⁷⁹ Ibid 25.

²⁸⁰ Ibid 27–8.

their application, concluding that it did not meet the requirements of the Russian Family Code since the marriage did not include a male, necessitating a ‘voluntary union between a man and a woman’.²⁸¹ The Court pointed out that the Russian Constitution and international law did not require the government to encourage or facilitate same-sex partnerships.²⁸²

The applicants filed an appeal, claiming that marriage between two people of the same sex was not prohibited under the Russian Family Code.²⁸³ They noted that same-sex couples were not included among the barriers to marriage in Article 14 of the Russian Family Code.²⁸⁴ The Moscow City Court supported the District Court’s rationale and affirmed the appealed judgement on 21 January 2010.²⁸⁵ It would be incorrect to interpret the lack of a clear prohibition on same-sex marriage as official approval of such unions.²⁸⁶

In the Gryazi Town Court (Lipetsk Region), Mr D Chunosov and Mr Y Yevtushenko contested the denial of their marriage notice,²⁸⁷ claiming that the European Convention on Human Rights and other international agreements forbade discrimination in any way, including on the basis of sexual orientation, and that the Russian Family Code did not limit same-sex couples’ ability to be married.²⁸⁸ The applicants relied on, *inter alia*, Articles 8, 12 and 14 of the ECHR.²⁸⁹

The Gryazi Town Court ruled on 2 August 2013, that the Register Office’s reluctance to review the marriage notice on its merits was illegal since, according to Russian legislation, all marriage notices must undergo this kind of review.²⁹⁰ Nonetheless, the Town Court referenced the ruling of the Constitutional Court in the Mr E Murzin case, which determined that same-sex couples were not granted the right to marry under the Russian Constitution or laws.²⁹¹ The applicants filed an appeal against that ruling, claiming that same-sex marriage was not illegal under the Russian Family

²⁸¹ Ibid 29.

²⁸² Ibid.

²⁸³ Ibid 30.

²⁸⁴ Ibid.

²⁸⁵ Ibid 31.

²⁸⁶ Ibid.

²⁸⁷ Ibid 32.

²⁸⁸ Ibid 33.

²⁸⁹ Ibid.

²⁹⁰ Ibid 34.

²⁹¹ Ibid.

Code and that marriage in Russia was not defined as a union between two people of different sexes.²⁹²

The Lipetsk Regional Court rejected the petitioners' appeal on 7 October 2013, claiming that their arguments were founded on a misinterpretation of national customs and family law.²⁹³ The applicants were denied permission to file a cassation appeal by the Lipetsk Regional Court on 12 March 2014.²⁹⁴

Citing Articles 8, 12, and 14 of the ECHR, Ms Shaykhrznova and Ms Yakovleva also appealed the Gryazi Town Court's decision to reject their marriage notice.²⁹⁵ The Town Court found against them, stating the Register Office had lawfully rejected the notice.²⁹⁶ Their appeals were denied by the Lipetsk Regional Court, which stated that their arguments violated national customs and were founded on a faulty understanding of family law.²⁹⁷

bb. Judgment of the European Court of Human Rights

(a) Violation of Article 8 of the ECHR

In the case, same-sex couples in Russia contend that their right to respect for their private and family lives under Article 8 of the ECHR is violated by the absence of legal recognition.²⁹⁸ The Russian government contends that there is no requirement to recognise same-sex partnerships and that this matter is covered by Article 12 of the ECHR, which deals with the right to marry.²⁹⁹ The Court found a violation of Article 8 of the ECHR,³⁰⁰ arguing that Russia's lack of legal recognition created a conflict between the reality of the applicants' relationships and the law's failure to protect them.³⁰¹

The petitioners contend that Russia has a positive duty to grant legal recognition, even if it is not through marriage, and that Article 8 of the ECHR covers both

²⁹² Ibid 35.

²⁹³ Ibid 36.

²⁹⁴ Ibid 37.

²⁹⁵ Ibid 38.

²⁹⁶ Ibid 39.

²⁹⁷ Ibid 40.

²⁹⁸ Ibid 103.

²⁹⁹ Ibid 102.

³⁰⁰ Ibid 225.

³⁰¹ Ibid 222.

‘private life’ and ‘family life’ in the context of same–sex relationships.³⁰² They propose alternative forms like civil partnerships or civil unions,³⁰³ but the Russian government argues that such recognition would undermine traditional family values and that the public opinion in Russia is not ready for such a change.³⁰⁴

The applicants’ stance is supported by third–party interveners, such as the Council of Europe Commissioner for Human Rights, several non-governmental organisations, and international organisations, who contend that legal recognition is crucial to guaranteeing same–sex couples’ equal rights and protection.³⁰⁵ They highlight the necessity for states to create sufficient legal frameworks and the growing international agreement on this matter.³⁰⁶

The case calls into question how the European Convention on Human Rights should be interpreted, how to strike a balance between social values and individual rights, and how the European Court of Human Rights should influence European legal norms. Although the Court recognises that member states have some latitude in deciding the precise type of legal recognition and the scope of protection that same–sex couples should receive, the protection must be sufficient and meet the fundamental requirements of same–sex couples in committed partnerships.³⁰⁷

(b) Violation of Article 14 of the ECHR in conjunction with Article 8 of the ECHR

The applicants argued that it was discrimination on the basis of sexual orientation since they were unable to get legal acknowledgement of their relationships through a method other than marriage.³⁰⁸ Together with Article 8 of the ECHR, they invoked Article 14 of the ECHR as well.³⁰⁹ While the Court determined that Article 8 of the ECHR had been violated, it deemed it unnecessary to investigate whether Article 14 of the ECHR had also been violated.³¹⁰ The applicants claimed that because they were unable to be married, they were subjected to discrimination based on their sexual orientation, which violated Article 14 of the ECHR in conjunction with Article 8 of the ECHR.³¹¹ Since

³⁰² Ibid 224.

³⁰³ Ibid 103.

³⁰⁴ Ibid 124, 205–6.

³⁰⁵ Ibid 119–39.

³⁰⁶ Ibid.

³⁰⁷ Ibid 101, 105, 183.

³⁰⁸ Ibid 226.

³⁰⁹ Ibid.

³¹⁰ Ibid 230.

³¹¹ Ibid.

they had the same rights as unmarried different–sex couples and marriage was the only way for them to receive legal recognition under Russian law, the Russian government said that the applicants’ complaints of discrimination based on their sexual orientation were incorrect.³¹²

f. *Przybyszewska v Poland*

aa. The circumstances of the case

Ten Polish nationals who were born between 1963 and 1991 are the applicants.³¹³ They reside in the Polish cities of Łódź, Cracow, and Warsaw and comprise five same–sex couples in committed partnerships.³¹⁴

The couples individually made the decision to be married a few years ago and went to their local civil register offices to complete the required procedures because marriage is the only option to formally establish a relationship in Poland.³¹⁵ Since marriage is only permitted between a man and a woman in Poland, the authorities rejected their dossiers.³¹⁶

Following the applicants’ appeals to the Courts challenging the decisions made by the registry offices and the justifications provided, the relevant district and regional courts upheld the decisions, specifically citing Article 1 of the Polish Family and Custody Code and Article 18 of the Polish Constitution.³¹⁷ The prospect of marriage between two people of the same sex was not covered by those regulations.³¹⁸

In 2017 and 2018, all of the applicants filed constitutional lawsuits, arguing that the Polish Family and Custody Code’s provisions violated the Polish Constitution.³¹⁹ 8 petitioners, claiming that M Muszyński, a judge on the Constitutional Court, had been wrongfully elected to the position, asked to be removed from the panel considering their cases on a number of occasions in 2018.³²⁰ The Constitutional Court declined to exclude him from their lawsuit in October 2018.³²¹

³¹² Ibid 229.

³¹³ *Przybyszewska v Poland* nos 11454/17 and 9 others Appendix (2024) (European Court of Human Rights decision).

³¹⁴ Ibid para 2.

³¹⁵ Ibid 4.

³¹⁶ Ibid.

³¹⁷ Ibid 6.

³¹⁸ Ibid.

³¹⁹ Ibid 9–11.

³²⁰ Ibid 10.

³²¹ Ibid 11.

