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The European approach to recognising, downgrading, and erasing same-sex marriages celebrated abroad*

Guido Noto La Diega, Senior Lecturer in Law, Northumbria University

This chapter analyses how European countries that provide some protection for same-sex couples (e.g. civil partnerships, but not marriage) deal with same-sex marriages celebrated abroad. In this respect, there are three models: recognition, downgrading, and erasure. Recognition means that these marriages are recognised as marriages, either for all purposes, or for some of them, e.g. for the exercise of EU freedoms. Romania is the case study, because Coman – the CJEU case that provides a basis for the recognition model – concerned a Romanian case and therefore it is important to see how Member States implement the CJEU's ruling. 'Downgrading' is the model whereby foreign marriages are treated as national civil partnerships. This is based on Orlandi and therefore Italy is the chosen case study. Hungary, finally, represents the 'erasure' model whereby same-sex marriages celebrated abroad are not even recognised as civil partnerships. These models are criticised from an EU law, European human rights law, and private international law perspective.

1. Introduction

Whereas in Europe the right to enter into a same-sex marriage has not been fully recognised,¹ it is becoming increasingly clear that LGBTQ+ peoples' right to see one's existing marriage recognised abroad is part of 'the very essence of the international right to marry.'² In the last two years, there has been an unprecedented move towards a stronger protection of same-sex couples who cross borders.³ First, in *Orlandi v Italy*,⁴ the European Court of Human Rights (ECtHR) stated that same-sex marriages celebrated abroad must be recognised at least as civil partnerships, even when a country decides not to allow such marriages to be celebrated within its territory. In the EU, a step forward was then made by the Court of Justice of the EU (CJEU) in *Coman*,⁵ which decided that parties to a same-sex marriage are 'spouses' even in Member States (MS) that do not allow this marriage within their territory. The ratio decidendi was that national policies cannot justify a violation of the fundamental EU freedoms,

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¹ *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010).

² Kees Waaldijk, 'The Gender-Neutrality of the International Right to Marry: Same-Sex Couples May Still Be Excluded from Marriage, But Their Exclusion – And Their Foreign Marriages – Must Be Recognised', in Andreas R. Ziegler (ed), *International LGBTI Law - Sexual Orientation and Gender Identity Law from an International-Comparative Perspective* (forthcoming).

³ In this chapter, 'foreign', 'celebrated abroad', and 'cross border' are synonyms. A more adequate, albeit cumbersome, expression would be 'same-sex marriages with transnational relevance.' The usual phrases will be preferred for readability purposes.

⁴ *Orlandi v Italy* Apps nos 26431/12; 26742/12; 44057/12 and 60088/12 (ECtHR, 14 December 2017).

⁵ Case C-673/16 *Coman & Ors v Inspectoratul General pentru Imigrări* ECLI:EU:C:2018:385.

e.g. free movement of people and relevant residence rights.⁶ Against this backdrop, this chapter analyses those countries that provide some protection for same-sex couples (e.g. civil partnerships), without allowing them to marry. The author found that the models that countries adopt when dealing with same-sex marriages celebrated abroad are recognition, downgrading, and erasure. Recognition means that these marriages are recognised as marriages, either for all purposes, or for some of them, e.g. for the exercise of EU freedoms. Romania is the case study of this model, because *Coman*⁷ – the legal basis of the recognition model – concerned a Romanian case and therefore it is important to see how MS implement the CJEU’s ruling. ‘Downgrading’ is the second model: the foreign marriage is treated as if it were a national civil partnership. Italy is a good case study for this approach because the relevant model can be seen as based on *Orlandi*.⁸ Finally, the third model is ‘erasure’, where same-sex marriages celebrated abroad are not even recognised as civil partnerships. An example of this is Hungary, where the Government justified the choice by saying that all other countries follow the Hungarian approach. This chapter refutes this justification and exposes its untenability.

This author carried out twenty semi-structured interviews by email with lawyers representing parties in prominent relevant cases, lawyers engaged with local LGBTQ+ organisations, and police officers.⁹ Email interviews created ‘space to think and time to talk.’¹⁰ These allowed the author to understand the relevant European and national laws and policies. Cases such as *Orlandi* and *Coman* show that in order to understand the national effects of same-sex marriages celebrated abroad, one needs to take – as this book does – an approach that integrates private international law, EU law, and human rights law. The focus of this chapter is on the European countries that do not provide same-sex marriage but offer some form of protection to same-sex couples, and in particular on Romania, Italy, and Hungary.¹¹

2. The recognition model and the power of the single market: same-sex marriages celebrated abroad must be recognised as ‘marriages’

The ‘recognition’ model means that foreign same-sex marriages are recognised as marriages even though domestic law does not allow these marriages to be celebrated in the territory of the relevant country. ‘Recognised’ encompasses both the recognition of all the effects of marriage, as well as the recognition of the status of ‘spouse’ for limited purposes, e.g. residence, impediment to marry,

⁶ The only national measures that can restrict the free movement and residence rights must be based on public policy, public security, or public health (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77, art 27(1)). Public policy is ‘a genuine and sufficiently serious threat affecting one of the fundamental interests of society’ (Case C-30/77 *Regina v Pierre Bouchereau* ECLI:EU:C:1977:172, para 4). In turn, public security is something ‘that might directly threaten the calm and physical security of the population as a whole or a large part of it’ (Case C-145/09 *Land Baden-Württemberg v Panagiotis Tsakouridis* ECLI:EU:C:2010:708). Such measures are subject to a ‘proportionality’ test and must be based ‘exclusively’ on the ‘personal conduct’ of the individual (art 27(2)).

⁷ *ibid.*

⁸ *Orlandi* (n 4).

