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The Evolution of Same-Sex Marriage Case Law in Europe[1]

Abstract: The number of countries allowing same-sex marriage is gradually increasing. Currently, 37 countries have laws regulating same-sex marriages, specifying their status and/or the possibility of adopting children. These solutions counter discrimination against same-sex couples and are part of the

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protection of human rights. Against the background of other countries, the pan-European tendency to accept the institution of same-sex marriage is garnering positive attention, although it is still controversial in some countries. Regulations of European law and the case law of the Court of Justice of the European Union, the European Court of Human Rights and the constitutional courts, which play an essential role in anti-discrimination measures and are in favour of respecting human rights, provide crucial support. This article discusses the evolution of the jurisprudence of the ECtHR, the CJEU and the national courts of selected countries (Slovenia, Spain, Portugal, Germany and Austria) concerning same-sex marriage. It highlights how recognising the right to same-sex marriage does not come at the expense of the rights of others or the public interest.
Keywords: right to marry, same-sex marriage, case law, ECtHR, CJEU

Introduction

The institutionalisation of non-heteronormative forms of cohabitation shows great dynamism and is the subject of social and political debate in most states of the European Union (Caprinali et al., 2023; Fuchs & Boele-Woelki, 2017; Hamilton & Noto la Diega, 2020; Szczerba-Zawada 2019). Since the beginning of the 21st century, an increasing number of countries have enacted legislation regulating same-sex relationships by defining the status of the relationships, the rights and duties of the partners or the possibility of adopting children (Digoix, 2020; Kużelewska, 2019). This represents a positive step forward in the fight against discrimination. Despite the controversy that still surrounds it (Kużelewska & Michalczuk-Wlizło, 2021), there is a pan-European trend towards acceptance of the institution of same-sex marriage (Bolzonaro, 2023). Therefore European law regulations and the case law of the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR) (Johnson, 2013) and constitutional courts play an essential role in anti-discrimination measures (Gallo et al., 2014).

This article aims to discuss the evolution of the case law of the ECtHR (Kovacic Markic, 2020), CJEU, and constitutional courts regarding same-sex marriage. It discusses the role European courts have played in this field and how their case law has developed. It will verify the research hypothesis on the consistency of the jurisdiction of the ECtHR, CJEU and selected constitutional courts; in general, we observe a significant tendency towards recognising same-sex marriages. Comparative and legal analysis methods will help achieve this aim. The paper is composed of three sections: section one examines the development of the ECtHR's case law on granting same-sex couples the right to marry, starting from the heteronormative view of marriage outlined in the last decades of the 20th century to the positive obligation of states to ensure the legal recognition and protection of same-sex partnerships through a specific legal framework. Section two analyses the evolution of the case law of the CJEU regarding the protection of the right of same-sex couples to enter into civil unions or get married. Section three is a brief country report devoted to the case law of selected constitutional courts in European states, namely Slovenia, Spain, Portugal, Germany

and Austria. The choice of these states is based on the fact that they are recognised as leading constitutional jurisdictions in Europe regarding same-sex marriage in particular. The principle of dynamic interpretation of constitutional provisions is most frequently adopted in these courts (Dzehtsiarou & O'Mahony, 2023).

1. The European Court of Human Rights and the right to marry for same-sex couples

The European Convention on Human Rights (ECHR) safeguards the right to marry under Article 12: '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.' This fundamental human right aims to protect citizens against government interference in their marital and family life (Van der Sloot, 2014, p. 398). In contrast to other articles of the Convention, Article 12 refers only to men and women. Initially, this led the ECtHR to a more conservative interpretation, relying primarily on textual and historical reading, which resulted in the denial of its applicability to same-sex couples (Willems, 2022, p. 5). In its subsequent case law, the Court considered, in light of Article 9 of the Charter of Fundamental Rights of the European Union (European Union, 2016), that the right to marry can no longer be limited to persons of the opposite sex in all circumstances (in *Schalk and Kopf v. Austria*, Judgment of the ECtHR, 2010, § 61).[2] However, in the absence of a European consensus, the right enshrined in Article 12 is still not recognised for same-sex couples (Shahid, 2017, p. 186). Strongly relying on this insufficient consensus, the Court has found itself in a somewhat conflicted position: it allows a rather wide margin of appreciation, which self-limits judicial activism and thus preserves its authority in (particularly conservative) Member States,[3] while at the same time it perpetuates unequal treatment of marginalised groups and thereby undermines its legitimacy as the guardian of Convention rights (Fenwick, 2016, p. 45; Shahid, 2017, pp. 195–196).

1.1 The ECtHR's early case law: A heteronormative approach to the meaning of Article 12

The ECtHR had a heteronormative approach to interpreting Article 12 of the ECHR in the 1980s and 1990s regarding the right of transsexual people to marry (Johnson & Falcetta, 2018, p. 6). In the case of *Rees v. the United Kingdom* (1986), the

2 Article 9 of the Charter states: 'The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.' Thus, to broaden its scope, Article 9 deliberately guarantees the right to marry without referring to men and women (Willems, 2022, p. 6).

3 The ECtHR faces some resistance from (certain) Member States in implementing its judgments and sufficiently guaranteeing Convention rights (Shahid, 2017, p. 195).

Court, relying primarily on textual interpretation, held that the right provided for in Article 12 protects traditional marriage between persons of the opposite biological sex. Moreover, marriage is protected in recognition that it is the foundation of the family. The ECtHR has noted that while exercising the right to marry is subject to national laws, possible restrictions must not affect its very essence (*Rees*, § 49–50). The same principle was upheld in the case of *Cossey v. the United Kingdom* (1990), where the Court held that the biological definition of an individual's sex for marriage aligns with the traditional interpretation of Article 12 (§ 46).