On 15 December 2021, the Constitutional Court rejected the constitutional objections filed by two applicants, stating that the prohibition against same–sex marriage should be viewed as a legislative omission, the investigation of which was outside its purview.³²² The remaining eight applicants’ constitutional objections have not yet been looked upon.³²³

bb. Judgment of the European Court of Human Rights

The Court restated the general principles concerning member states’ duties in cases similar to the present one, declaring that in order for same–sex couples to receive proper recognition and protection for their relationship, member states have to establish a legislative framework.³²⁴ Previous court rulings, such as *Oliari*, discussed material (maintenance, taxes, or inheritance) or non–material (rights and duties in terms of mutual assistance) aspects that are pertinent to any stable couple and would be advantageous to regulate within a legal framework that is accessible to same–sex couples.³²⁵

The Court noted that same–sex marriage was not at issue in this case and that while member states controlled the specific legal framework that same–sex couples could employ, they had much less control over legal recognition and protection in general.³²⁶ Ensuring that same–sex couples had sufficient protection from member states was crucial.³²⁷

The Court came to the conclusion that same–sex couples in a committed and stable relationship could not be considered to have their basic requirements of protection and recognition met by the Polish legal system.³²⁸ Fundamental facets of their shared existence, including property, maintenance, taxes, and inheritance, were outside the control of same–sex spouses.³²⁹ Furthermore, their connection was irrelevant when interacting with the administrative or judicial branches.³³⁰

The government’s arguments for not providing same–sex couples with legal recognition or protection did not significantly deviate from those cited by the Russian Federation and considered by the Court in *Fedotova*, the European Court of Human

³²² Ibid 12.

³²³ Ibid.

³²⁴ Ibid 98.

³²⁵ Ibid 99, 102.

³²⁶ Ibid 121.

³²⁷ Ibid.

³²⁸ Ibid 115.

³²⁹ Ibid 108–9.

³³⁰ Ibid.

Rights observed.³³¹ The Court also took note of the increasingly hostile and homophobic attitudes towards sexual minorities displayed by high-ranking politicians from the ruling party, including resolutions ‘counteracting LGBT ideology’ passed by some local government bodies in Poland.³³²

The Court determined that the applicants’ desire to have their individual relationships properly acknowledged and safeguarded by the law outweighed all of the government’s public-interest arguments.³³³ In light of the arguments put forward by the parties, the third-party interveners’ comments, and the Court’s case-law as clarified and consolidated in *Fedotova*, Poland had overreached itself and disregarded its obligation to guarantee that the applicants had a particular legal framework that recognised and protected their same-sex relationships.³³⁴

g. Interim conclusion

The European Court of Human Rights has heard cases over the years that contested some member states’ refusal to recognise same-sex marriage legally. The Court ruled that while member states must grant legal recognition under the European Convention on Human Rights, same-sex couples are not required to be able to marry.

The European Court of Human Rights has made several significant decisions regarding same-sex marriages. In *Schalk and Kopf*, the Court ruled that the European Convention on Human Rights does not oblige member states to legislate for or legally recognize same-sex marriages. However, it accepted same-sex relationships as a form of ‘family life’ for the first time. In *Vallianatos*, the Court held that the exclusion of same-sex couples from registering a civil union violated the Convention. In *Oliari*, the Court established a positive obligation for member states to provide legal recognition for same-sex couples. This decision set a precedent for future cases regarding states that do not recognize same-sex couples’ right to family life. *Chapin and Charpentier* largely confirmed *Schalk and Kopf*, holding that denying a same-sex couple access to marriage does not violate the Convention. In *Fedotova*, member states are obliged to recognize same-sex unions or civil unions. In *Przybyszewska*, the Court

³³¹ Ibid 116.

³³² Ibid 84.

³³³ Ibid 122.

³³⁴ Ibid 123.

ruled that by failing to legalize same–sex unions, Poland had violated the right to respect for private and family life.

IV. IMPACT ON DOMESTIC LEGISLATION

‘The High Contracting Parties undertake to abide by the final judgement of the Court in any case to which they are parties’ states Article 46(1) of the ECHR. According to *Ilgar Mammadov v Azerbaijan*³³⁵ a contracting state must implement ‘individual and/or, if appropriate, general measures in its domestic legal order to put an end to the violation found by the Court’.³³⁶ This would entail that same–sex couples must be granted legal status by contracting states that have violated the European Convention on Human Rights by failing to do this. For example, the Greek legislature extended the civil unions system to same–sex couples shortly after *Vallianatos*.³³⁷ The Italian lawmaker took a similar action against *Oliari*. In Italy, same–sex couples could form civil partnerships less than a year later.³³⁸ Similar legislation is also being proposed by several of the contracting states that have lately been impacted by European Court of Human Rights rulings.

The willingness of the national governments to embrace such reforms will determine whether the European Court of Human Rights rulings may have aided in the advancement of such laws, finally granting same–sex couples legal status. The judgements of the European Court of Human Rights are being disregarded in countries such as Poland. There, an ultra–conservative Polish party won the parliamentary elections in September 2023.³³⁹ Poland would only have been able to reimburse the parties for the damages awarded by the European Court of Human Rights.³⁴⁰ The Prime Minister of Romania has stated that legalising same–sex partnerships is not a top priority for

³³⁵ *Ilgar Mammadov v Azerbaijan* no 15172/13 (2019) (European Court of Human Rights decision).

³³⁶ *Ibid* para 150.

³³⁷ Law 4356/2015 (Civil Partnership, Exercise of Rights, Criminal and Other Provisions) available at https://www.kodiko.gr/nomothesia/document/140974/nomos-4356-2015#google_vignette.

³³⁸ Law No 76 of 20 May 2016 available at https://www.gazzettaufficiale.it/atto/serie_generale/carica-DettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2016-07-28&atto.codiceRedazionale=16G00156&elenco30giorni=false.

³³⁹ Stefan Garsztecki ‘Analyse: Polen wählt Europa: der schwierige Neuanfang nach dem Wahlsieg der Opposition 2023’ 24 October 2023 available at <https://www.bpb.de/themen/europa/polen-analysen/nr-318/542124/analyse-polen-waehlt-europa-der-schwierige-neuanfang-nach-dem-wahlsieg-der-opposition-2023/>, accessed on 13 January 2025.

³⁴⁰ Articles 34, 41 of the ECHR.

the administration,³⁴¹ therefore the European Court of Human Rights ruling runs the danger of being ignored there as well. Similar circumstances exist in Bulgaria, where no action to provide same–sex couples legal status is anticipated in response to the *Koilova and Babulkova v Bulgaria*³⁴² ruling.³⁴³ Given that Russia has been excluded from the Council of Europe and that the European Court of Human Rights has postponed the review of any cases against Russia,³⁴⁴ it is extremely unlikely, if not impossible, that *Fedotova* will have any impact in Russia.

The main reason why certain contracting nations have not taken action to legalise same–sex relationships is because the European Court of Human Rights lacks an efficient system to compel nations to carry out its rulings.³⁴⁵ Even if the European Court of Human Rights does not have the means to effectively implement its judgments, it remains essential for same–sex couples in their quest for national legal recognition.

Therefore, proposals to legalise same–sex marriage and same–sex civil unions have generated debate across Europe. Andorra, Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Liechtenstein, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain, Sweden, and the United Kingdom offer the possibility of same–sex marriages. Same–sex marriages are also permitted in Norway,

³⁴¹ Luiza Ilie and Lincoln Feast ‘Romania is not ready to uphold same-sex couples’ rights – PM’ *Reuters* 24 November 2023 available at <https://www.reuters.com/world/europe/romania-is-not-ready-uphold-same-sex-couples-rights-pm-2023-11-23/>, accessed on 12 January 2025.

³⁴² *Koilova and Babulkova v Bulgaria* no 40209/20 (2023) (European Court of Human Rights decision).

³⁴³ Article 46 of the Constitution of the Republic of Bulgaria of 1991 with amendments through 2015 English version available at https://www.constituteproject.org/constitution/Bulgaria_2015.

³⁴⁴ Committee of Ministers ‘Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe’ 16 March 2022 available at <https://rm.coe.int/0900001680a5ed96>, accessed on 25 January 2025.

³⁴⁵ Carlos Santaló Goris ‘The European Court of Human Rights: Advancing Legal Recognition of Same-Sex Couples across Europe?’ *EIPA* 4 July 2024 available at <https://www.eipa.eu/de/blog-de/the-european-court-of-human-rights-advancing-legal-recognition-of-same-sex-couples-across-europe/>, accessed on 2 February 2025.