⁹ In qualitative research, participant selection should have a clear rational and purpose. Here I contacted the main LGBTQ+ organisations in the countries that fell within the scope of the research and they acted as gatekeepers introducing me to experts in the field. I selected twenty interviewees because I analysed 16 countries and some of the interviewees were not able to answer all the questions. The number is not high, but qualitative research does not aim to represent the entire relevant population and offsets the limited quantity with a more intensive study of the sample. See Michelle Cleary, Jan Horsfall and Mark Hayter, ‘Data Collection and Sampling in Qualitative Research: Does Size Matter?’ (2014) 70 *Journal of Advanced Nursing* 473.

¹⁰ Nalita James, ‘Using Email Interviews in Qualitative Educational Research: Creating Space to Think and Time to Talk’ (2016) 29 *International Journal of Qualitative Studies in Education* 150.

¹¹ The study of individual legal systems in order to shed light on more general issues of LGBTQ+ rights in Europe is similar to the method adopted by Jule Mulder, *EU Non-discrimination law in the Courts* (Hart 2017)

citizenship, and adoption.¹² Examples of this are Romania, Estonia,¹³ Slovakia,¹⁴ Latvia,¹⁵ and Andorra.¹⁶

This model is based on the CJEU's seminal decision in *Coman*.¹⁷ Building on *Croatia*,¹⁸ where it was decided that excluding same-sex couples from family reunification breaches the ECHR,¹⁹ *Coman* stressed that it is crucial to recognise these foreign spouses as such, and not downgrade them to generic family members,²⁰ because the spouses' rights to move and reside freely in the EU cannot be limited by national laws, whereas they can when it comes to partners.²¹ The Romanian General Inspectorate for Immigration denied a residence permit to a Romanian man's American husband because the Civil Code expressly prohibits both the celebration of same-sex marriages in Romania and their recognition if celebrated abroad.²² Local authorities interpreted this as meaning that Romania would adopt the erasure model. This is not the case, as convincingly stated by the CJEU. First, previous case law already harmonised the concept of 'spouse', that is 'a person joined to another person by the bonds of marriage.'²³ Since 'person' is gender-neutral, it can cover same-sex spouses.²⁴ Second, in exercising any national competence – including the regulation of personal status – MS 'must comply with EU law,'²⁵ which includes the freedom to reside in any MS according to secondary EU rules.²⁶ Third, interferences with the fundamental freedom to reside are allowed only if based on objective public-interest considerations and if they are proportionate to a legitimate national objective.²⁷ This is where the 'societal objection' comes into play. The Court accepted that the EU must respect national identities, some of which include a heterosexual view of marriage.²⁸ However, it held that for the objection to be successful there must be 'a genuine and sufficiently serious threat to a fundamental interest of society,'²⁹ which was not the case. The conclusion was that 'spouses' must be treated as such, regardless of their sexual orientation and gender. Even though the decision concerned the right to residence, *Coman* is

¹² These are the aspects considered in Kees Waaldijk (ed), 'More and more together: Legal family formats for same-sex and different-sex couples in European countries – Comparative analysis of data in the LawsAndFamilies Database' (2017) 75 *Families and Societies Working Paper Series* 1.

¹³ Private International Law Act (*Rahvusvahelise eraõiguse seadus*), arts 55-56, and Aliens Act 2009 (*Välismaalaste seadus*), arts 118(1) and 137.

¹⁴ A visible effect of *Coman* (n 5) has been the change of policy in Slovakia where, right after the publication of the Court of Justice's decision, the Government declared that his country would recognise same-sex marriages celebrated abroad for free movement purposes.

¹⁵ Constitutional Court of Latvia (*Latvijas Republikas Satversmes tiesa*), 21 May 2016.

¹⁶ Tribunal Superior de Justícia, Sala Administrativa, sentència No 108-2012.

¹⁷ *Coman* (n 5). There are two pending Supreme Court cases on this issue.

¹⁸ App no 47082/12 (ECtHR, 23 February 2016). Cf. Danielle Teutonic, 'Pajic v. Croatia: the European Court of Human Rights continues the incremental trend towards equal legal recognition of same-sex couples' (2017) 25 *Tulane Journal of International and Comparative Law* 461

¹⁹ ECHR, arts 8 and 14. The CJEU build on *Pajic* but goes beyond it. Freedom of movement is not part of the ratio decidendi in *Pajic*, but, as will be argued below, its importance in the context of *Coman* may bring to the recognition of same-sex marriages for all purposes, and not just for residence purposes.

²⁰ However, according to Andy Hayward, 'Relationships with Status: Civil Partnership in an Era of Same-Sex Marriage', in this *Book*, civil partnerships have their own symbolic value.

²¹ Directive 2004/38/EC, art 2(2)(b).

²² Codul civil al României, art 277(2), incorrectly referred to in *Coman* (n 5) [8] as art 227.

²³ *Coman*, ibid [34], that refers to C-127/08 *Metock and Others* ECLI:EU:C:2008:449.

²⁴ *Coman*, ibid [35].

²⁵ ibid [38].

²⁶ C-148/02 *Garcia Avello v The State of Belgium* ECLI:EU:C:2003:539

²⁷ *Coman* (n 5) [40].

²⁸ EU Treaty, art 4(2).

²⁹ *Coman* (n 5) [44].

likely to constitute a stepping-stone towards to full recognition of foreign same-sex marriages. Indeed, its ratio decidendi goes well beyond the right to residence, this being that MS ‘*must comply with EU law, in particular the Treaty provisions on the freedom conferred on all Union citizens to move and reside*’³⁰ anywhere in the EU. Therefore, discriminatory marriage policies cannot be an excuse to breach the pillars of EU law, i.e. the four freedoms of movement and the Charter of Fundamental Rights of the EU (hereinafter ‘Charter’). Should *Coman* be interpreted narrowly, as merely the basis of a non-discriminatory right to residence, the case would risk producing no practical effects. LGBTQ+ people are unlikely to exercise their free movement rights if equality³¹ and non-discrimination³² are not fully recognised.