This stance was rejected in the renowned case of *Goodwin v. the United Kingdom* (Judgment of the ECtHR, 2002). Firstly, the ECtHR held that procreation is not a necessary condition for a couple's fundamental right to marry; the inability of any couple to conceive a child cannot be a reason per se for denying a couple such a right. Given the significant social changes that have taken place in the marital sphere, solely biological criteria for assessing an individual's gender are no longer appropriate (*Goodwin*, § 98 and § 100). The underlying doubt, which the reasoning (un)willingly implies, persists: if reproduction is not a constitutive element of marriage, why should same-sex couples be denied this right (Novak et al., 2019, p. 38)?[4]

1.2 The evolution of same-sex marriage after 2010: Relying on the lack of European consensus

The core issue addressed in this section, whether the right to marry is available to same-sex couples, was considered by the ECtHR for the first time in the case of *Schalk and Kopf* (Kogovšek Šalamon, 2016, p. 1074). The state did not permit the applicants (two men) to marry, so they alleged a violation of Article 12 of the ECHR (*Schalk and Kopf*, § 39). The Court held that the wording of Article 12 must be regarded as deliberate, given that all other substantive articles of the Convention grant rights and freedoms to 'everyone' or 'no one'.[5] Furthermore, in the 1950s, when the ECHR was adopted, marriage was understood in the traditional sense as a union between partners of different sexes (*Schalk and Kopf*, § 55). Accepting the applicants' argument that the Convention is a living instrument to be interpreted in the light of present-day conditions, the ECtHR acknowledged that the institution of marriage develops with the evolution of society. Therefore, regarding Article 9 of the Charter, the right enshrined in Article 12 cannot in all circumstances be limited to

4 This stance was, however, rejected by the Court in *Schalk and Kopf*. In the Court's view, the finding that procreation is not a fundamental element of marriage does not allow any conclusion regarding the issue of same-sex marriage (§ 56).

5 According to some authors, the ECtHR overlooked the fact that Article 12 was inspired by Article 16 of the Universal Declaration of Human Rights (UDHR; United Nations, 1948), which also provides for the right of men and women to marry. The purpose pursued by the UDHR, however, was not to exclude same-sex couples from exercising this right but to provide adequate protection for women, recognising them as equals (Van der Sloot, 2014, pp. 400–403).

opposite-sex couples (*Schalk and Kopf*, § 57 and § 61).[6] However, as it stated, the Court should not rush to judgment, as it has not found a European consensus on the subject of same-sex marriage.[7] National authorities are, therefore, best placed to assess and respond to the needs of each society. In its ruling, the ECtHR emphasised that Article 12 does not obligate Member States to recognise same-sex marriages (*Schalk and Kopf*, § 58 and § 62–63).[8]

Moreover, in *Schalk and Kopf* the applicants alleged a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private and family life), as Austria did not provide for any other form of legal recognition of their union (§ 65).[9] In this respect, the Court went a significant step further and wrote that same-sex couples living in stable de facto partnerships enjoy protection not only in terms of 'private' but also 'family' life, enshrined in Article 8 of the Convention (§ 94–95). It supported a European trend towards the recognition of same-sex relationships (Ammaturo, 2014, pp. 178–179; Crisafulli, 2014, p. 418; Radonjić, 2023, p. 84; Waaldijk, 2021, p. 468). However, the ECtHR did not go so far as to limit the wide margin of appreciation given to Member States at the time: they were still free to decide on the timing and scope of legal recognition of same-sex unions (*Schalk and Kopf*, § 105 and § 108)

In the subsequent case of *Vallianatos and Others v. Greece* (2013), the Court recognised a violation of Article 14, read in conjunction with Article 8, because Greece had introduced, in addition to marriage, civil unions available only to opposite-sex partners. By excluding same-sex couples, the ECtHR noted, the law discriminated based on sexual orientation (*Vallianatos*, § 79).[10] Somewhat surprisingly, since it could not rely on a European consensus, the Court settled for the emerging trend towards the introduction of legal recognition of same-sex relationships.[11] Although

6 Unfortunately, the ECtHR did not clarify what such circumstances are (Shahid, 2017, p. 186).

7 At the time of the judgment in *Schalk and Kopf*, same-sex marriage was permitted in 6 out of the 47 Member States (*Schalk and Kopf*, § 27). The Court's reliance on (the lack of) European consensus and the resulting wide margin of appreciation enjoyed by Member States is criticised as unclear and inconsistent – even more so as the ECtHR does not consequently inspect States' justifications for limiting marriage to persons of the opposite sex (Hamilton, 2013, p. 7).

8 In the Court's view, Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life), a provision of more general purpose and scope, cannot be interpreted as conferring the right to marry on same-sex couples either.

9 In 2010 Austria introduced a law recognising same-sex unions. The ECtHR thus considered only whether this should have been done beforehand (*Schalk and Kopf*, § 103–104).

10 To reinforce its position, the Court held that same-sex couples would have a particular interest in entering into such a union as it would provide them with the sole basis on which to have their relationship legally recognised (*Vallianatos*, § 90).

11 At the time of the *Vallianatos* judgment, 19 Member States of the Council of Europe authorised some form of registered partnership other than marriage. However, only Greece and Lithuania reserved this alternative to marriage for heterosexual couples (*Vallianatos*, § 91).

a step forward, the case in question did not change the Court's heteronormative understanding of marriage (Shahid, 2017, p. 187). In the case of *Hämäläinen v. Finland* (2014), the ECtHR was tasked with ruling on whether a requirement that legal recognition of changed gender be conditional on converting a previously contracted marriage into a registered partnership was in line with the Convention standards in Articles 8, 12 and 14; Finland allowed marriage only between persons of the opposite sex (*Hämäläinen*, § 24 and § 29). The Grand Chamber reaffirmed the stance taken in *Schalk and Kopf*, which stated that in the absence of a European consensus on same-sex marriage and given the sensitive moral and ethical dilemmas involved, Member States are granted a wide margin of appreciation (*Hämäläinen*, § 75). The Court further emphasised that Article 12 as a *lex specialis* protects the traditional concept of marriage; it does not impose an obligation to extend this right to same-sex couples (Johnson & Falcetta, 2018, p. 10).[12] The ECtHR determined that the differences between registered partnerships and marriage would not bring about any fundamental changes in the applicant's legal situation, and therefore it found no violation of the ECHR (Fenwick, 2016, p. 13).