Switzerland and Iceland.³⁴⁶ In 2025, Liechtenstein will become the 22nd nation to allow same-sex marriage.³⁴⁷ Ten more European nations – Croatia³⁴⁸, Cyprus³⁴⁹, the Czech Republic³⁵⁰, Hungary³⁵¹, Italy³⁵², Latvia³⁵³, Monaco³⁵⁴, Montenegro³⁵⁵, and San Marino³⁵⁶ – lawfully accept civil unions of some kind.

³⁴⁶ Your Europe ‘Marriage’ 29 October 2024 available at https://europa.eu/youreurope/citizens/family/couple/marriage/index_en.htm, accessed on 9 January 2025.

³⁴⁷ POLITICO ‘Liechtenstein legalizes same-sex marriage in near-unanimous vote’ 17 May 2024 available at <https://www.politico.eu/article/liechtenstein-legalizes-same-sex-marriage-in-near-unanimous-vote/>, accessed on 23 December 2024.

³⁴⁸ Same Sex Life Partnership Law of 2014 available at https://www.zakon.hr/z/732/Zakon-o-zivotnom-partnerstvu-osoba-istog-spola#google_vignette.

³⁴⁹ Ministry of Interior of the Republic of Cyprus ‘Political Cohabitation Agreement – Registered Partnerships’ available at <https://www.gov.cy/moi/en/political-cohabitation-agreement-registered-partnerships/>, accessed on 9 January 2025; Civil Union Law of 2015 (No 184(I)/2015) English version, available at https://www.visitcyprus.com/wp-content/uploads/files/weddings/2015_1_184_EN_FINAL.pdf.

³⁵⁰ Ministry of Justice of the Czech Republic ‘Establishment of a registered partnership’ 5 November 2020 available at <https://portal.gov.cz/en/informace/establishment-of-a-registered-partnership-INF-83>, accessed on 9 January 2025.

³⁵¹ Act XXIX of 2009 on Registered Partnership, on the Amendment of Certain Laws Related Thereto and Necessary to Facilitate the Certification of Partnership available at <https://net.jogtar.hu/jogszabaly?docid=A0900029.TV>.

³⁵² Ministry of Foreign Affairs and International Cooperation of the Italian Republic ‘Civil Partnerships’ undated available at <https://www.esteri.it/en/servizi-consolari-e-visti/italiani-all-estero/stato-civile/unioni-civili/>, accessed on 9 January 2025.

³⁵³ The Baltic Times ‘Court recognizes another same-sex couple as legitimate family’ 7 August 2022 available at https://www.baltictimes.com/court_recognizes_another_same-sex_couple_as_legitimate_family/, accessed on 9 January 2025.

³⁵⁴ Camille Esteve ‘Getting Married in Monaco’ *Monaco Tribune Online* 27 September 2023 available at <https://www.monaco-tribune.com/en/2023/09/getting-married-in-monaco/>, accessed on 9 January 2025.

³⁵⁵ Associated Press (AP) ‘Conservative Montenegro registers 1st same-sex partnership’ 25 July 2021 available at <https://apnews.com/article/government-and-politics-europe-montenegro-756e44d1b649f2282c2c7f0ee488f2b7>, accessed on 9 January 2025.

³⁵⁶ Luca Santocchia ‘San Marino approves law on civil unions: “More streamlined than Cirinnà”’ *Euronews* undated available at <https://it.euronews.com/2018/11/16/san-marino-approva-legge-sulle-unioni-civili-piu-snella-rispetto-alla-cirinna>, accessed on 9 January 2025.

In some European countries, same–sex partnerships are not recognised. The constitutions of Armenia³⁵⁷, Belarus³⁵⁸, Bulgaria³⁵⁹, Croatia³⁶⁰, Georgia³⁶¹, Hungary³⁶², Latvia³⁶³, Lithuania³⁶⁴, Moldova³⁶⁵, Montenegro³⁶⁶, Poland³⁶⁷, Russia³⁶⁸, Serbia³⁶⁹, Slovakia³⁷⁰, and Ukraine³⁷¹ all define marriage only as a union between a man and a woman. However, among these, same-sex civil unions are permitted in Croatia, Hungary, Latvia, and Montenegro.

1. Domestic response of Germany

The introduction of marriage for same–sex couples led to a revolution in legal practice in Germany. The courts must, therefore, reinterpret the existing laws with regard to the equality of all couples. This leads to numerous legal disputes over issues such as adoption, parental care, maintenance and division of assets. Case law is constantly changing, creating a contemporary legal system that covers all aspects.

³⁵⁷ Article 35 of the Constitution of the Republic of Armenia of 1995 with amendments through 2015 English version available at https://www.constituteproject.org/constitution/Armenia_2015.

³⁵⁸ Article 32 of the Constitution of the Republic of Belarus of 1994 with amendments through 2004 English version available at https://www.constituteproject.org/constitution/Belarus_2004.

³⁵⁹ Article 46 of the Constitution of Bulgaria of 1991 with amendments through 2015 English version available at https://www.constituteproject.org/constitution/Bulgaria_2015.

³⁶⁰ Article 61 of the Constitution of the Republic of Croatia of 1991 with amendments through 2013 English version available at https://www.constituteproject.org/constitution/Croatia_2013.

³⁶¹ Article 30 of the Constitution of Georgia of 1995 with amendments through 2018 English version available at https://www.constituteproject.org/constitution/Georgia_2018.

³⁶² Article L of the Constitution of Hungary of 2016 with amendments through 2016 English version available at https://www.constituteproject.org/constitution/Hungary_2016.

³⁶³ Article 110 of the Constitution of the Republic of Latvia of 1922, reinstated in 1991, with amendments through 2016 English version available at https://www.constituteproject.org/constitution/Latvia_2016.

³⁶⁴ Article 38 of the Constitution of the Republic of Lithuania of 1992 with amendments through 2019 English version available at https://www.constituteproject.org/constitution/Lithuania_2019.

³⁶⁵ Article 48 of the Constitution of the Republic of Moldova of 1994 with amendments through 2016 English version available at https://www.constituteproject.org/constitution/Moldova_2016.

³⁶⁶ Article 71 of the Constitution of Montenegro of 2007 with amendments through 2013 English version available at https://www.constituteproject.org/constitution/Montenegro_2013.

³⁶⁷ Article 18 of the Constitution of the Republic of Poland of 1997 with amendments through 2009 available at https://www.constituteproject.org/constitution/Poland_2009.

³⁶⁸ Constitution of the Russian Federation of 1993 with amendments through 2014 English version available at https://www.constituteproject.org/constitution/Russia_2014.

³⁶⁹ Article 62 of the Constitution of the Republic of Serbia of 2006 English version available at https://www.constituteproject.org/constitution/Serbia_2006.

³⁷⁰ Article 41 of the Constitution of the Slovak Republic of 1992 with amendments through 2017 English version available at https://www.constituteproject.org/constitution/Slovakia_2017.

³⁷¹ Article 51 of the Constitution of Ukraine of 1996 with amendments through 2019 available at https://www.constituteproject.org/constitution/Ukraine_2019.

a. The concept of marriage in the German Constitution

The German parliament (*Bundestag*) approved a change to the German Civil Code of 1900 (*Bürgerliches Gesetzbuch*) that permits same–sex marriage at its meeting on 30 June 2017. In a roll–call vote, 393 parliamentarians voted in favour of the bill, while 226 voted against it. The bill was approved by the *Bundesrat* on 7 July 2017. The German *Bundesrat* is a legislative body that represents the sixteen federated states of Germany at the federal level.³⁷²

b. Parliamentary procedure

Several bills to ‘open’ marriage to same–sex partners have been submitted to the German Parliament for several years. The ‘Draft bill to introduce the right to marriage for persons of the same sex’ was submitted by the parliamentary group of the democratic socialist political party in Germany (*Die Linke*) on 23 October 2013.³⁷³ The ‘Draft law to abolish the ban on marriage for same–sex couples’ was submitted on 10 June 2015 by the centre–left green political party in Germany (*Bündnis 90/Die Grünen*) and some members of this parliamentary group.³⁷⁴ The ‘Draft law to introduce the right to marriage for people of the same sex’ was finally introduced by the *Bundesrat* on 11 November 2015.³⁷⁵ The deliberations on the draft bill by the *Bundesrat*, the *Die Linke* parliamentary group and the *Bündnis 90/Die Grünen* parliamentary group were resumed by the Committee on Legal Affairs and Consumer Protection on 28 June 2017.³⁷⁶ It recommended that the German parliament adopt the *Bundesrat*’s bill and declare the parliamentary group bills finalised.³⁷⁷ On 30 June 2017, a roll–call vote

³⁷² Article 51(1) of the German Constitution.