Arguably, *Coman* provided a foundation for the principle of continuity of personal status,³³ whereby, in a context of increasingly geographically fluid families, foreign statuses ‘will never be open to challenge by applying a different law.’³⁴ However, it is being implemented very narrowly, as exemplified by Romania. In July 2018, the Constitutional Court applied *Coman* and stated that same-sex spouses of EU citizens have the same residence rights as different-sex ones.³⁵ The Court observed that same-sex couples have the ‘right to private and family life under Article 8 of the ECHR and Article 7 of Charter, and their relationship is recognised by the law.’³⁶

Despite these bold general statements, the Court did not go so far as declaring the unconstitutionality of the Civil Code provision preventing the recognition of foreign same-sex marriages.³⁷ The provision is still valid ‘as long as the Romanian authorities provide a framework to implement the EU decision in *Coman*.’³⁸ It is unclear what this framework will look like and we can expect two years of litigation before the Romanian *Coman* case is settled,³⁹ but the framework that will need to be in place will have to ensure freedom of movement rights to all spouses of EU citizens, without discrimination on the grounds of gender or sexuality. Implementing the spirit of the CJEU’s ruling should have meant going beyond the mere residence right to recognising the validity of foreign same-sex marriages for all purposes, but this is not surprising since the Constitutional Court ‘is hardly a champion of equal

³⁰ *ibid* [38], italics added.

³¹ EU Charter of Fundamental Rights [2000] OJ C-364/01, art 20. (hereinafter “Charter”)

³² *Ibid*, art 21.

³³ The principle had already be affirmed in other contexts, see *Wagner and J.M.W.L. v. Luxembourg* App no 76240/01 (ECtHR, 28 June 2007) paras. 117 ff. and *Paradiso and Campanelli v Italy* App no 25358/12 (ECtHR, 24 January 2017), paras 150 ff. In the context of same-sex relationships, see Frances Hamilton and Lauren Clayton-Helm, ‘Same Sex Relationships Choice of Law and the Continued Recognised Relationship Theory’ (2016) 3(1) *Journal of International and Comparative Law* 1; Stuart M Davis, *Conflicts of Law and the Mutual Recognition of Same-Sex Unions in the EU* (PhD Thesis, University of Reading 2015) and, in private international law in general, see Toni Marzal Yetano, ‘The Constitutionalisation of Party Autonomy in European Family Law’ (2010) 6 *Journal of Private International Law* 158. From an EU law perspective, with a focus on the Charter of Fundamental Rights of the EU, art 9, see Massimo Condinanzi and Chiara Amalfitano, ‘La libera circolazione della “coppia” nel diritto comunitario’ (2008) 13 *Dir EU* 399. A more nuanced version was proposed by Vincenzo Scalisi, ‘«Famiglia» e «famiglie» in Europa’ [2013] *Riv dir civ* 8.

³⁴ Yetano (n 33) 185. On the compatibility of the portability principle and the recognition method in conflicts of law see Silvia Pfeiff, *La portabilité du statut personnel dans l’espace européen* (Bruylant 2017).

³⁵ Constituțională a României, *decizia* 18 July 2018 no 534.

³⁶ *ibid*.

³⁷ Codul civil al României, art 277(2).

³⁸ Curtea Constituțională a României, *decizia* 18 July 2018 no 534.

³⁹ After *ibid*, the case went back to a first instance court in Bucharest and should the decision be favourable the Government may appeal thus further delaying the final settlement of the case.

rights.⁴⁰ Such interpretation arguably does not comply with EU Law, because if same-sex marriage is not recognised for all purposes LGBTQ+ people are unlikely to exercise the residence rights, as suggested by the fact that the Coman-Hamilton family still lives in the US.

Considering the unfavourable attitude of the majority of the Romanian population towards LGBTQ+ rights,⁴¹ one could have expected that the recognition of same-sex marriages by means of a judicial decision imposed by the CJEU would prompt a backlash. Instead, in October 2018, a three-year campaign aimed at changing the Constitution to expressly refer to marriage as the union between a man and a woman⁴² resulted in a referendum that failed⁴³ because only 20.4% of the citizens voted and the quorum was not obtained.⁴⁴ *Coman* may produce legal⁴⁵ and societal changes going beyond mere residence rights.⁴⁶ The opportunity may present itself with one of the four civil partnerships bills to the floor of the Romanian parliament and most political leaders declared to be in favour of the recognition of same-sex couples.⁴⁷ Interestingly, ‘the only non-controversial provision in the bills’⁴⁸ is that foreign same-sex marriages should be treated as civil partnerships. However, any such downgrading would be in breach of the ratio decidendi in *Coman*, i.e. ensuring that same-sex couples feel free to circulate in all MS without their rights and status being in danger.⁴⁹

For some years now, private international law scholars have wondered whether ‘a refusal by a [Member] State to acknowledge the marriage or partnership status of a same-sex couple [is or is not] compatible with EU law or human rights.’⁵⁰ Now we know, on the one hand, that EU law requires all spouses to be treated in the same way to ensure free movement of people.⁵¹ On the other hand, the ECtHR decided in

⁴⁰ Elena Brodeala, ‘Paying Lip Service to the CJEU: The Unsurprising Decision of the Constitutional Court of Romania in the Coman Case’ (*Oxford Human Rights Hub*, 26 July 2018) <ohrh.law.ox.ac.uk/paying-lip-service-to-the-cjeu-the-unsurprising-decision-of-the-constitutional-court-of-romania-in-the-coman-case/> accessed 12 March 2019.