In the case of *Oliari and Others v. Italy* (2015), three same-sex couples claimed that Italy breached Article 14 in conjunction with Article 12 by not allowing them to marry. However, this part of their application was rejected as manifestly ill-founded (§ 193–194; for more on this, see Fenwick, 2016, p. 11). While the Court recognised a gradual development in allowing same-sex couples to marry, with 11 Member States of the Council of Europe granting such rights at the time, it still held on to its view from *Schalk and Kopf* and *Hämäläinen* (*Oliari*, § 191–192). In *Chapin and Charpentier v. France* (2016), the application of Article 12 was again reaffirmed. However, the complaint that alleged a violation of the same-sex couple's right to marry was rejected without restraints. The ECtHR held that not enough time had passed since the earlier cases for it to reach a different conclusion (*Chapin and Charpentier*, § 31–32 and § 39–40).[13] In the case in question, the Court also considered whether France had violated Articles 8 and 14; by denying same-sex couples the right to marry, the level of legal protection otherwise afforded by civil partnerships was inferior. The Court ruled that states enjoy a certain margin of appreciation regarding the legal safeguard-

12 Initially the applicant did not invoke Article 12 of the ECHR; it was the ECtHR that included it in its consideration. Some authors consider this to be equivocal at least, since the Court merely reiterated its position that Article 12 does not impose an obligation to recognise same-sex marriages. Once again, this reinforced the heteronormative approach to Article 12 (Johnson & Falcetta, 2018, p. 13; Shahid, 2017, p. 190).

13 In 2013, France allowed same-sex partners to marry; the ECtHR acknowledged this when ruling on an alleged violation of Article 14 taken in conjunction with Article 12, as the applicants were free to marry. However, some scholars argue that the reasoning could have been reversed: by changing its laws, France admitted a previous wrong practice. As in some other cases, the ECtHR could have held this against it (Shahid, 2017, p. 192).

ing of same-sex relationships, and since France appeared to have followed trends observed in other Member States, it did not overstep its discretion (*Chapin and Charpentier*, § 48–51).

1.3 Legal recognition of same-sex relationships: The state's positive obligation

Although in *Oliari* the interpretation of Article 12 remained heteronormative and thus unchanged, the Court nonetheless took a significant step forward in providing the necessary legal recognition and protection for same-sex unions. By failing to provide a legal framework for same-sex partnerships, apart from marriage which was reserved for heterosexual couples, Italy breached its positive obligation under Article 8 of the Convention (*Oliari*, § 185). In determining the state's margin of appreciation, the Court considered the importance of legal recognition for an individual's existence and identity and the rapid evolution of a European (and global) consensus on legislative protection of same-sex relationships.[14] In addition, the ECtHR attributed importance to public support for and acceptance of same-sex couples in society. The need to regulate such unions had been persistently reiterated by Italy's highest judiciary, which did not go unnoticed by the Court (*Oliari*, § 179–180). However, reliance on the 'internal' consensus was heavily criticised in the literature (see Ziyadov, 2019).[15] The ECtHR noted a fundamental gap between the social reality of the applicants, who lived their relationships openly, and the law, which granted them no recognition. The obligation to provide for the legal recognition of same-sex couples would not, in the eyes of the Court, amount to any particular burden on the state but would serve an essential social need (*Oliari*, § 173). *Oliari* showed a further step in the strengthening of the rights of same-sex persons under the ECHR (D'Amico & Nardocci, 2017, p. 173).

The heteronormative interpretation of Article 12 remains intact even in present-day case law.[16] Contrary to the lack of progress regarding the right to marry for same-sex couples, the Court has further elaborated its understanding of the posi-

14 At the time, 24 out of 47 Member States of the Council of Europe had legislated for some form of recognition and protection in favour of same-sex couples (a 'thin majority'). The ECtHR considered the global trend as well, specifically mentioning the decision of the Supreme Court of the United States of America in the case of *Obergefell et al. v. Hodges, Director, Ohio Department of Health et al.* in 2015 (*Oliari*, § 65 and § 178).

15 The doctrine of European consensus already lacks clarity, thereby deviation from generally applicable models of this consensus is particularly problematic. Reliance on national consensus could also delay the overcoming of discrimination against same-sex couples (Fenwick, 2016, pp. 24–25). In addition, criticism of the European consensus doctrine addresses the Court's inconsistency when outlining the factors on which the width of the margin of appreciation is determined (Ziyadov, 2019, p. 645).

16 This is even more so as the ECtHR dismissed the application in the case of *Fedotova and Others v. Russia* (2023), which alleged (among other things) the violation of Article 12 as manifestly ill-founded (§ 82).

tive obligation to recognise and protect such relationships under Article 8. In January 2023, the Grand Chamber delivered its judgment in the case of *Fedotova and Others v. Russia*, holding that the trend towards legal recognition of same-sex partnerships, which the Court had followed in its past case law, is now confirmed, with 30 Member States of the Council of Europe regulating these unions (either by allowing same-sex marriage or by providing legal protection in various forms of civil or registered partnerships) (§ 175).[17] As a result, the state parties to the Convention are required to provide for a legal framework that ensures recognition and adequate protection to same-sex couples.[18] Only through such an interpretation of Article 8 of the ECHR can the right to private and family life for homosexual persons be effectively protected. Moreover, such an understanding of this right is consistent with the principles of a democratic society – pluralism, tolerance, broadmindedness – as guaranteed by the Convention. Legal recognition and protection confer legitimacy on same-sex couples and promote their inclusion in society (*Fedotova*, § 178–180).

In waiving its positive obligation, Russia referred to the protection of the traditional family, respect for the negative feelings of the majority of the Russian population towards same-sex relationships, and the protection of minors from the promotion of homosexuality.[19] All of these were rejected by the ECtHR, mainly because traditions, stereotypes and prevailing social attitudes in a particular country cannot justify differential treatment based on sexual orientation; the rights of minority groups cannot be subject to the acceptance of the majority (*Fedotova*, § 206–222).[20] Finally, the Court held that states enjoy a wider margin of appreciation for the form and content of such recognition and protection. The Court has not specified whether the legal framework needs to take the form of a registered partnership or civil union (Waaldijk, 2024). However, since Convention rights are not merely theoretical and illusory but practical and effective, the legal framework must provide same-sex couples with aspects integral to their life as a couple (*Fedotova*, § 189–190). The ECtHR confirmed the standards established in *Fedotova* in three subsequent cases: *Buhuceanu and Others v. Romania* (2023), *Maymulakhin and Markiv v. Ukraine* (2023)

17 The Court referred to different bodies of the Council of Europe that have stated that legal protection and recognition of same-sex unions is essential. It also considered international developments, including the Advisory Opinion no. OC-24/17 of the Inter-American Court of Human Rights (*Fedotova*, § 177). It should be noted that as of 16 March 2022, Russia is no longer a member of the Council of Europe nor a contracting party to the ECHR. As the applications in question were lodged before 16 September 2022, the ECtHR still had jurisdiction to deal with them.

18 According to the Court's ruling, the margin of appreciation afforded to states is considerably reduced, due to the European consensus and the aspects essential to the individual's personal and social identity (*Fedotova*, § 187).