³⁷³ *Bundestag* ‘Draft law introducing the right to marriage for persons of the same sex’ *Bundestag* printed paper 18/8 23 October 2013 available at https://www.bundestag.de/resource/blob/383126/e20021ef6056d6d9f240913ac5e47381/b_gesetzentwurf.pdf, accessed on 10 January 2025.

³⁷⁴ *Bundestag* ‘Draft law to abolish the ban on marriage for same–sex couples’ *Bundestag* printed paper 18/5098 10 June 2015 available at https://www.bundestag.de/resource/blob/383128/4d87ee496a8452cbc551f6e45ed15593/d_gesetzentwurf.pdf, accessed on 10 January 2025.

³⁷⁵ *Bundestag* ‘Draft law introducing the right to marriage for persons of the same sex’ *Bundestag* printed paper 18/6665 11 November 2015 available at <https://dserver.bundestag.de/btd/18/066/1806665.pdf>, accessed on 10 January 2025.

³⁷⁶ *Bundestag* ‘Recommendation for a resolution and report by the Committee on Legal Affairs and Consumer Protection (6th Committee)’ *Bundestag* printed paper 18/12989 28 June 2017 available at <https://dserver.bundestag.de/btd/18/129/1812989.pdf>, accessed on 10 January 2025.

³⁷⁷ *Ibid.*

was held in the plenary session of the German Parliament, with 393 votes in favour of the bill and 226 votes against, with four abstentions.³⁷⁸

Since the amendment of the law, Section 1353(1) 1 of the German Civil Code reads as follows: ‘Two people of different sexes or of the same sex enter into a marriage for life’. ‘Marriage is entered into for life’ was previously stated in Section 1353(1) 1 of the German Civil Code³⁷⁹.

c. Content of the amendment

In Germany, it was long disputed whether it was possible to introduce marriage for partners of the same sex simply by law, or whether this would require an amendment to the Constitution in accordance with Article 79(2) of the Constitution of the Federal Republic of Germany of 1949 (*Grundgesetz*). There is widespread agreement that it was so self-evident for the authors of the German Constitution that marriage within the meaning of Article 6(1) of the German Constitution only meant the union of one man and one woman, that there was not even a need for a corresponding definition.³⁸⁰

Article 6(1) of the German Constitution states: ‘The special protection of the state order shall apply to marriage and the family’. In legal terms, the revised Section 1353(1) 1 of the German Civil Code only provides a definition of marriage – in a sense a ‘clarification’, but its brief wording hardly reveals its fundamental meaning. It has therefore been emphasised several times in the public debate that Article 6(1) of the German Constitution does not contain such a definition and that the concept of marriage under the German Constitution is therefore open to persons of the same sex.³⁸¹ This assessment, which also underlies the majority decision of the German Bundestag, will be analysed below using the usual methods of interpretation.

d. The genesis of Article 6 of the German Constitution

The origins of Article 6 of the German Constitution lie in the Constitution of the Weimar Republic of 1919 (*Weimarer Reichsverfassung*).³⁸² This places marriage and the

³⁷⁸ Bundestag ‘Marriage for persons of the same sex’ 30 June 2017 available at <https://www.bundestag.de/parlament/plenum/abstimmung/abstimmung/?id=486>, accessed on 10 January 2025.

³⁷⁹ In the version valid before 1 October 2017.

³⁸⁰ Compare d. The genesis of Article 6 of the German Constitution.

³⁸¹ Jörn Ipsen ‘Ehe für alle – verfassungswidrig?’ (2017) 15 *NfWZ* 1096.

³⁸² Article 119(1) of the Weimar Constitution: ‘Marriage, as the foundation of family life and the preservation and propagation of the nation, is under the special protection of the constitution. It is based on the equal rights of the two sexes.’

family under the special protection of the state order. Article 119 of the Weimar Constitution already emphasised the importance of marriage as the basis for family life and stressed the equality of the sexes.

Marriage was described in even greater detail in the first drafts of the Constitution. It was emphasised that marriage was a life partnership between husband and wife and formed the basis for the family.³⁸³ Gender inequality between partners therefore played a key role in these early formulations.

In Article 6 of the German Constitution, the definition of marriage was shortened in its final version. The gender differences between the partners are no longer explicitly mentioned. However, it is claimed that the constitutional legislator considered this gender inequality to be a characteristic of the concept of marriage.

There are several arguments in favour of the interpretation of gender-relatedness. On the one hand, the historical context serves as an indication. The genesis of Article 6 of the German Constitution makes it clear that marriage was intended as a relationship between husband and wife. A comparison with other provisions can also be used. The social conditions of the time must also be taken into account. Homosexual acts could be punished at the time the German Constitution was established.³⁸⁴ Therefore, a marriage in which same-sex partners were married was unthinkable at the time the German constitution was created and for a long time afterwards.

e. The case law of the Federal Constitutional Court

In its established case law, the Federal Constitutional Court has confirmed the concept of marriage as defined by the constitutional legislator in the past. In its judgement of 17 July 2002, the Federal Constitutional Court defined marriage in accordance with the German Constitution as

the union of a man and a woman in a long-term partnership ... based on free will with the participation of the state, in which man and woman live together in equal partnership and are free to decide on the organisation of their cohabitation.³⁸⁵

³⁸³ Peter Häberle (ed) *Entstehungsgeschichte der Artikel des Grundgesetzes* 2 ed (2010) 93–9.

³⁸⁴ Article 175 of the German Penal Code of 1871 (*Strafgesetzbuch*) in the version valid before 10 June 1994.

³⁸⁵ BVerfGE 105, 313 (345) 35 *NJW* (2002) 2543 (Constitutional Court of Germany decision).

The Federal Constitutional Court therefore comes to the following conclusion:

The institution of registered civil partnership does not fall under this protection. The same–sex nature of the partners is the difference to marriage and at the same time forms its basis. According to Article 6(1) of the German Constitution, a registered civil partnership is not a marriage. Same–sex couples are recognised as having this right. By helping these persons to better develop their personality and reducing discrimination, the legislator takes account of Articles 2(1), 3(1) and (3) of the German Constitution.³⁸⁶

The Federal Constitutional Court subsequently had the opportunity to rule on the relationship between marriage and civil partnerships on several occasions. Article 3(1) of the German Constitution was always used as the standard. Article 3 of the German Constitution guarantees equality before the law, equal rights of the sexes and prohibits discrimination and favouritism based on certain characteristics. It is therefore an equality right.³⁸⁷ In its judgement of 7 July 2009, the Federal Constitutional Court declared the difference in survivors' pensions for public sector employees to be incompatible with Article 3(1) of the German Constitution.³⁸⁸ The unequal treatment of marriage and registered civil partnerships in the German Inheritance Tax and Gift Tax Act of 1906 (*Erbschaftsteuer– und Schenkungsteuergesetz*) was declared incompatible with Article 3(1) of the German Constitution in the judgement of 21 July 2010.³⁸⁹ According to the German Federal Salaries Act of 1957 (*Bundesbesoldungsgesetz*), the unequal treatment of married civil servants and those living in a registered civil partnership with regard to family allowances was declared incompatible with Article 3(1) of the German Constitution, as stated in the judgement of 19 July 2012.³⁹⁰ The ruling of 19 February 2013 declared the ban on successive adoption by a civil partner pursuant to Section 1742 of the German Civil Code in conjunction with Section 9(7) of the German Civil Partnership Act of 2001 (*Lebenspartnerschaftsgesetz*) to be incompatible

³⁸⁶ BVerfGE 105, 313 (345) 35 *NJW* (2002) 2543 (Constitutional Court of Germany decision).

³⁸⁷ Hans D Jarass & Bodo Pieroth (eds) *Grundgesetz für die Bundesrepublik Deutschland* 18 ed (2024) ch Article 3 margin nos 1–3.

³⁸⁸ BVerfGE 124, 199 20 *NJW* 1439 (2010) (Constitutional Court of Germany decision).

³⁸⁹ BVerfGE 126, 400 38 *NJW* 2783 (2010) (Constitutional Court of Germany decision).