⁴¹ The last available data from 2017 suggests that 74% of the Romanian population is against same-sex marriage (Pew Research Center, *Eastern and Western Europeans Differ on Importance of Religion, Views of Minorities, and Key Social Issues* (Pew 2018) 12). According to an interviewee, this attitude depends on the importance of the Orthodox Church and on the delay with which Romania decriminalised homosexuality: in 1996, a lesbian woman was imprisoned for three years for her sexuality and the decriminalisation law was passed only in 2001.

⁴² The *Lege de revizuire a Constituției României 2018* amended the Constitution, art 48, in order to include an express reference to marriage as the union between a man and a woman and called for a referendum to approve the amendment.

⁴³ On the reasons of the failure, see Valerie Hopkins, ‘Romanian voters ignore referendum on same-sex marriage ban’ (*Financial Times*, 7 October 2018) <www.ft.com/content/9bbcf3ce-ca62-11e8-b276-b9069bde0956> accessed 10 March 2019.

⁴⁴ The referendum campaign started in 2015, well before the *Coman* ruling, but after the national lawsuit that ultimately led to *Coman* was initiated (2013). However, the lawsuit became public on 19 July 2016, one day before the first hearing at the Constitutional Court.

⁴⁵ So far, there have not been meaningful legal changes, but Hungarian MPs have used *Coman* to justify the introduction of civil partnerships in recently presented bill.

⁴⁶ According to one of the interviewees, there has already been a positive change in societal attitudes towards LGBTQ+ people, with even conservative Romanian media giving positive visibility to the case.

⁴⁷ This data emerged from the interviews and suggests that Romanian laws may change more rapidly than Romanian society.

⁴⁸ Email from Viski to Author (4 March 2019).

⁴⁹ Since the next 48 months will see Romanian politicians busy with several electoral campaigns, it seems unlikely that civil unions will be at the top of the public agenda.

⁵⁰ Davis (n 33) 37.

⁵¹ *Coman* (n 5).

*Orlandi*⁵² and *Oliari*⁵³ that states must protect same-sex relationships and cannot erase foreign same-sex marriages.

Finally, it is not by chance that the most advanced decision on foreign same-sex marriages is based on the need to preserve the single market. The convergence between LGBTQ+ rights and capitalism has been convincingly argued by sexuality scholars.⁵⁴ For example, Mario Mieli noted that ‘contemporary gay movements originated in those countries where the capital reached the stage of real subsumption.’⁵⁵ The moment at which LGBTQ+ rights are asserted is congruent with capital’s dominion, control and transformation of *all* social relations and modes of production.⁵⁶ Economic modernisation is a key factor that motivates the introduction of LGBTQ+ rights in legislation.⁵⁷ Where the queer⁵⁸ fled the family unit at the turn of the twentieth century; the LGBTQ+ subject, freshly endowed with rights, returns as a productive member at the turn of the noughties.⁵⁹ Moreover, Mieli’s pages provide further support to the idea that recognising the right to residence of all spouses is enough to achieve the freedoms of movement and the rights to equality, dignity, and non-discrimination as enshrined in the Charter. Indeed, despite the fact that in ‘most capitalist countries, the freedom to be homosexual is recognized as a right (...) such legal freedom means freedom to be excluded, oppressed, repressed, ridiculed, become victims of moral and physical violence, and be isolated into ghettos.’⁶⁰ This is also linked to Foucault’s idea of using freedom, or the illusion thereof, as a device of power. Accordingly, he argued that the ‘freedom of circulation, in the broad sense of the term [is] one of the facets, aspects, or dimensions of the deployment of apparatuses of security.’⁶¹ In order for societies to change and avoid

⁵² *Orlandi* (n 4).

⁵³ *Oliari and others v Italy*, App Nos 18766/11 and 36030/11, (ECtHR, 21 July 2015).

⁵⁴ See Mario Mieli, *Elementi di critica omosessuale* (Einaudi 1977), translated to English as *Towards a gay communism* (tr David Fernbach and Evan Calder Williams, Pluto 2018), and John d’Emilio, ‘Capitalism and gay identity’ in Ann Snitow, Christine Stansell, and Sharan Thompson (eds), *Powers of Desire: The Politics of Sexuality* (Monthly Review Press 1983) 100.

⁵⁵ Mieli (n 54) 9.

⁵⁶ Mieli refers to Marx’s categories of formal and real subsumption. In early capitalism, there is only a formal subsumption of labour by capital, which means that the labour process is not directly affected but the worker’s submission is a consequence of the capitalist’s control over the means of production. The following stage of ‘real subsumption’ refers to when the capitalist mode of production changes the nature itself of labour and its conditions. Mieli (n 54) 9 refers to Karl Marx, *Il capitale: Libro I* (La Nuova Italia 1969) ch 6. For a critical reading of these concepts and their interpretations see Sandro Mezzadra, ‘The Topicality of Prehistory: A New Reading of Marx’s Analysis of “So-called Primitive Accumulation”’ (2011) 23 *Rethinking Marxism* 302, 313 ff.

⁵⁷ Phillip M Ayoub, ‘Contested norms in new-adopter states: International determinants of LGBT rights legislation’ (2015) 21 *EJIR* 293, 297.

⁵⁸ Queer here is not used as an umbrella term for LGBTQ+ people: it characterises the radical queer that rebels against both the heteronormative and homonormative societies. See e.g. Sandra Jeppesen, ‘Queer anarchist autonomous zones and publics: Direct action vomiting against homonormative consumerism’ (2010) 13 *Sexualities* 463.