19 It is important to note that Russia relied on the judgment in *Oliari*, arguing that there is no *internal* consensus on same-sex unions in Russia (*Fedotova*, § 214).

20 It cannot be overlooked that the same reasoning can be applied, *mutatis mutandis*, to justify the right of same-sex couples to marry.

and *Przybyszewska and Others v. Poland* (2023). The Court has explicitly and rightly opted for a dynamic (evolutionary) interpretation of the Convention, which assumes that it is a 'living instrument' and dictates that it should be 'interpreted in the light of the currently shaped context and prevailing concepts in democratic states' (Garlicki, 2023, p. 31). In addition, it stated that the concept of family is also dynamic.

2. Case law of the Court of Justice of the European Union

In opposition to the ECtHR, the CJEU was, in its foundation, essentially economic in nature, as were the original treaties. As Rosas (2022, p. 205) explains, the Court gradually recognised fundamental rights as part of the general principles of EU law today. Although 30 or 40 years ago, it was still criticised for not being genuinely committed to protecting fundamental rights, it is impossible to say that the CJEU pays a mere 'lip service to such rights' (Rosas, 2022, p. 205). Regarding the differentiation between the two judicatures, Tryfonidou (2020, p. 104) notes that while the ECtHR gives effect to the human rights obligations that the ECHR aims to impose on its signatory states, the CJEU's role is to ensure 'that in the interpretation and application of the Treaties, the law is observed' (Article 19(1), Treaty on European Union, 2016) not only by Member States but also by the EU institutions.

The protection of same-sex couples in the European Community originated from freedom of movement for workers and the prohibition of discrimination on grounds of nationality or sex. At the outset, the message was not entirely clear, as evidenced by the *Grant* case (Judgment of the CJEU, 1998), which deals with travel concessions for unmarried persons granted only to partners of the opposite sex. The argument made that such a limitation constituted discrimination prohibited by Article 119 of the Treaty (on the principle that men and women should receive equal pay for equal work (Treaty on European Union, together with the complete text of the Treaty establishing the European Community (European Union, 1992) and Council Directive 75/117/EEC (European Parliament, 1975)) was rejected by the Court. The Court replied that the refusal was based on regulations that affected men and women equally, so there was no discrimination directly based on sex. It also stated that differences in treatment based on sexual orientation are not included in 'discrimination based on sex' (§ 44 and 45).[21]

The Treaty of Amsterdam (European Union, 1997) marked a significant change in the EU, paving the way for the current Article 19 of the Treaty on the Functioning of

21 Facing the argument invoked in the Human Rights Committee's decision in *Toonen v. Australia* that declares that when Article 26 of the International Covenant on Civil and Political Rights mentions 'sex', it includes sexual orientation, the Court explained that even though Community acts had to respect fundamental rights which constitute an integral part of the general principles of law, those rights could not implicate an extension of the Community's competences.

the European Union (2016). On this basis, Council Directive 2000/78/EC (European Parliament, 2000), establishing a general framework for equal treatment in employment, was adopted. According to its first article, its purpose is combating discrimination on several grounds, including sexual orientation, in the field of employment. Despite its limited scope (which led to some work towards a more encompassing anti-discrimination directive; see European Commission, 2008), the Directive played a crucial role in addressing issues related to discrimination against sexual minorities, as it allowed such cases to be brought before the Court and decided accordingly. This Directive marked a milestone in the evolution of EU legislation concerning the fight against discrimination, precipitating a series of judgments in which the CJEU decided that couples of the same sex, when bonded by civil unions or marriages, were comparable to heterosexual couples and should be treated equally (Judgment of the CJEU, 2008; Judgment of the CJEU, 2011; Judgment of the CJEU, 2012).

This case law, and the protection it offers to same-sex couples, was limited not only because the scope of Directive 2000/78 is circumscribed but also because these judgments make comparability to marriage contingent upon the existence of a civil union, whose validity is up to Member States to determine. Without a state's legal recognition of unions between same-sex persons, the CJEU did not qualify the situations between same-sex and different-sex couples as comparable in the accession of Article 2(2a) of the Directive and hence concluded for the absence of direct discrimination. The Court censured the discrimination that resulted from comparison of the rights attached to civil unions between same-sex couples and those arising from marriages between different-sex couples. However, it did not censure discrimination stemming from the impossibility of same-sex couples being part of civil unions recognised by the Member States or marriages. Despite the lack of competence of the EU to interfere in the way Member States choose to regulate family matters, the CJEU could still analyse some cases, bearing in mind, as Tryfonidou states, that 'similar situations [should] be treated in the same way but, also, that different situations must be treated differently' (2020, p. 110).[22]

Directive 2000/78 is 'the only EU legal instrument that expressly imposes a positive obligation on Member States aiming to protect the rights of sexual minorities' (Tryfonidou, 2020, p. 105). However, the CJEU has also relied on case law concerning civil unions and marriage between couples of the same sex derived from the Directive 2004/38/EC (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 (European Parliament, 2004). Recital 31 of this Directive emphasises that 'Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as […] sexual orientation'. In the meantime, the Treaty of Lisbon (European Union, 2007) entered into force, placing the Charter of Funda-

22 As the Court seems to have done in the *Hay* case (Judgment of the CJEU (Fifth Chamber), 2013).

mental Rights as a binding primary source of EU law. The provisions of the Charter apply to the 'institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law'. The Treaty on the Functioning of the European Union (2016) included in its general provisions, in Article 10, the broad objective of the Union when defining and implementing its policies and activities of combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