³⁹⁰ BVerfGE 131, 239 20 *NVwZ* 1304 (2010) (Constitutional Court of Germany decision).

with Article 3(1) and Article 6(1) of the German Constitution, and the unequal treatment of married couples and registered civil partners with regard to spousal splitting was also declared to be incompatible with the general principle of equality by the ruling of the Federal Constitutional Court of 7 May 2013.³⁹¹

f. Commentary literature

The comments on Article 6(1) of the German Constitution are also based on the case law of the Federal Constitutional Court on the concept of marriage.³⁹² Marriage was also regarded as self-evident in the constitutional law handbooks, as it unites persons of different sexes.³⁹³ Nevertheless, Article 6(1) of the German Constitution does not contain a definition of marriage and therefore does not preclude the opening up of marriage in accordance with Section 1353(1) of the German Civil Code.

g. Changes in the German Constitution or in opinion?

According to constitutional law, the German Constitution can be amended, as the political and social conditions that existed when it was adopted do not continue to exist without restriction.³⁹⁴ However, the requirements for amendment are high,³⁹⁵ but not insurmountable, which is why the German Constitution, in contrast to the American Constitution, for example, belongs to the type of flexible constitution.³⁹⁶ The fact that the German Constitution is amended on average almost every year shows that the legislator amending the Constitution has always taken social changes into account by amending the Constitution.³⁹⁷ A constitution is supposed to provide security and stability. It is like a stable wall that protects citizens. If this wall is constantly rebuilt just because people's opinions change, it would no longer be stable. That is why there are clear rules on how to change a constitution. Changes can only be made if these rules are adhered to.

On the day of the vote, the German Parliament consisted of 630 members. It is undisputed that social views have changed, as 393 members of the parliament voted in

³⁹¹ BVerfGE 133, 377 24 *DSiR* 1228 (2013) (Constitutional Court of Germany decision).

³⁹² Hans D Jarass & Bodo Pieroth (eds) *Grundgesetz für die Bundesrepublik Deutschland Kommentar* 18 ed (2024) ch Article 6 margin no 4.

³⁹³ Detlef Merten & Hans-Jürgen Papier (eds) *Handbuch der Grundrechte Vol. IV* (2011) ch Section 108 margin no 9.

³⁹⁴ Horst Dreier (ed) *Grundgesetz Kommentar Vol. II* 4 ed (2023) ch Article 79(1) margin nos 38 ff.

³⁹⁵ Article 79(1) of the German Constitution.

³⁹⁶ Jörn Ipsen 'Ehe für alle – verfassungswidrig?' (2017) 15 *NVwZ* 1098.

³⁹⁷ *Ibid.*

favour of the law and voted as representatives of the entire people.³⁹⁸ However, the majority of two-thirds of the statutory number of members required for constitutional amendments has not yet been reached by those in favour of the law.³⁹⁹ Therefore, the need for a constitutional amendment would be undermined if Article 6(1) of German Constitution were to contain a constitutionally defined concept of marriage, as argued here.

Nonetheless, there are enough signs of a fundamental shift in the conventional perspective of marriage to allow for the constitutional introduction of the right to marry for people of the same sex, given the legislator's organisational discretion. If either new facts not covered by the legislative provision arise or if facts have changed as a result of the general development, the Federal Constitutional Court's case law allows for a change in meaning.⁴⁰⁰ Therefore, without altering the wording of a constitutional requirement, its meaning may change.⁴⁰¹ However, the constitutional norm's meaning and intent set the limit, allowing for a significant shift in values in the instance of Article 6(1) of the German Constitution.⁴⁰²

h. The 'essence' of marriage

The legal and social changes over the last several decades provide an answer to the issue of whether marriage has evolved over time. The difference between the sexes played a decisive role in the traditional understanding of marriage as a union between a man and a woman. This concept was also codified in German legislation, namely in the German Constitution, which protected marriage as a unique union between a man and a woman. The wording of Article 119(1) of the Weimar Constitution was quoted at the beginning, which places marriage as the 'basis of family life and the preservation and propagation of the nation' under the special protection of the Weimar Constitution. Article 6(1) of the German Constitution could therefore have the same function as Article 119(1) of the Weimar Constitution, so that marriage is also regarded here as the precursor to the family. However, the wording in Article 6(1) of the German Con-

³⁹⁸ Article 38(1) 2 of the German Constitution.

³⁹⁹ Article 79(2) of the German Constitution.

⁴⁰⁰ BVerfGE 2, 380, 401 31 *NJW* 1137 (1953) (Constitutional Court of Germany decision).

⁴⁰¹ *Bundestag* 'Draft law introducing the right to marriage for persons of the same sex' *Bundestag* printed paper 18/6665 11 November 2015 7 available at <https://dserver.bundestag.de/btd/18/066/1806665.pdf>, accessed on 10 January 2025.

⁴⁰² *Ibid.*

stitution is kept as simple and clear as possible. By purposefully avoiding pathos, Article 6(1) of the German Constitution contributes to the Constitution's status as a solid and enduring cornerstone of the German legal system. The text is simple and explicit, emphasising the value of marriage and family without promoting any particular values. But there has also been a discernible shift in how marriage is understood since the 1990s, especially as a result of Federal Constitutional Court case law.

The institution of marriage is protected by Article 6(1) of the German Constitution. The legislator must ensure that the fundamental structural principles of this institution are preserved.⁴⁰³ Based on historical forms of life and the freedom character of the German Constitution, marriage today is defined as a community of support and responsibility that is not necessarily linked to starting a family.⁴⁰⁴ Therefore, the protection of the German Constitution also includes childless marriage.⁴⁰⁵

Traditionally, marriage was primarily understood as a union between a man and a woman, with the gender difference between the partners being considered an essential characteristic. In a ruling in 1993, the Federal Constitutional Court found that there was insufficient evidence of a fundamental change in the understanding of marriage with regard to this gender difference.⁴⁰⁶ The legal recognition of same-sex partnerships in Germany was unthinkable until the criminal ban on homosexual acts was lifted in 1969.⁴⁰⁷

However, as homosexuality gradually became less stigmatised, there was a change in legal practice. In 1993, the Federal Constitutional Court declared that opening up marriage to same-sex couples was not mandatory from a constitutional perspective, but was possible in principle if the legislature decided to do so.⁴⁰⁸ Accordingly, a change in the traditional understanding of marriage was possible.

The establishment of registered civil partnerships, which in many jurisdictions gave nearly the same rights and responsibilities as marriage until same-sex marriage was legalised, was a pivotal moment in this transformation.⁴⁰⁹ The fact that both types

⁴⁰³ Michael Sachs (ed) *Grundgesetz Kommentar* 10 ed (2024) ch Article 6 margin no 31.

⁴⁰⁴ Harald Scholz & Norbert Kleffmann (eds) *Praxishandbuch Familienrecht* 45 ed (2024) ch A Materielles Eherecht, Eheschließungsrecht margin no 1.

⁴⁰⁵ Michael Sachs (ed) *Grundgesetz Kommentar* 10 ed (2024) ch Article 6 margin no 41.

⁴⁰⁶ *Bundestag* 'Draft law introducing the right to marriage for persons of the same sex' *Bundestag* printed paper 18/6665 11 November 2015 7 available at <https://dserver.bundestag.de/btd/18/066/1806665.pdf>, accessed on 10 January 2025.

⁴⁰⁷ *Ibid.*

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *Ibid* 7–8.

of partnerships are now referred to as ‘marriage’ indicates that society no longer distinguishes between marriage and civil partnerships.⁴¹⁰ The legal equality of civil partnerships and marriage has also been substantially achieved, as seen by several court rulings that highlight the disparity in treatment between spouses and civil partners.

Marriage has changed significantly as a result of the growing societal acceptability of same–sex relationships, which is reinforced by legal restrictions. Therefore, allowing same–sex marriage is both a legislative measure and a reaction to the societal shift that is redefining what marriage and family represent. Marriage is now viewed in Germany as an institution that is open to all couples rather than just a union between a man and a woman.

The 2009 statute revising the German Transsexuals Act of 1980 (*Transsexuellengesetz*) was another significant move, allowing transgender persons to stay married after changing their gender without needing to file for divorce.⁴¹¹ This modification demonstrates the legislator’s readiness to advance the conventional definition of marriage and allow same–sex relationships. Marriage has evolved much beyond its basic, heterosexual form, as seen by the societal shift that is backed by political and legal rulings.

The Federal Constitutional Court has acknowledged this evolution as well and highlighted the need for marriage to change to reflect the equality and autonomy guaranteed by the German Constitution.⁴¹² This is demonstrated by the increasing number of nations that have allowed same–sex marriages, such as the United States, Belgium, and Ireland.⁴¹³

In summary, societal and legal advancements have resulted in a profound shift in the essence of marriage in Germany. Marriage is now an institution that is available to all pairings in Germany, not only heterosexual couples. Legislators and the Federal Constitutional Court both recognise the growing acceptance of diverse lifestyles and the increased acknowledgement of individual rights as indicators of this shift.