⁵⁹ This is consistent with D’Emilio (n 54), who suggests that capitalism reorganises the traditional model of family, making men travel in search of external sources for their families’ subsistence; thanks to said mobility, new sexual relations could be pursued relatively freely. See also Jeffrey Weeks, *Coming out: homosexual politics in Britain from the nineteenth century to the present* (rev ed, Quartet 1990) on parallels between regulation of homosexuality and regulation of the working class. Others have noted that the ‘penetration of the market deeper into everyday life has created spaces for commodified forms of lesbian and gay existence’ (Alan Sears, ‘Queer Anti-Capitalism: What’s Left of Lesbian and Gay Liberation?’ (2005) 69 *Science & Society* 92).

⁶⁰ Mario Mieli, ‘Per la critica della questione omosessuale’ (1972) 3 *Fuori!* 1-2, as cited by Massimo Prearo, ‘Introduction’, in Mieli (n 54) xvii.

⁶¹ Michel Foucault, ‘18 January 1978’ in Michel Senellart, François Ewald, and Alessandro Fontana (eds), *Security, Territory, Population* (Palgrave Macmillan UK 2007) 49

ghettos, mere residence rights are not enough and, accordingly, narrow interpretations of *Coman* must be avoided.

3. A second-best solution: downgrading foreign same-sex marriages to civil partnerships

Most countries that do not recognise same-sex marriages celebrated abroad as marriages follow the ‘downgrading’ model.⁶² They treat these marriages as if they were civil partnerships, regulated either by foreign law, or by the domestic law. These countries include Italy, Northern Ireland,⁶³ San Marino,⁶⁴ Switzerland,⁶⁵ Croatia,⁶⁶ Greece,⁶⁷ Liechtenstein,⁶⁸ Cyprus,⁶⁹ and Slovenia.⁷⁰ The legal foundation of this model is *Orlandi*,⁷¹ where it was decided that when a couple’s situation corresponds to family life – and same-sex married couples fall within the scope – States that do not put in place legal safeguards for these relationships are in breach of the right to private and family life.⁷² Although the divergence between law and society was not the ratio decidendi in *Orlandi*, the Court did note that the contracting country ‘failed to take account of the social reality of the situation.’⁷³ However, the societal argument in this case was presented as a predominantly negative force against LGBTQ+ rights. Indeed, on the one hand, the lack of consensus around same-sex marriage justified the non-adoption of the recognition model.⁷⁴ On the other hand, the societal argument seems the main thread in the dissenting opinion. There, it was observed that societal changes, even when occurring in all the parties to the Convention, do not alter the scope of the parties’ engagements,⁷⁵ and that societal changes and citizens’ needs do not entail human rights under the Convention.⁷⁶ The underlying political agenda is evident and exemplified by the dissenting opinion culminating with a quote from conservative judge Scalia: ‘no social transformation without representation.’⁷⁷ From this, one can infer that the societal argument is a dangerous one: it prevents the full protection of LGBTQ+ rights, and it can be distorted to discriminate against minorities.⁷⁸

Italy is a useful case study from this book’s perspective, because despite Italian society being largely accepting of a plurality of family forms and of LGBTQ+ rights,⁷⁹ Italy has been the last Western

⁶² Following Hayward (n 20), the recognition as national civil partnerships could be seen as a change in name but not necessarily a ‘downgrade.’

⁶³ Since same-sex marriage has not been legalised, *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam) [25] still applies.

⁶⁴ Legge 20 November 2018, art 3(4).

⁶⁵ Federal Law on Private International Law of 18 December 1987, art 45(3).

⁶⁶ Life Partnership Act, arts 73, 74 and 75. See *Pajic* (n 18).

⁶⁷ Civil Partnership Act no 4356 of 2015.

⁶⁸ Registered Partnership Act of 16 March 2011 and the Registered Partnership Decree of 16 August 2011.

⁶⁹ Civil Union Act 2015 (L. 184(I)/2015), s 43.

⁷⁰ The Civil Union Act 2016, art 6(4).

⁷¹ *Orlandi* (n 4).

⁷² European Convention on Human Rights (ECHR), art 8; *Orlandi* (n 4) paras 209-211.

⁷³ *Orlandi* (n 4) para 209.

⁷⁴ *Orlandi* (n 4).

⁷⁵ Dissenting Opinion of Judges Pejchal and Wojtyczek: *Orlandi* (n 4) para 2.

⁷⁶ *Ibid*, para 4.

⁷⁷ *Ibid*, para 14.

⁷⁸ As noted by Mulder (n 11) 271, the various ideologically influenced approaches to equality law explain the difficulties in its harmonisation.

⁷⁹ According to Pew Research Centre (n 41), in 2017 59% of the Italian population was in favour of same-sex marriage.

European country to recognise same-sex relationships. It did so in 2016 with the Civil Unions Act,⁸⁰ which introduced the civil partnerships following the ECtHR's decision against Italy in *Oliari*.⁸¹ The Court stated that in light of the growing European consensus around the recognition of same-sex relationships and because of the conflict between an accepting society and silence of the law, the absence of a legal framework recognising same-sex relationships violated the right to respect for private and family life.⁸² A key element of the implementation framework was a decree on private international issues that opted for the downgrading principle, though with the caveats explained below.⁸³ Even though the Italian Parliament asked the Government to pass a decree whereby same-sex marriages celebrated abroad were regulated by the Italian rules on civil unions, the Government adopted a more nuanced and favourable approach, with different rules applying to Italian couples and couples of Italians and foreigners on the one hand, and couples of foreigners on the other hand.

