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Equal Marriage Rights: How have the two European courts approached it?

Current Reflections on EU Anti-Discrimination Law –
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Today's programme

- Introduction
- Defining 'equal marriage rights'
- European courts and their characteristics and jurisdictions
- Development of 'equal marriage rights' before the courts
- Developmental stages
- Legal bases for litigation
- Equal marriage rights before the courts: Case Law ECtHR and CJEU
- Challenges for courts
- Outlook for the future

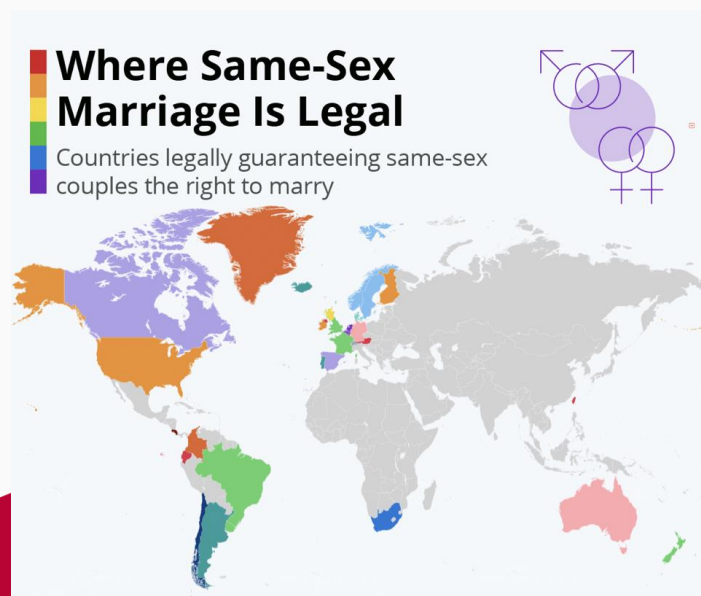
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Rapid (global) legalisation same-sex marriage



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Defining some terms

■ 'Equal Marriage Rights'

- In comparison to rights of different-sex couples, rights of trans individuals, with registered partnerships and other forms of legal recognition of same-sex relationships
- The right to marry & the principle of non-discrimination (marriage certificates, permissions etc.)
- The legal recognition of marriage (marriage abroad, conversion etc.)
- Benefits linked to the concept of marriage (tax benefits, inheritance benefits, spousal benefits, tenancy rights etc.)

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European courts and their characteristics and jurisdictions

European Court of Human Rights (ECtHR)

- Council of Europe
- European Convention on Human Rights (ECHR)
- Instated after WWII
- Main human rights court in Europe
- Consensus-based analysis
- Margin of appreciation

Court of Justice of the European Union (CJEU)

- ECSC, EAEC/Euratom, EEC, EC, EU
- Instated after WWII
- Economic focus: 'integration'
- CJEU overlooking interpretation and application of (EU) Treaties (and secondary legislation)
- 'Integration' court
- Primacy / Supremacy EU law

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Development of 'equal marriage rights' before the courts

European Court of Human Rights (ECtHR)

- Status of 'marriage': competence of Contracting States
- Development 'equal marriage rights' in stages

Court of Justice of the European Union (CJEU)

- Status of 'marriage': competence of Member States
- Development 'equal marriage rights' in stages

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Developmental stages before the courts

Stages European Court of Human Rights (ECtHR)

- 1. ECHR & human rights discourse?
- 2. LGBT-activism & -litigation; reinterpretation of 'family' and 'marriage' ('family life')
- 3. Recognition 'foreign' concluded marriages?

Stages Court of Justice of the European Union (CJEU)

- 1. (Founding) Treaties / Acquis communautaire?
- 2. Equality in employment and occupation
- 3. Mainstreaming anti-discrimination & free movement rights
- 4. Coman judgment; recognition marriages concluded in other Member States

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Legal bases for litigation

Case law ECtHR

- Articles 8, 12 and 14 ECHR
- Article 12 ECHR:
 - Marriage for 'opposite' sex couples (*Rees*);
 - Biological criteria for determining sex (*Cossey, Sheffield & Horsham*);
 - No longer biological criteria needed (*Goodwin*);
 - 'Marriage traditional union between partners of opposite sex, no consensus, wide margin of appreciation (*Schalk & Kopf*, repeated in *Hämäläinen, Oliari*, and *Chapin and Charpentier*);
 - Recognition marriages concluded in other Contracting States (*Orlandi*)

Case law CJEU

- *Acquis communautaire* LGBTQ+ friendly?: No (*Grant, D & Sweden v Council*)
- 2000: Adoption 'Employment Equality Framework Directive':
 - Equal marriage rights in case of legally recognized LGBTQ+ couples 'comparable' to different-sex spouses (*Maruko, Römer, Hay, Dittrich & others, W v. Commission*)
 - No legal recognition? No comparability (*Parris*)
- 2004: Adoption Citizenship Rights Directive (CRD)
 - EU citizenship -> free movement rights for family, irrespective of sexuality of citizen (*Coman* = Recognition marriages concluded in other Member States)
- Treaty of Lisbon 1-12-2009
 - CFR; Article 10 TFEU

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Where are we now?

Case law ECtHR

- No right to marry for same-sex couples before the ECtHR under Article 12 or 14
- No 'consensus' (*Schalk*: 2010)
- Margin of appreciation for Contracting States
- Currently 17 Contracting States where same-sex marriage is allowed
- Rights of same-sex couples in registered partnerships on the basis of Article 8 (*Valliantos, Oliari, Pajić, Taddeucci and McCall, Fedotova*)
- Recognition marriages concluded in other Contracting States (*Orlandi*)

Case law CJEU

- No right to marry for same-sex couples before the CJEU
- Article 9 Charter Fundamental Rights EU (CFR)
- Article 51 CFR (scope)
- Article 52(3) CFR (relation with ECHR)
- *Coman* = Recognition marriages concluded in other Member States
 - However: *Coman* case pending before ECtHR (*Coman and Others v. Romania*; also see *A.B. and K.V. v. Romania*.)
- European Commission: LGBTIQ Equality strategy 2020-2025: 'facilitating the exercise of free movement rights for all families, including rainbow families.'

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Challenges for courts?

- Boundaries competences with Contracting/Member States;
- Sensitivity / delicacy topic (link with tradition, religion, culture etc.);
- Judicial activism or judicial restraint?: Trying to strike balance between rights LGBT-individuals and of States protecting State interests;
- Legitimacy, credibility, authority issues?

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Outlook for the future?

- Urging courts to have **coherency** and **consistency** in their judgments and to **apply strict scrutiny** and **non-discrimination** more explicitly;
- **Request** from States **weighty reasons** to **justify differential treatment** on the basis of sexual orientation (unlike the ECtHR in *Schalk and Kopf* and the CJEU in *Parris, Léger* etc.);
- Urging courts to uphold the judgments of the European courts;
- EU:
 - Execute LGBTIQ Equality Strategy 2020-2025;
 - Adopt LGBTQ+ friendly legislation (Equality Directive; harmonisation initiative for mutual recognition of parenthood between Member States etc.);
 - Take legal action against States that violate equal marriage rights of LGBTQ+ EU

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Thank you for your
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