⁴¹⁰ Ibid 8.

⁴¹¹ Ibid.

⁴¹² Ibid.

⁴¹³ Ibid 8–9.

2. Domestic response of Poland

Despite the Polish Constitution's clear definition of marriage as a partnership between a man and a woman, same-sex couples in Poland face complicated and changing legal and social realities. In order to comprehend the current status of marriage and partnership recognition for LGBTQ+ people in Poland, the following passage will examine the interactions between Article 18 of the Polish Constitution, court decisions, and relevant legislation.

a. The concept of marriage according to the Polish Constitution

Article 18 of the Polish Constitution states:

Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.

The courts have repeatedly ruled and confirmed that 'marriage is defined as a union exclusively of a woman and a man' under Article 18 of the Polish Constitution. The Constitutional Tribunal of Poland decided on 11 May 2005:

Indeed, the Polish Constitution defines marriage as a union between a man and a woman only. A contrario, therefore, it does not allow for same-sex unions. ... Marriage (as a union of a man and a woman) has been given a separate constitutional status in the domestic law of the Republic of Poland determined by the provision of Article 18 of the Polish Constitution. A change of this status would only be possible with the rigours of the mode of amendment of the Constitution as set out in Article 235 of that Act.⁴¹⁴

On 9 November 2010, the Constitutional Tribunal declared that the heterosexuality of marriage concept is the sole normative element that may be decoded from Article 18

⁴¹⁴ Judgment of the Constitutional Tribunal of 11 May 2005 K 18/04 6–7 (Constitutional Tribunal of Poland decision) available at <https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?sprawa=3826>.

of the Polish Constitution, according to the doctrine of constitutional law.⁴¹⁵ The Supreme Administrative Court of Poland declared on 25 October 2016 that:

Admittedly, the Act on Publicly Funded Healthcare does not clarify who is a spouse. However, this notion is sufficiently and clearly defined in the aforementioned Article 18 of the Constitution of the Republic of Poland, which refers to marriage as a union of a man and a woman. It has been emphasised in the literature that Article 18 of the Constitution establishes the principle of heterosexuality of marriage, ... which is not so much a principle of the political system, as a legal norm that prohibits the ordinary legislator to give the character of marriage to unions between persons of one sex. It is therefore clear that in the light of the Constitution and consequently in the light of Polish law, marriage can be and is exclusively a heterosexual union, and thus in a marriage the spouses cannot be persons of the same sex.⁴¹⁶

b. Statutory laws

Although cohabitation is not specifically covered by Polish law, there are clauses in a number of laws that acknowledge relationships between unmarried couples and provide certain rights and responsibilities. For instance, ‘next of kin’ is defined as ‘a spouse, an ascendant, descendant, brother or sister, relative by marriage in the same line or degree, a person being an adopted relation, as well as his spouse, and also a person actually living in co-habitation’ in Article 115(11) of the Polish Penal Code⁴¹⁷. The Polish Supreme Court declared 6-1 in February 2016 that same-sex couples are included in the definition of ‘domestic partner’ and, as a result, that a person in a same-sex relationship may decline to testify.⁴¹⁸

⁴¹⁵ Judgment of the Constitutional Tribunal of 9 November 2010 SK 10/08 16 (Constitutional Tribunal of Poland decision) available at <https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?&pokaz=dokumenty&sygnatura=SK%2010/08>.

⁴¹⁶ Judgment of the Supreme Administrative Court of Poland of 25 October 2016 II GSK 866/15 (Supreme Administrative Court of Poland decision) available at http://www.orzeczenia-nsa.pl/wyrok/ii-gsk-866-15/sprawy_ubezpiezen_zdrowotnych_ochrona_zdrowia/33055d0/6.html?q=&symbol=652&haslo=Ochrona+zdrowia&_sad=Naczelnny+Sqd+Administracyjny&skarzony=Prezes+Narodowego+Funduszu+Zdrowia&okres=2016_10.

⁴¹⁷ Polish Penal Code of 1997 (as amended) English version available at <https://ihl-databases.icrc.org/en/national-practice/penal-code-1997-amended>.

⁴¹⁸ European Commission ‘Landmark decision of the Supreme Court regarding rights of same-sex partners in criminal law’ 24 March 2016 available at <https://www.equalitylaw.eu/downloads/3773-poland-landmark-decision-of-the-supreme-court-regarding-rights-of-same-sex-partners-in-criminal-law-pdf-101-kb>, accessed on 15 January 2025.

Same-sex couples are also given limited recognition under other laws. Since 2004, the other partner's income is also taken into account when determining which partner is eligible for social benefits.⁴¹⁹ Article 6.14 of the Polish Social Aid Act on 12 March 2004, states that a family's ability to receive social benefits is based on its income per member.⁴²⁰ Therefore, people who are married, living together in a de facto union, and sharing a household are referred to as 'family' under the legislation.⁴²¹ Additionally, if a spouse is extremely ill or has an accident, a person may be deemed 'next of kin' for medical purposes under Article 3.1(2) of the Polish Patients' Rights Act of 6 November 2008.⁴²² The term 'next of kin' encompasses a 'person in a durable partnership'.⁴²³

c. Legal analysis of the domestic response in Poland

Article 18 of the Polish Constitution defines marriage as an exclusive relationship between a man and a woman. The legal arguments against the acceptance of same-sex marriage are based on this wording, which forms a cornerstone of the country's basic legislation.

In its 2005 and 2010 decisions, the Constitutional Tribunal of Poland provided a clear and succinct interpretation of Article 18 of the Polish Constitution, which prohibits same-sex unions. The Court emphasised that the Polish Constitution exclusively defines marriage as a heterosexual relationship and that any change to this definition would require a formal amendment to the Polish Constitution. The legalisation of same-sex marriage within the current constitutional framework is essentially prohibited under this viewpoint.

The Supreme Administrative Court of Poland endorsed this viewpoint as well, ruling that marriage in the Polish Constitution may only be a partnership between a man and a woman. This ruling has a substantial impact on the legal recognition of same-sex relationships, especially with regard to access to rights and benefits typically afforded to married couples.

⁴¹⁹ Dorota Pudzianowska 'Income, troubles and legal family formats in Poland' (2017) 6 available at <https://www.ined.fr/Xtradocs/lawsandfamilies/LawsAndFamilies-PL-Section2.pdf>, accessed on 15 January 2025.

⁴²⁰ Ibid.

⁴²¹ Ibid.

⁴²² Ibid 11.

⁴²³ Ibid.

This legislative framework prevents same–sex marriage from being accepted in Poland. The Polish Constitution effectively forbids the legal recognition of same–sex couples, according to the Constitutional Tribunal and the Supreme Administrative Court of Poland. This legal status limits the lives of LGBTQ+ individuals and families in Poland, which has a big social and political impact.

But it is also crucial to acknowledge how Poland’s social and political landscape is evolving. The public’s opinion of same–sex partnerships is swiftly shifting, and support for legalising same–sex couples is constantly increasing. In addition, the importance of protecting the rights of same–sex couples as minority rights has been repeatedly emphasised in the case law of the European Court of Human Rights.

Despite these legal challenges, the struggle for LGBTQ+ rights in Poland is still ongoing. In an effort to improve the present legal system and grant same–sex couples greater equality and respect, activists and civil society groups are vigorously pushing for legislative changes.

V. CHALLENGES AND LIMITATIONS

While the European Court of Human Rights has played a central role in advancing the rights of LGBTQ+ people, including through its case law on same–sex marriage and recognition, its influence on national legislation across Europe has not been without challenges and limitations. This chapter critically analyses these obstacles and examines the factors that hinder the effective implementation of the European Court of Human Rights judgments at national level, as well as the different responses of member states and the ongoing debates on the interpretation and application of the Court’s evolving standards in this area.

1. Issues of enforcement and effectiveness

As a key element in preserving democratic stability and promoting good governance, the European Convention on Human Rights has made a remarkable contribution to the defence and promotion of human rights and the rule of law⁴²⁴ throughout Europe. The main challenge is ensuring that the judgments are implemented effectively at the national level, particularly with regard to structural and systemic human rights issues.

⁴²⁴ Preamble of the ECHR.