With couples where at least one spouse is Italian, the marriage will be downgraded to a civil union and the applicable law will be the Italian Civil Unions Act Italian.⁸⁴ The downgrading would already be problematic if it produced the 'mere' loss of the name 'marriage,' without practical effects. In Italy, however, the differences between marriage and civil unions are both symbolic and substantive,⁸⁵ the main ones being that civil partners do not have a duty of fidelity,⁸⁶ and cannot adopt.⁸⁷ The main ratio of such downgrading is to 'prevent elusive behaviours of Italian citizens who go abroad to marry with the purpose of circumventing Italian law.'⁸⁸ Therefore, same-sex marriages celebrated abroad between foreigners will be recognised in Italy as marriages, as opposed to downgraded to civil unions.⁸⁹ Reflecting on the anti-elusive rationale of the downgrading rule, arguably same-sex marriages should be recognised and not downgraded whenever it is not celebrated to circumvent Italian law. One could contend⁹⁰ that when couples of different nationalities marry abroad, they are not trying to circumvent the Italian ban on same-sex marriage; accordingly, the anti-elusive rationale of the downgrading rule should not apply and, therefore, their marriage should not be downgraded. Similarly, it could be said that the downgrading provision should apply only to marriages where both parties are Italian citizens

⁸⁰ Legge 20 May 2016 no 76 '*Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze.*'

⁸¹ *Oliari* (n 53) para 178 and *passim*.

⁸² ECHR, art 8.

⁸³ Decreto legislativo 19 January 2017 no 7 '*Modifiche e riordino delle norme di diritto internazionale privato per la regolamentazione delle unioni civili.*' ('Decreto no 7/2017')

⁸⁴ Legge 31 May 1995 no 218, art 32-bis, inserted by Decreto no 7/2017.

⁸⁵ As argued by, Diego Lasio and Francesco Serri, 'The Italian Public Debate on Same-Sex Civil Unions and Gay and Lesbian Parenting' (2019) 22 *Sexualities* 691, the 'differences between heterosexual marriage and same-sex union are the bedrock of the current expression of heteronormativity in Italy.'

⁸⁶ Legge no 76/2016, art 1(11). On the point, see L. Olivero, 'Unioni civili e presunta licenza d'infedeltà' [2017] *Riv trim dir proc civ* 213.

⁸⁷ Nonetheless, case law recognises that same-sex couples can access the stepchild adoption. See e.g. Corte di Cassazione 31 May 2018 no 14007 (2018) 10 *Corr giur* 1204.

⁸⁸ Explanatory Memorandum to Draft Decreto o 7/2017, 2. This argument was raised also at the time when the first European countries started introducing same-sex marriage, but it was proved to be untenable: Katharina Boele-Woelki, 'The Legal Recognition of Same-Sex Relationships within the European Union' (2008) 82 *Tul L Rev* 1949, 1954. See also Carla Garlatti, 'Comma 28', in Cesare Massimo Bianca (ed), *Le unioni civili e le convivenze* (Giappichelli 2017) 432, 442.

⁸⁹ This is not expressly provided in the Civil Unions Act, but it is inferred by Corte di Cassazione 14 May 2018 no 11696 (2018) 6(1) *Foro it* 1948 from the anti-elusive objective of the private international law provisions in said Act and in Decreto no 7/2017.

⁹⁰ As done convincingly by Matteo Winkler, "'A case with Peculiarities": Mixed Same-Sex Marriages before the Supreme Court' (2018) 4 *Italian Law Journal* 273, 282.

and reside in Italy; should any of these elements vary (e.g. an Italian couple genuinely resident abroad), the application of the Civil Unions Act would be unwarranted.⁹¹ However, the Supreme Court did not follow this reasoning and applied the downgrading provision to all same-sex marriages celebrated abroad, with the sole exception of those couples where both spouses are foreigners.⁹²

Another critique that can be moved to the Supreme Court's 2018 decision on couples of mixed nationality is that it downplays the increasing European consensus around same-sex marriage, thus clearly diverging from the case law of the ECtHR in *Oliari*⁹³ and *Orlandi*.⁹⁴ Third, and more importantly, the Supreme Court stresses that both human rights and constitutional case law state that lawmakers have discretion on the type of protection same-sex couples can access.⁹⁵ However, the court inappropriately conflates the (indeed discretionary) decision on whether or not to introduce same-sex marriage (right) and the simpler taking account of the effect of a marriage that has already happened and is fully effective in another State (status). Under Article 9, the right to marry can be limited only by national laws governing its exercise.⁹⁶ In the event of the recognition, or lack thereof, of same-sex marriages celebrated abroad, the couple already exercised the right to marry and, accordingly, national restrictions should not apply. Statuses should be recognised in a non-discriminatory way.⁹⁷ The difference between marriage as a right to be exercised and marriage as an already existing act is reflected in the different private international law rules that apply to the formalities of marriage and those that apply to the spouses' capacity. On the one hand, there 'is no rule more firmly established (...) that that which applies the maxim *locus regit actum* to the formalities of marriage,'⁹⁸ which means that countries demand to retain full control on the exercise of the right to marry by a monopoly on the law applicable to the formalities of marriage. On the other hand, marriages that could not be celebrated within one's territory (for example polygamous marriages), if they have been celebrated abroad, will be valid under private international law if contracted between parties of full capacity⁹⁹ and pursuant to the foreign rules on formalities.¹⁰⁰

The argument could be reinforced by noting that the 'downgrading' model breaches other fundamental human rights that do not allow national exemptions, such as discrimination on ground of sexual orientation,¹⁰¹ equality,¹⁰² and freedom of movement and residence.¹⁰³ This latter is likely to be the key to unlocking the recognition model. Despite *Orlandi* legitimising the 'downgrading' option, an argument can be made for the 'recognition' model. On the one hand, as done above, it can be shown how *Orlandi* and the Italian Supreme Court inadvertently conflated the celebration of marriage and

⁹¹ Garlatti (n 87) 442-443.