In this context, the *Coman* case (Judgment of the CJEU, 2018) put Directive 2004/38 to the test regarding same-sex couples' rights. The CJEU reaffirmed that it is up to Member States to exclusively legislate on marriage and civil unions but in a way that complies with EU law. The refusal in this case to recognise the marriage of a third-country national to an EU citizen of the same sex for the mere purpose of granting a derived right of residence would interfere with Mr Coman's right conferred by Article 21(1) of the Treaty on the Functioning of the European Union (2016) to move and reside freely in the territory of the Member States. The CJEU also stated that the restriction of this right cannot be justified on the grounds of public policy and national identity. As a result, the Court imposed a positive obligation on Member States, as explained by Tryfonidou, 'to recognise the same-sex marriages of Union citizens for the grant of family reunification rights when they exercise their free movement rights under EU law' (2020, p. 105). Even so, as he further explains, 'the Court's rationale for doing this is a purely functional one […] rather than a genuine wish to protect the rights of sexual minorities'. Nevertheless, this anticipated judgment (Kochenov & Belavusau, 2020, p. 238; Mulder, 2018 p. 132) constitutes 'an unquestionable achievement of the Court of Justice' (Kochenov & Belavusau, 2020, p. 233), since it represents a breakthrough for the principle of equal treatment in the EU. It opens up 'the third stage in the development of the equal marriage case law of the EU' (Shahid, 2017, p. 407). The CJEU confined *Coman* to its facts, providing an interpretation with a narrow scope. It did not require an obligation from Member States to introduce same-sex marriage or partnership; this would be impossible due to the limits of EU competence, as family matters fall within the sphere of national law (Kochenov & Belavusau, 2020, p. 236). According to the Court, regardless of the marriage model adopted in their internal law, Member States are obliged to recognise a family relationship resulting from same-sex marriage; this recognition is to take place for the sole purpose of exercising freedom of movement and residence within the EU (Wojewoda, 2022, p. 261).

This line of case law is complemented by the 2021 judgment in Case C 490/20, *V.M.A. v Stolichna obshtina, rayon "Pancharevo"* (Judgment of the CJEU, 2021). The Court held that a minor whose status as a Union citizen is not established and whose birth certificate issued by the competent authorities of a Member State indicates as its parents two persons of the same sex, one of whom is a citizen of the Union, must be

recognised by all Member States as a direct descendant of that citizen of the Union within the meaning of Directive 2004/38 to exercise the rights conferred by Article 21(1) TFEU and by the secondary acts of secondary legislation concerning them.

3. Same-sex marriage in the jurisprudence of constitutional courts of selected states

3.1 Slovenia

The Constitutional Court of the Republic of Slovenia has played an essential role in regulating the legal status of same-sex partners in the country. The Court has addressed the status of same-sex partners in procedures for reviewing the constitutionality of laws, when deciding constitutional appeals and when reviewing the admissibility of legislative referendums. The following is a chronology of the main decisions of the Constitutional Court on the legal regulation of same-sex partnerships.

In its decisions no. U-I–425/06 of 2 July 2009 and no. U-I–212/10 of 14 March 2013, the Constitutional Court evaluated the legal regime governing inheritance by same-sex partners. In the former, the Court ruled that Article 22 of the Same-Sex Civil Partnership Registration Act (Republic of Slovenia, 2005), which regulates the position of partners in registered same-sex partnerships, is incompatible with the Constitution of the Republic of Slovenia concerning the right to inherit from a deceased partner.[23] The Court ruled that, until the discrepancy is resolved, the same rules will apply to inheritance between partners in a registered same-sex partnership as inheritance between spouses under the Inheritance Act (1978). In the latter decision, the Constitutional Court ruled that the Inheritance Act is incompatible with the Constitution and that until the unconstitutionality is remedied, for inheritance between same-sex partners who have been living in a long-lasting partnership but have not entered into a civil partnership under the Same-Sex Civil Partnership Registration Act, and where there are no grounds which would invalidate such a partnership between them, the same rules apply as under the current statutory regime for inheritance between partners who are not married.

The Family Code and the Act Amending the Marriage and Family Relations Act (ZZZDR-D) eliminated unconstitutionalities in individual acts established by

23 The Constitutional Court found that, contrary to the prohibition of discrimination, the law regulates the inheritance of same-sex partners in a registered partnership differently from the inheritance of same-sex couples who have entered into a marriage or are in a civil partnership. It stated that the situation of same-sex and heterosexual couples is essentially the same, since in both cases there is a stable relationship between two persons who are close, mutually supportive and mutually helpful. The legislator did not base the distinction on a factual circumstance but on sexual orientation (Decision of the Constitutional Court, 2009, § 13–15).

the Constitutional Court and comprehensively regulated and equated same-sex and heterosexual couples in all rights and obligations at the general and system levels respectively (Žuber & Kaučič, 2019, p. 143). The primary issue of the legislative referendums on these two acts was whether the majority decided on the rights of a stigmatised and discriminated minority, namely same-sex couples, who are demanding recognition of their dignity and equality before the law. Such decision-making and the potential prejudicing of the constitutional rights of a minority could have been prevented solely by an advance prohibition of the referendum, which did not occur since the Constitutional Court had allowed both referendums (decisions of the Constitutional Court no. U-II–3/11 of 8 December 2011 and no. U-II–1/15 of 28 September 2015; see also Žuber & Kaučič, 2021, pp. 145–146) and thus left the final decision on the rights of a minority in voters' hands. Both referendums proved that legislative referendums are an inappropriate means for resolving controversial social issues in cases when such decision-making prejudices the rights of minorities and prevents the elimination of rights violations (Žuber & Kaučič, 2019; see also Žuber & Kaučič, 2021).

In a historic move, the Constitutional Court issued two landmark decisions in 2022 that granted same-sex couples the same legal status as heterosexual couples. In Decision no. U-I–486/20, Up-572/18 of 16 June 2022, the Court assessed the constitutionality of a legal regulation that reserves marriage only to persons of the opposite sex. It found that Article 53 of the Constitution does not explicitly state whether marriage can be entered into only by persons of the opposite sex but that this decision is left to the legislature, who, when regulating marriage, must also take into account the prohibition of discrimination under Article 14 of the Constitution and the argument of human dignity, which is the cornerstone of human rights. It reiterated the view, based on established constitutional jurisprudence, that same-sex couples, like opposite-sex partners, form durable partnerships. Thus the Constitutional Court held that legislation denying same-sex couples the right to marry is incompatible with the requirement of non-discriminatory treatment based on sexual orientation. It specifically stated that the argument of tradition, invoking the majority conception of marriage as the union of husband and wife, could not justify discrimination. Denying marriage to same-sex couples cannot contribute to the protection of the family, which is a constitutionally permissible goal. In Decision no. U-I–91/21, Up-675/19 of 16 June 2022, the Constitutional Court decided that a regulation under which same-sex partners cannot adopt a child together is also incompatible with the Constitution. Since the situations of different-sex partners living in a marriage and same-sex partners living in a formal partnership are essentially identical, the distinction in the regulation of joint adoption is based on the personal circumstance of sexual orientation. Protecting the child is a constitutionally permissible aim which the legislator must pursue, but the government has failed to demonstrate that the exclusion of same-sex

partners from joint adoption achieves this objective. Moreover, it stated that in some instances, such exclusion even prevents the protection of the child's best interests.