This is made possible by the legally binding human rights legislation of the Council of Europe, the Court's case law, and the conclusions of monitoring organisations. The organization's transversal and multidisciplinary approach encompasses both targeted cooperation programs that assist domestic authorities in addressing the issues raised by the Court's judgements and other Council of Europe monitoring mechanisms, as well as standard-setting work that provides guidance in response to challenges posed to human rights in European societies.

According to Article 46(1) 3 of the ECHR, judgements of the European Court of Human Rights are binding on the contracting parties. The Council of Europe's enforcement monitoring aims to ensure that the convicted member states implement the judgements of the European Court of Human Rights. This monitoring by the organs of the Council of Europe has changed and gained in importance in recent years, as the failure to implement European Court of Human Rights judgements is increasingly seen as a threat to the authority of the Court and thus to the human rights protection system of the European Convention on Human Rights. This is also explained by the fact that there is increasing political resistance to the validity of the European Convention on Human Rights in some member states.

The implementation of judgements of the European Court of Human Rights is a significant problem and is at the centre of the debate on the effectiveness of the European Convention on Human Rights. Although the European Court of Human Rights plays an important role in safeguarding human rights in Europe, there are many barriers that hinder the implementation of its judgements.

2. The main problems in the enforcement of European Court of Human Rights judgements

A number of legal, social, and political issues contribute to the implementation of the European Court of Human Rights' rulings on same-sex marriage. The intricacy of the issues in this field is shown by a deeper look at these problem areas.

The European Court of Human Rights has not imposed a binding obligation on the member states of the European Convention on Human Rights to authorise same-sex marriages. Rather, the member states are given a generous margin of appreciation, which allows them to take their own cultural, religious and social characteristics into account. This practice therefore results in different implementation of European Court

of Human Rights' judgements in the member states. One example of this is the judgement in the case of *Schalk and Kopf*, in which the European Court of Human Rights ruled that Article 12 of the ECHR does not require same-sex marriages to be legalised. This decision has meant that many member states have made limited progress in creating rights for same-sex couples, leading to unequal treatment within member states.

The European Court of Human Rights ruling in the 2015 case of *Oliari*, which demands that same-sex couples be legally recognised, has not been consistently implemented in different nations. In some member states, only civil partnerships or registered partnerships are permitted, but these are not legally equivalent to marriage. This is a big issue because these civil partnerships or registered partnerships sometimes do not provide the same rights in important areas like adoption, family reunification, or pension benefits. In reality, same-sex couples are at a disadvantage because of this unfair treatment. Countries such as Poland, which do not formally recognise same-sex couples despite the ruling of the European Court of Human Rights, are examples of the inadequate implementation of the ruling.

The European Court of Human Rights rulings on same-sex marriage face strong political and societal opposition in several of its member states. Some governments refuse to follow these rulings because they believe they pose a danger to traditional values, particularly in nations with significant conservative or religious influences. Poland is a notable example of countries where LGBTQ+ people's rights are being significantly curtailed. Political groups in these nations are using resistance to same-sex marriage to win over conservative voters and exacerbate societal tensions. This opposition not only complicates the application of European Court of Human Rights rulings but also results in the ongoing discrimination against LGBTQ+ people.

In countries that have taken legal measures to recognise same-sex partnerships, there are often still strong social prejudices. Due to these deep-rooted beliefs, measures that appear to guarantee equality may not have the desired effect. Even when equality is guaranteed by law, some institutions or authorities often do not fully recognise these rights in reality. As a result, same-sex spouses are still at a disadvantage when it comes to exercising their rights. The significance of the judgements of the European Court of Human Rights is considerably diminished by this discrepancy between legal recognition and actual social acceptance, which means that those affected continue to be disadvantaged.

In several instances, the European Court of Human Rights uses Article 8 of the ECHR to elucidate LGBTQ+ rights problems. Although this provision upholds the right to privacy and family life, there are certain restrictions on how it can be applied to same–sex relationships. For instance, governments are allowed to establish partnership arrangements that are different from marriage and, as a result, provide less rights and protections, whereas Article 8 of the ECHR merely ensures a minimal degree of recognition. The ruling in *Fedotova*, where the European Court of Human Rights urged Russia to provide legal recognition of same–sex couples, serves as one illustration of this. Russia has failed to take any action to abide by the ruling in spite of this request. Due to the narrow application of Article 8 of the ECHR, member states still retain the ability to reject equality, meaning that LGBTQ+ people’s rights are not completely guaranteed.

The implementation of judgements may require far–reaching changes in national legal systems, which may be opposed by political and social forces. In certain nations, the national constitutions and the standards set out by the European Court of Human Rights clash. The main issue here is that constitutional revisions are sometimes only achievable through drawn–out and politically challenging processes. For instance, the constitutional courts of countries like Poland have decided that marriage is only defined by their constitutions as a union between a man and a woman. As a constitution can often only be amended by politically challenging majority decisions, these constitutional criteria make it difficult to implement the judgements of the European Court of Human Rights. As a result, legal equality for same–sex couples is still blocked in many member states.

Today, the Court issues over 1,000 judgements on several tens of thousands of complaints per year, although at the beginning of the era, complaints were rarely received.⁴²⁵ First and foremost, the European Court of Human Rights is overburdened. The entire Convention system and the previously so clearly defined task of the European Court of Human Rights have been shaken by the veritable flood of complaints since the mid–1990s.⁴²⁶ Three causes explain the explosive increase in addition to the growth in the number of member states and thus potential complainants: Firstly, a large

⁴²⁵ Bundeszentrale für politische Bildung (bpb) ‘Der Europäische Gerichtshof für Menschenrechte’ 31 October 2023 available at <https://www.bpb.de/kurz-knapp/hintergrund-aktuell/542276/der-europaeische-gerichtshof-fuer-menschenrechte/#node-content-title-2>, accessed on 10 January 2025.

⁴²⁶ Ibid.

number of repetitive cases,⁴²⁷ secondly, a multiplication of systemic problems and thus a multiplication. The latter can be attributed to the lack of implementation of judgements.

The European Court of Human Rights does not have its own enforcement body.⁴²⁸ The implementation of its judgements is primarily the responsibility of the member states of the Council of Europe.⁴²⁹ If the European Court of Human Rights establishes a violation of the Convention, it can determine a specific compensation payment.⁴³⁰ In addition, the member state in question is obliged to eradicate the consequences and make amends. At the same time, the member state must ensure that future violations of the Convention are similarly avoided. However, the exact implementation is the responsibility of the member state in question. The member state therefore has the choice of how to implement the judgement. The Ministerial Committee is responsible for monitoring.⁴³¹ The Committee of Ministers consists of representatives of the individual member states of the Council of Europe.⁴³² Monitoring the implementation of judgements is on the agenda of the Committee of Ministers four times a year.⁴³³ The effectiveness and political pressure can increase significantly if judgements are repeatedly on the agenda and discussed.⁴³⁴ The core tenets of the monitoring process, which also stem from the nature of the rulings, are constant communication and discussion.⁴³⁵ The enforcement procedure's main purpose is to help the relevant member states determine the causes of the violations noted in the ruling as well as possible corrective actions.⁴³⁶ Coercion in the true meaning of 'enforcement' is impossible.⁴³⁷

⁴²⁷ George Stafford 'The Implementation of Judgments of the European Court of Human Rights: Worse Than You Think – Part 2: The Hole in the Roof' 8 October 2019 available at <https://www.ejiltalk.org/the-implementation-of-judgments-of-the-european-court-of-human-rights-worse-than-you-think-part-2-the-hole-in-the-roof/>, accessed on 10 January 2025.

⁴²⁸ Giulia Gentile & Dari Sartori 'Interim Measures as "Weapons of Democracy" in the European Legal Space' (2023) 1 *EHRLR* 18–31.

⁴²⁹ Article 46(2) of the ECHR.

⁴³⁰ Articles 34, 41 of the ECHR.

⁴³¹ Article 46(2) of the ECHR.

⁴³² Council of Europe 'Member of the Committee of Ministers' 3 February 2025 available at <https://www.coe.int/en/web/cm/members-cm>, accessed on 6 February 2025.

⁴³³ Rapporteur Group on Human Rights 'Supervision of the execution of judgments of the European Court of Human Rights: procedure and working methods for the Committee of Ministers' Human Rights meetings' 30 March 2016 available at <https://search.coe.int/cm?i=09000016806303a9>, accessed on 6 February 2025.