⁹² Corte di Cassazione (n 88).

⁹³ *Oliari* (n 53).

⁹⁴ *Orlandi* (n 4).

⁹⁵ Corte di Cassazione (n 44) refers to Corte Costituzionale 2014 no 170; *Oliari* (n 53), *Schalk and Kopf* (n 1).

⁹⁶ Charter, arts 9 and 18; ECHR, art 12.

⁹⁷ Charter, art 21; ECHR, art 14.

⁹⁸ Paul Torremans (ed), *Cheshire, North & Fawcett Private International Law* (15th ed, OUP 2017) 893.

⁹⁹ The prevalent view is that the parties have capacity to marry if they meet the requirements set forth by the laws of both domiciles (dual domicile theory). The alternative theory looks at the intended matrimonial home. In both instances, the State does not demand full control over marriages that have already been celebrated abroad: indeed, both the dual domicile theory and the intended matrimonial home doctrine allow the validity of marriages that could not be celebrated in the UK. See Torremans (n 97) 910.

¹⁰⁰ Private International Law (Miscellaneous Provisions) Act 1995, s 5; *Baindail v Baindail* [1946] P 122 at 127-128.

¹⁰¹ Charter, art 21.

¹⁰² *Ibid*, art 20

¹⁰³ *Ibid*, art 45.

recognition of its effects. On the other hand, the CJEU case law can prevail on that of the ECtHR. Indeed, the Charter expressly recognises that the Charter's rights cannot restrict or adversely affect 'human rights and fundamental freedoms as recognised [...] by Union law.'¹⁰⁴ Therefore, the case law on free movement, and namely *Coman*, could prevail on *Orlandi*. Indeed, a major difference between the ECHR and EU-law is that 'where the Convention sets out *minimum* standards, EU law *sets* the standard.'¹⁰⁵ This is also a result of the *Åkerberg*¹⁰⁶ case, that decided that the Charter is binding when states act within the scope of EU law, not only when they implement EU law, thus ultimately increasing 'judicial oversight by the CJEU in human rights affairs.'¹⁰⁷ Even though *Coman* mandated the 'recognition' model in a case regarding residence rights, an implementation that aspires to be true to the spirit of *Coman* and of the EU Treaties more generally should lead to the admission that, practically, same-sex married couples will not exercise their EU freedoms (to move, reside, work, etc.), if they know that their status will be in danger and they will be treated as second-class citizens. Therefore, the downgrading model arguably breaches EU Law (*Coman*) and human rights including freedom of movement, equality, and non-discrimination.

4. The erasure of same-sex marriages celebrated abroad breaches both EU Law and European Human Rights Law.

Alongside countries that recognise foreign same-sex marriages and countries that downgrade them to civil unions, a minority of countries adopt the erasure model, whereby perfectly valid same-sex marriages celebrated abroad do not produce any effects despite the virtual availability of civil unions to nationals. In Europe, this is the case of Hungary and Czech Republic,¹⁰⁸ and is in direct breach of both EU Law and European human rights law as enshrined in *Coman* and *Orlandi*.

In Hungary, as in most Eastern European countries,¹⁰⁹ the majority of the population opposes same-sex marriages (64%). This, however, does not per se explain why Hungary adopts the erasure model, given that in other countries, the population is more strongly opposed to equal marriage and yet they recognise foreign same-sex marriages (Armenia) or downgrade them to civil partnerships (Greece).

In 2018, a reform of Hungarian private international law came into force.¹¹⁰ A provision in the relevant bill provided for the downgrading of foreign same-sex marriages to registered partnerships,¹¹¹ but it did not pass because the Government claimed that such a recognition is not

¹⁰⁴ Ibid, art 53.

¹⁰⁵ Martin Kuijer, 'The challenging relationship between the European Convention on Human Rights and the EU legal order: consequences of a delayed accession' (2018) *The International Journal of Human Rights* 1, 7, italics in the text, referring to Case C-399/11, *Melloni v Ministerio Fiscal* ECLI:EU:C:2013:107, paras 56-60.

¹⁰⁶ Case C-617/10 *Åklagaren v Åkerberg Fransson* ECLI:EU:C:2012:340, paras 20-21. Cf. Emily Hancox, 'The Meaning of "Implementing" EU law under Article 51(1) of the Charter: *Åkerberg Fransson*' (2013) 50 *CMLR* 1411.

¹⁰⁷ Kuijer (n 104) 6.

¹⁰⁸ In Czech Republic, the law regulates only foreign different-sex marriages and foreign civil partnerships, allowing their registration in a special registry. Under Czech public law, the Office for the Registration of Civil Acts has the power to act only when expressly provided by the law and the lacuna has the unfortunate effect to recognise foreign civil partnerships, but erase foreign same-sex marriages.

¹⁰⁹ Czech Republic and Slovakia constitute the only exception, with 'only' 29% and 47% respectively opposing same-sex marriage, according to Pew Research Centre (n 41) 12.

¹¹⁰ Private International Law Act 2017.

¹¹¹ Concept of the new International Private Law Act.

common in international private law.¹¹² As demonstrated in this chapter, such an assertion is plainly not correct. Indeed, in most countries foreign same-sex marriages are effective either as marriages or as civil partnerships.