The legislature responded to the findings of these unconstitutional provisions by adopting the Act Amending the Family Code (DZ-B, 2023), which defines marriage as a living union of two persons (Article 3). The change in the definition of marriage in this context also affected the provisions on adoption, which had previously provided that a child could be adopted jointly only by spouses or cohabiting partners (Article 213 DZ-B). A legislative referendum was also announced on this law, but it did not occur); the Constitutional Court, during its review of the admissibility of this referendum, concluded that it was not admissible. It held that the content of the law was that of a law correcting established unconstitutional provisions and that such laws were excluded from the referendum procedure (Article 90(2), fourth indent of the Constitution; Decision of the Constitutional Court no. U-I–398/22 of 14 December 2022).

3.2 Spain

Same-sex marriage was legalised in Spain by Law no. 13/2005 of 1 July 2005, which modified the Spanish Civil Code (SCC; Republic of Spain, 1889) regarding the right to enter into matrimony. The most notable change brought about by this law is the amendment to Article 44 of the SCC, in which a second paragraph was added, stipulating that marriage between persons of the same sex is subject to the same requirements and has the same legal effects as marriage between persons of different sexes. The Partido Popular argued that the reform violated Article 32 of the Spanish Constitution (SC; Republic of Spain, 1978), specifically Article 32(1), which explicitly states that 'man and woman have the right to marry with full legal equality'.[24] An unconstitutionality appeal was therefore lodged against Law no. 13/2005. Seven years later, the Sentencia del Tribunal Constitucional (Judgment of the Spanish Constitutional Court, STC) 198/2012 of 6 November 2012 confirmed the constitutionality of the amendment to the SCC that was introduced by Law no. 13/2005.

Before 2005, the Spanish Constitutional Court had previously referred to same-sex marriage. It is worth noting the Auto del Tribunal Constitucional (Order of the Spanish Constitutional Court, ATC) 222/1994 of 11 July 1994, which recognises that, unlike 'marriage between a man and a woman' (Article 32(1)), 'a partnership between persons of the same biological sex is not a legally regulated institution, nor is its establishment embodied in a constitutional right' (ATC 222/1994, Fundamento Jurídico (FJ) 2). Therefore, the Constitutional Court confirms 'the full constitutionality of the heterosexual principle as a qualifier of the marriage bond'. However, it also ac-

24 Article 32(2) of the SC allows the legislator to regulate 'the forms of marriage, the age at which it may be entered into and the required capacity therefore, the rights and duties of the spouses, the grounds for separation and dissolution, and the consequences thereof'.

knowledges that the 'legislator may enact a regime where homosexual partners may enjoy the same rights and legal advantages as marriage' (ATC 222/1994, FJ 2).

In STC 198/2012, the Constitutional Court refers to ATC 222/1994 but provides a new interpretation of Article 32 of the SC in light of current circumstances (Portilla, 2013, p. 544). Concerning marriage as an institutional guarantee, the Court stated that the only difference introduced by the 2005 reform was that spouses may also belong to the same sex. Therefore, the Court understands that this reform develops the institution of marriage 'without making it unrecognisable to the image held of this institution in modern Spanish society' (Article 32 SC; STC 198/2012, FJ 9). Marriage is characterised by 'equality between the spouses, the free will to enter into marriage with the person of one's own choice and freedom to choose one's partner and the expression of that choice and a manifestation of this wish' (STC 198/2012, FJ 9; Expósito, 2013, p. 89; Presno, 2013). These essential marriage characteristics remain in the SCC even after the 2005 reform. Consequently, from this perspective, the option chosen by the legislator in 2005 cannot be considered unconstitutional (STC 198/2012, FJ 9).

Finally, the Constitutional Court, focusing on the analysis of the essential content of marriage as a fundamental right, concludes that from this perspective, Law no. 13/2005 is not unconstitutional either, because:

> what the legislator is doing […] is modifying how the constitutional right to marry is exercised, without affecting its content or harming the right of heterosexual persons to marry, since the contested law does not introduce any material amendment in the legal provisions governing the requirements and effects of civil marriage between persons of the opposite sex, and without the option chosen entailing the denial or restriction of the constitutional right of any person to marry or not to marry. (STC 198/2012, FJ 11)

In this context, the Court clarified that it could not be automatically concluded from ATC 222/1994 'that heterosexual marriage is the only constitutionally legitimate option' (STC 198/2012, FJ 10). According to Enriqueta Expósito, '[t]he Constitutional Court Ruling 198/2012 constitutes the last link in the legal debate started with the enactment of the Law 13/2005' (Expósito, 2013, p. 1) and expressly defines the Constitution as a 'living tree' (Martinico, 2015, p. 199). The Constitutional Court did not recognise the right to marry as a new right granted to same-sex couples but solely declared that same-sex marriage was not inconsistent with the Constitution (Roca Trias, 2017, p. 84). The decision of the Court relied on so-called 'evolutionary interpretation' of the Constitution (Martínez de Aguirre, 2016, p. 210).

3.3 Portugal

The Portuguese Constitutional Court 'faced the constitutional question of same-sex marriages' for the first time in its Ruling no. 359/2009.[25] The Court, in this appeal, was questioned as to 'whether the Constitution *requires* […] that marriage be *configured* in such a way as to encompass same-sex unions' (§ 10).[26] The Court's ruling was negative, which meant that it did not declare the applicable Article 1577 of the Portuguese Civil Code (PCC; Republic of Portugal, 1966), which until 2010 defined marriage as a contract necessarily 'entered into by two persons of different sexes', unconstitutional. The Court held that 'the Constitution does not require the law to incorporate same-sex marriage, and […] both prohibition of the latter and the provision for differentiated regimes are legitimate' (Ruling no. 121/2010, § 6). It seems that the Court 'at least implicitly accepted that the ordinary legislator' could 'extend the institution of marriage to homosexual unions' (Miranda, 2010, p. 546).

Change came about when, at the beginning of 2010, Government Bill no. 7/XI (Republic of Portugal, 2009) was approved, which amended particular articles of the PCC to permit civil marriage between two persons of the same sex. The amendment included removing the requirement for the parties to be heterosexual from the definition of marriage in Article 1577 of the PCC. The president of the republic requested the Court to consider the constitutionality of these amendments with the constitutional concept of marriage established in Article 36(1) (Portuguese Constitution (PC); Republic of Portugal, 1976).