⁴³⁴ *Ibid.*

⁴³⁵ *Ibid.*

⁴³⁶ *Ibid.*

⁴³⁷ *Ibid.*

Additionally, the implementation procedure might take a very long time, sometimes years. The value of the legal remedies that the impacted parties are seeking is greatly reduced by these protracted delays. In the case of *Oliari*, for example, it took years for Italy to introduce legal regulations for registered partnerships. Those who have experienced human rights breaches may become frustrated, hopeless, and helpless as a result of the protracted wait for justice.

The different capacities of member states present another significant obstacle to successful implementation. Some member states might not have the financial means to carry out the actions required by the Court's rulings. This can be especially difficult when rulings call for major changes to national laws, the creation of new oversight organisations, or the payment of substantial sums of money to victims. In a similar vein, a lack of human resources, including skilled attorneys and administrative personnel, may make it more difficult for rulings to be implemented effectively and efficiently.

In conclusion, there are several major challenges in putting the European Court of Human Rights' decisions into practice. The successful implementation of these decisions is hampered by the wide latitude granted to member states, social opposition, and the lack of strong enforcement tools. The process is further complicated by the burden on the legal system and the disparities in governmental capacities. Due to these obstacles, LGBTQ+ rights may not be treated equally throughout Europe, which may frustrate people pursuing justice for human rights abuses. Reforms are required to address these problems and increase the effectiveness of the European Court of Human Rights. This might entail bolstering enforcement mechanisms, providing additional assistance to member states, and fostering a more robust human rights culture across Europe.

3. After-effects of inadequate enforcement

The insufficient implementation of the European Court of Human Rights' rulings gravely jeopardises the integrity of the European Convention on Human Rights and the foundation of the Council of Europe. Disregarding court rulings undermines the

rule of law idea, which holds that all subjects of law, including the state itself, are subject to the law.⁴³⁸

This disrespect for the Court's rulings has grave repercussions for the people whose rights have been infringed. Even after a decision in their favour by the European Court of Human Rights, these individuals frequently continue to live in a cycle of injustice. The same issues that compelled them to seek assistance from the Court still exist, putting them at danger of human rights abuses. In addition to extending individual suffering, this sends the dismal message that the Convention and the rights it defends are not really safe.

Furthermore, when rulings from the European Court of Human Rights are not followed, it undermines public trust in the Court's and the Council of Europe's overall efficacy. When lawmakers' statements and their actual implementation diverge, people lose faith in the institutions established to safeguard their fundamental rights. This lack of trust can have far-reaching effects and threaten the basis of a just and democratic society.

In conclusion, a functional human rights framework depends on the effective implementation of the rulings of the European Court of Human Rights, which is not just a technical matter. Governments must abide by the Court's rulings in order to uphold the rule of law, safeguard individual rights, and preserve public trust in the institutions that defend those rights.

4. Measures to improve enforcement

The successful execution of the rulings of the European Court of Human Rights is essential to the restoration of a strong system of human rights protection throughout Europe. This procedure needs to be improved by reforming and reorganising many key sections.

First and foremost, the Committee of Ministers' oversight function has to be greatly enhanced. By actively monitoring compliance and giving member states greater direction, the Committee can strengthen its capacity to persuade governments of member states to uphold their commitments under the European Convention on

⁴³⁸ European Commission 'What is the rule of law?' undated available at https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/what-rule-law_en, accessed on 12 February 2025.

Human Rights. In addition to bolstering the Committee's stance, this enhanced supervision will contribute to the development of a more effective and efficient system for human rights protection.

Second, transparency is crucial in the implementation process. Information on the state of judgement enforcement that is accessible to the public can put significant pressure on member states to guarantee compliance. Civil society organisations may also actively monitor the situation and push for prompt and complete enforcement of convictions thanks to this transparency.

Furthermore, successful enforcement requires the active participation of civil society. In order to monitor the implementation process, notify the public of decisions that are still pending, and encourage their complete execution, civil society mobilisation is crucial. The participation of civil society can offer a crucial counterpoint and help to increase accountability.

Moreover, the Council of Europe need to look at the prospect of providing financial support in some circumstances when member states find it challenging to successfully execute rulings due to financial limitations. To overcome the obstacles and guarantee complete compliance, such assistance could be crucial.

Finally, in situations when member states routinely ignore rulings, it could be necessary to strengthen the present penalty mechanisms. To encourage improved adherence to the Convention and maintain the integrity of the European Convention on Human Rights system, harsher and more deterrent penalties may be more successful.

In summary, by guaranteeing that human rights are effectively upheld and respected throughout the European continent, the implementation of these measures may greatly enhance the European Court of Human Rights system.

VI. CONCLUSION

Whenever Article 8 of the ECHR or Article 12 of the ECHR are invoked in relation to same-sex relationships, the Court frequently adopts a heteronormative view of marriage; citing the historical context of the Convention's adoption, the Court asserts that same-sex couples are not entitled to marry under the European Convention on Human Rights. However, the legalisation of same-sex marriage is becoming more widespread worldwide, with the majority of these countries being in Western and Northern Europe. Since 22 of the 50 member states of the Council of Europe already permit same-sex marriage, the European Court of Human Rights has so far determined that there is no

European agreement on the subject, as it did in the recent cases of *Oliari* and *Chapin and Charpentier* on equal marriage rights. The European Court of Human Rights gives member states a margin of appreciation to decide whether to allow same-sex couples to marry or not by using this kind of consensus-based approach. Additionally, this margin is broad if the subject is a delicate moral, ethical, or religious matter, as same-sex marriage is. The research has shown that the existing consensus-based analysis of the European Court of Human Rights could be problematic for a number of reasons, including the negative treatment of minorities by the majority in several member states. The European Court of Human Rights seeks to balance safeguarding minorities, including same-sex couples, with upholding its authority and credibility in the eyes of member states that may not support the advancement of rights and the provision of legal protection for same-sex couples.

As further instances pertaining to equal marriage rights arise in the coming years, it remains to be seen what the European Court of Human Rights will do. When at least half of the member states of the Council of Europe have legalised same-sex marriage, the issue will become much more intriguing. According to the European Court of Human Rights' ruling in *Oliari*, civil unions are valuable and would provide same-sex couples a sense of legitimacy. The same applies to marriage and same-sex partnerships. The European Court of Human Rights provided a way to interpret Article 12 of the ECHR and the right to marry and start a family as allowing same-sex marriage in the future by stating in *Schalk and Kopf* that it could be interpreted to allow marriage between people of the same sex. The European Court of Human Rights can affect how European consensus is interpreted if it so chooses, and it may also have an impact on state practice through its case law. The Court must now let future same-sex applicants to take advantage of this chance and eventually enjoy full equality in marriage rights, after providing a limited one in *Schalk and Kopf*.

According to *Tyrer v the United Kingdom*⁴³⁹ the European Court of Human Rights described the European Convention on Human Rights as a 'living instrument' that 'must be interpreted in the light of present-day conditions' in 1978.⁴⁴⁰ One excellent example of how the European Convention on Human Rights is viewed as a 'living instrument' is the European Court of Human Rights' stance on same-sex couples. The

⁴³⁹ *Tyrer v the United Kingdom* no 5856/72 (1978) (European Court of Human Rights decision).

⁴⁴⁰ *Ibid* para 32.

European Court of Human Rights' use of this phrase in *Fedotova* was not an accident.⁴⁴¹

In less than half a century, same-sex couples have risen from social exclusion to a position where they are legally treated on par with opposite-sex couples in many European nations. The European Court of Human Rights has kept pace with these social shifts, but it has also taken into account the varying opinions and stances held by its contracting states. For this reason, a judgement like *Fedotova* might not have a major impact in countries such as Germany, Spain or the Netherlands, where same-sex marriage has been legal for more than 20 years in some cases. However, *Fedotova* may not agree with the majority's stance on homosexuality in nations like Poland.

The European Court of Human Rights is therefore in a challenging situation with regard to the recognition of same-sex couples: Its rulings may not be sufficient for certain nations, while they may seem unrealistic to others. However, there is still room for improvement given the European Court of Human Rights' changing stance on same-sex couples. It is possible that the European Court of Human Rights may eventually determine that the European Convention on Human Rights protects same-sex couples' right to marry, moving beyond just acknowledging that right to a legal status. However, additional contracting nations must first take this step before this may occur.

⁴⁴¹ *Fedotova v Russia* nos 40792/10, 30538/14 and 43439/14 para 167 (2023) (European Court of Human Rights decision).