The Hungarian case study is important also because it shows how *Coman* cannot be interpreted as meaning merely that residence rights must be recognised for same-sex spouses. Indeed, even before *Coman*, Hungarian authorities would grant spouses in same-sex marriages celebrated abroad a residence permit, without any clarification as to whether this was based on the recognition of the relationship as marriage, registered partnership, or cohabitation.¹¹³ Nonetheless, same-sex married couples are still fighting in court to be recognised at least as registered partners. A decision of a first instance court ordered the registration of a same-sex marriage as a registered partnership,¹¹⁴ and this was upheld on appeal. In January 2019, however, on further appeal by the Government, the Supreme Court quashed those rulings. Even though no provision prevents the recognition of same-sex marriages at least as registered partnerships, the Government referred to the lack of ad-hoc provision on downgrading and to the constitutional definition of marriage ‘as the union of a man and a woman.’¹¹⁵ Such argument is based on the conflation, criticised above, between allowing same-sex marriages to be celebrated within the national territory and the recognition of unions where the right to marry has already been exercised, namely through same-sex marriage celebrated abroad. When it comes to the former, the ‘right to marry’ applies and this is guaranteed only ‘in accordance with the national laws governing’¹¹⁶ its exercise;¹¹⁷ conversely, in relation to the latter, freedoms of movement, dignity, and non-discrimination will apply and the exercise of these rights cannot be limited by national provisions. Therefore, national rules – including national constitutional bans on same-sex marriage – do not apply to marriages celebrated abroad, since the right to marry has already been exercised.

To make one hopeful as to a positive outcome of the Hungarian dispute is the fact that the Supreme Court concluded that it was not possible to order the registration of foreign same-sex marriages as civil partnerships for the technical reason that the claimants asked for their relationship to be recognised as marriage, not as civil partnership. The parties have submitted a new request of recognition as civil partnership and, given the ‘technical grounds’¹¹⁸ on which the lower courts’ decisions were quashed, one can expect a positive outcome for this dispute and, accordingly, the adoption by Hungary of the downgrading model. Thus, Hungary will avoid claims for state liability (*Coman*) and breach of human rights (*Orlandi*).

5. Conclusions

¹¹² Email from Tamás Dombos (Háttér Society) to author (4 August 2017).

¹¹³ Email from Tamás Dombos (Háttér Society) to author (9 March 2019).

¹¹⁴ ‘Sajtóközlemény - Bíróság: a magyar államnak is el kell ismernie a külföldi meglegházasságokat bejegyzett élettársi kapcsolatként’ (*Háttér*, 27 April 2017) <hatter.hu/hirek/birosag-a-magyar-allamnak-is-el-kell-ismernie-a-kulfoldi-meleghezassagokat-bejegyzett> accessed 11 March 2019.

¹¹⁵ Fundamental Law of Hungary 2011, art L(1).

¹¹⁶ Charter, art 9.

¹¹⁷ This ‘national safeguard’ clause explains why *Oliari* (n 53) reiterated *Schalk and Kopf* (n 1) in finding that States have a wider margin of appreciation on whether or not to introduce same-sex marriage. This margin of appreciation has become a ‘rather empty rhetorical device,’ rather than a tool to balance uniform protection of human rights and national traditions, as argued by Janneke Gerards, ‘Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights’ (2018) 18 *Human Rights Law Review* 495.

¹¹⁸ Email from Tamás Dombos (Háttér Society) to author (28 February 2019).

Despite a variety of approaches towards same-sex marriages celebrated abroad, there is a clear trend towards the recognition of their effects even in those countries where the society does not seem particularly favourable to LGBTQ+ rights.¹¹⁹ Nonetheless, there has not been that change in jurisprudence that would have been necessary for the ‘realization of universal Convention rights for gay men and lesbians.’¹²⁰ The societal objection does not seem to play a great role in the decisions concerning foreign same-sex marriages, probably because the latter are perceived as less of a threat for society, compared to domestic same-sex marriages.

Whilst ideologies and politics are not always explicitly present in the legal developments around cross-border same-sex marriages, they still play an important role. For example, one of the few times that the societal argument has played a prominent role has been the dissenting opinion in *Orlandi*,¹²¹ where society and national identity have been used to serve a conservative legal agenda and to slow down the progress of LGBTQ+ rights. At the same time, where human rights failed (*Orlandi*), the free market succeeded (*Coman*). The fact that the ratio decidendi of the most advanced decision on same-sex marriages celebrated abroad is the unity of the single market is not accidental and speaks volumes about the convergence between LGBTQ+ rights and capitalism and the shift from radical queer to LGBTQ+ citizen and labourer.

After *Orlandi*, the ‘erasure’ model must be ruled out because it is a direct breach of human rights law. The recognition model should be preferred to the downgrading one, despite the latter being legitimised by *Orlandi*. First, this decision can be criticised for conflating national same-sex marriages and foreign ones. The former falls under the right to marry under Article 8 of the Charter and national laws can limit its exercise. The latter concerns instances where the right to marry has already been exercised and, therefore, falls under rights to equality, non-discrimination, and free movements; for these rights, the Charter does not allow national exemptions. Second, under certain circumstances EU law can prevail on the ECHR law and, for the purposes of this chapter, this means that *Coman* can prevail on *Orlandi*. MS should not limit themselves to implement *Coman* as a mere obligation to open the right to residence to LGBTQ+ spouses: they should recognise the validity of foreign same-sex marriages for all purposes; otherwise, it is unlikely that a same-sex couple will move to a country where they would be legally free, but still members of a ghetto.

¹¹⁹ This confirms the data analysed by Waaldijk (n 2). If one compares them to a report the same editor published twelve years before, one gets the sense of significant increase of protection for LGBTQ+ rights. See Kees Waaldijk (ed), *More or less together: Levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partner* (INED 2005).

¹²⁰ Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2013) 211.

¹²¹ *Orlandi* (n 4).

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