In its Ruling no. 121/2010 (Ruling of the Portuguese Constitutional Court, 2010), the Constitutional Court decided that the amendments to same-sex marriage in question were not unconstitutional. The Court concluded that the Constitution did not intend to prohibit the evolution of the institution of matrimony, even though the marriage described in the Constitution was between two persons of different sexes. Furthermore, focusing on Article 36(1) of the PC, the same Court stated that 'the constitutional concept of marriage is an open one […]. The ordinary legislator is charged with understanding what corresponds to the dominant conceptions in this matter at each moment in time and reflecting them in the legal order' (§ 23). Thus, the Court clarified that the 'key structural element of the concept of marriage, without which that concept is decharacterised', is not 'the difference in sexes between the people who want to involve themselves in that shared life and to subject it to the rules of marriage', but 'the establishment of a shared life situation by two people' (§ 23).

25 Quote from Ruling of the Portuguese Constitution Court no. 121/2010, §7. The English translation is available at https://www.tribunalconstitucional.pt/tc/en/acordaos/20100121.html. Translations of this ruling are taken from this source.

26 The English translation of Ruling no. 359/2009 is available at https://www.tribunalconstitucional.pt/tc/en/acordaos/20090359.html. Translations of this ruling are taken from this source.

For this reason, the marriage format is not deprived of its essential typical elements by allowing same-sex persons to marry, since

> the state in which two people share their lives – which is characterised by sharing and mutual assistance, in a common life path that is governed by the law and possesses a nature that tends to perpetuity – also lies naturally within the reach of two people of the same sex who want to bind themselves in this way, one to the other and before the State (§ 23).

It follows from this configuration of the right to marriage as a fundamental right that the legislator cannot remove it from the legal order or alter its essential core (§ 23; Mariano, 2013, p. 36).

Finally, the same Ruling highlights that 'extending marriage to spouses of the same sex' does not conflict 'with the recognition and protection of the family as a *fundamental element of society*' (Article 67 of the PC). Indeed, 'the Constitution untied the bond between the formation of a family and marriage' (Ruling no. 121/2010, § 24). In summary, the Court concluded that the legislative initiative on which the request was based does not violate the institutional guarantee of marriage; it also considered that the initiative 'does not have the effect of denying any person, or restricting, the fundamental right to (or not to) marry' (§ 18). Following the Constitutional Court's decision, same-sex civil marriage was permitted by the publication of Law no. 9/2010 on 31 May 2010.

3.4 Germany

The regulations of German law stand out from others, as the legislature introduced the right of non-heteronormative persons to marry into the legal system by ordinary law. In the light of the amendment to the Civil Code dated 20 July 2017, 'marriage is contracted […] by two persons of different or the same sex' (§ 1353(1)); this change is controversial and disputed in the doctrine of German law (Henninger, 2022; Łącki, 2018). Furthermore, it raises the question of whether the distinction between the spouses' sex, not explicitly expressed in a constitutional provision, is necessary to define the institution of marriage and the realisation of its functions. Indeed, as the content of Article 6(1) of the Basic Law contains a conjunction of the concepts of marriage and family, it seems that these are separate institutions. This is important insofar as only the family is ascribed to the reproductive function; allowing in ordinary law the possibility for homosexual couples to marry would result in these unions being covered by the protection expressed in Article 6(1) of the German Constitution. It should also be recalled that in its judgment of 19 February 2013, the Federal Constitutional Court ruled that two persons of the same sex may have parental custody of a child. From the point of view of the addressees of the norms, it would be illogical to interpret them as prohibiting the possibility of homosexual marriage. In addition, in several judgments relating to the institution of same-sex partnership,

introduced firstly in in 2002[27] and later extended in 2004 (Federal Republic of Germany, 2004) and subsequent years, the Court took the view that the different legal situation of spouses and homosexual partners in a life partnership violates the provisions of Article 3(1) of the Constitution. With this in mind, it seems a natural step to extend the institution of marriage to non-heteronormative persons. Giving priority to the principle of equality in Article 3(1) over the constitutional principle of marriage protection expressed in Article 6(1) of the German Constitution resulted in a change in the definition of marriage.

3.5 Austria

A similar situation has arisen in Austria, with the proviso that the Austrian Basic Law does not contain provisions establishing special protection for marriage. The Austrian Constitutional Court has evolved in its exegesis of the principle of equality. In a judgment of 12 December 2003, it was argued that the principle of equality does not dictate the extension of marriage, as a union primarily aimed at having offspring, to other types of unions (Judgment of the Constitutional Court of Austria, 2003), while in a judgment of 4 December 2017, it was deduced that the legal regulation of marriage as a union based on the difference between the sexes not extending to same-sex unions is not acceptable in modern legal culture, in the light of the principle of equality. Furthermore, it was emphasised that partnerships between non-heteronormative persons and marriage as a union between heteronormative persons are based on the same values and are essentially equal (Judgment of the Constitutional Court of Austria, 2017). Thus the separation of the forms of institutionalisation of heterosexual and homosexual relationships violates the prohibition of discrimination resulting directly from the principle of equality expressed in Article 7(1) of the Austrian Constitution of 1920. The Austrian Court's ruling removed barriers to homosexual couples' access to the institution of marriage by pointing out the stigmatisation of relationships differentiated by the sex of the partners. Even the de facto equalisation of the rights and obligations of marriage and civil partnerships does not make the regulation constitutional. The only way to remove the violation of the norms of the Basic Law is to allow marriage to be entered into by non-heteronormative persons.

Conclusion

The criterion for the selection of the five countries discussed above was aimed at justifying the thesis that the adoption by constitutional courts of a dynamic interpretation of the regulations of fundamental laws is a contribution to the institution-

27 For example, the judgment of 17 July 2002, BVerfGE 105, 313(351); the judgment of 7 July 2009, BVerfGE 124, 199; the judgment of 21 July 2010, BVerfGE 126, 400; the judgment of 19 February 2013, BVerfGE 133, 59.

alisation of unions for non-heteronormative persons. The constitutional courts have recognised the definition of a family as dynamic, constantly growing and evolving. This recognition has resulted in changing the definition of a marriage previously reserved for a union between a man and a woman.

The consistency in case law of the ECtHR, CJEU and national courts can be observed: as a general rule, the ECtHR tends to recognise same-sex marriage, although at the same time it leaves the regulation of this legal issue to Member States in their legal order. It follows from the case law of the ECtHR that limiting the institution of marriage to a union between a man and a woman does not constitute an infringement of the human rights of same-sex couples and does not constitute discrimination based on their personal situation. Protecting the value of the traditional family is a legitimate reason for regulating the individual rights of spouses and same-sex partners. The question that has arisen as to whether same-sex partners should be granted the same rights with regard to the possibility of marrying is, after all, within the margin of assessment of the individual state. In this regard, the ECtHR held in *Schalk and Kopf* that both procedurally and substantively, this right is subject to the domestic legislation of states, and the competent authorities of the state concerned are in the best position to identify the needs of the society, bearing in mind that marriage has deep-rooted social and cultural connotations that may vary considerably from society to society. This is a pragmatic approach by the ECtHR; by placing an obligation upon national authorities to recognise and regulate same-sex partnerships, the Court ensures a solution to several practical problems. Nevertheless, in the realm of matrimonial rights, the ECtHR concedes to the sentiments of certain segments of society regarding the union of two individuals in matrimony, asserting that national authorities are compelled to acknowledge same-sex partnerships and to delineate the rights and responsibilities of the partners involved. However, these authorities are not mandated to extend access to the specific institution known as marriage. In this manner, numerous practical challenges encountered by same-sex couples are addressed, while concurrently accommodating the sensibilities of conservative factions within society concerning the sanctity of marriage. This intricate balancing act reflects the Court's attempt to navigate the complexities of societal values while promoting legal recognition for same-sex partnerships.

Secondly, the ECtHR has consistently held that national laws governing the exercise of the right to marry (as allowed by Article 12) should not 'restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired'. In this context it has been observed that the Court has limited considerably' the 'discretion of states and their margin of appreciation under Article 12. At the same time, the Court did not share the argument that negative public attitudes towards same-sex couples create a public interest allowing the state to refrain from legal institutionalisation. This means that no Member State of the Convention is still able to invoke its

cultural context as an argument justifying the denial of legal recognition and care to same-sex couples. The ECtHR's position is framed in a way that goes beyond the context of a single state. Moreover, it seems that in *Fedotova*, the ECtHR did not accidentally use the plural number in the term 'Member States', which indicates that it intended to create a jurisprudential precedent relating this Convention obligation not only to the respondent state but also to all other state parties to the Convention.

The CJEU, in its judgments, makes the recognition of marriage and civil partnership relationships conditional on the institution being legally recognised in a Member State. The CJEU confirmed that it is exclusively up to Member States to legislate on marriage and civil partnerships, but in a way that is compatible with EU law. Refusing to recognise a third-country national's marriage to a same-sex EU citizen for the sole purpose of granting a derived right of residence would interfere with the right to move and reside freely within the territory of a Member State. The CJEU also stated that a restriction of this right could not be justified on grounds of public policy and national identity. As a result, it imposed a positive obligation on Member States to recognise same-sex marriages of Union citizens to grant the right to family reunification when they exercise their right to free movement under EU law. Thus the Court's rationale is purely functional and not part of a genuine desire to protect the rights. Both the ECtHR and the CJEU have experienced a notably parallel evolution in their jurisprudence regarding equal marriage rights. Initially providing no protection, they have gradually progressed towards a reinterpretation of family and marriage concepts, embracing innovative interpretations and even acknowledging legally established marriages from other jurisdictions. The ECtHR has unequivocally asserted its vigilant observation of how EU law influences the status of individuals with same-sex orientations, frequently referencing the EU context in the rationales of its notable judgments, such as *Schalk and Kopf*. Similarly, the CJEU remains attuned to the doctrinal developments shaped by the ECtHR. Their reciprocal relationship and mutual influence have recently been underscored through landmark decisions, including the CJEU's ruling in *Coman* and the ECtHR's judgments in the Italian cases of *Oliari* and *Orlandi*.

Nonetheless, the disparities between the legal orders of Convention law and EU law carry significant implications. In its most recent landmark rulings, the ECtHR has unanimously reinforced the obligation of Council of Europe (CoE) Member States to extend legal recognition to same-sex couples, asserting that failure to do so infringes upon their right to family life. Any potential recognition of same-sex marriage for a full spectrum of legal contexts outside the ambit of EU law can only materialise through voluntary harmonisation by CoE Member States. The Convention does not mandate equality between these partnerships and marriage; similarly, the ECtHR does not obligate Member States to recognise such equality. Consequently, ECtHR judgments are binding solely on the signatories of the Convention to which

they pertain, with their actual implementation and the status of the Convention within national law contingent upon each state's constitution and will.

In stark contrast, the CJEU enjoys a unique advantage: while the ECtHR cannot dictate that the legal acknowledgment of same-sex relationships is an obligation applicable to all, the CJEU operates under the supremacy of EU law over the national laws of Member States, including their constitutions. Therefore, CJEU decisions wield direct binding force across all EU Member States. Though the CJEU is not beholden to ECtHR rulings, these decisions undeniably impact the CJEU, and vice versa, as evidenced by their respective case law. The robust interplay of rulings from both the CJEU and the ECtHR illustrates not only their substantial influence on national legal frameworks but also their profound mutual impact on each other's judicial reasoning. In any case, the jurisprudence of both European courts and national constitutional courts is evolving in terms of extending legal protection against discrimination towards forms of homosexual cohabitation, and permanent same-sex adult relationships are treated as a form of family life. Furthermore, a consensus has developed on the existence of a positive obligation for national legislatures to adopt legal regulations institutionalising same-sex unions. Nevertheless, the selection of the legal form of the union remains with the parliaments of individual states.

Selected states where the regularisation of same-sex unions has taken place due to the interpretation of existing norms have been also described. It should be emphasised that the noticeable diversity in exegesis has always aimed at a general recognition of same-sex unions by legitimising the legal shape of the relationship and the mutual rights and obligations of the partners. In many states, a parallel recognition model has been adopted by introducing the institution of civil partnerships into the legal order, alongside the traditional form of marriage. Despite the ECtHR's unequivocal jurisprudence pointing out that the prohibition of same-sex marriage constitutes discrimination based on sexual orientation, many states still reject the idea of a gender-neutral definition of marriage. The interpretations of the European courts and the rulings of the constitutional courts do not undermine the traditional concept of marriage as a union between a husband and wife, nor do they alter the conditions or implications of marriage for heterosexual couples. Instead, they allow same-sex partners to marry alongside opposite-sex partners.

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