

# European Law Developments on SOGIE

Complementing rulings of the European Court of Human Rights, the European Committee on Social Rights, and the European Court of Justice.

By Arpi Avetisyan.<sup>175</sup>

Rise of populism and nationalism, vocal anti-gender movements are increasingly more noticeable across Europe. This inevitably affects SOGIE communities and human rights activists working in this area. Judging from the extensive flow of cases on SOGIE issues to regional courts, it is evident that litigation plays ever bigger role in upholding human rights and holding states accountable.

This essay looks into the legal developments in the area of SOGIE rights at the European level, focusing on the complementing rulings of the European Court of Human Rights (ECtHR),<sup>176</sup> the European Committee on Social Rights (ECSR)<sup>177</sup> and the European Court of Justice (CJEU).<sup>178</sup>

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Despite some setbacks, the 2017-2018 have witnessed important legal developments at the European level, especially in the areas of recognition of same-sex couples and freedom of movement, freedom of expression, prohibition of sterilisation of trans people, asylum, and *non-refoulement*.<sup>179</sup>

Many of the cases touch upon morality issues and the notion of “traditional family” weaves though and combines with other areas of SOGIE rights being brought to the Courts’ attention.

## Family rights

Within context of the right to freedom of movement, the landmark judgment of *Coman and Others*<sup>180</sup> brought a big celebration for confirming equality for same-sex spouses exercising their freedom of movement across the EU. In this case, Adrian Coman, a Romanian citizen, had married his husband (a US citizen) in Belgium while residing there. Although EU law provides protection against discrimination based on sexual orientation (SO),<sup>181</sup> and freedom of movement is one of the essential pillars of the EU,<sup>182</sup> Romania did not recognise

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<sup>176</sup> The [European Court of Human Rights](#) is a Council of Europe body, which rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights.

<sup>177</sup> The [European Committee of Social Rights](#) monitors compliance with the Charter under two complementary mechanisms: through collective complaints lodged by the social partners and other non-governmental organisations ([Collective Complaints Procedure](#)), and through national reports drawn up by Contracting Parties ([Reporting System](#)),

<sup>178</sup> The [Court of Justice of the European Union](#) is the judicial institution of the European Union and of the European Atomic Energy Community (Euratom). Its primary task is to examine the legality of EU measures and ensure the uniform interpretation and application of EU law.

<sup>179</sup> This is not a comprehensive survey, but provides highlights on developments that have had or will have a significant impact in further developments in respective areas.

<sup>180</sup> CJEU, *Case C-673/16, Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Others*, 5 June 2018.

<sup>181</sup> Article 21 of the EU Charter on the Fundamental Rights.

<sup>182</sup> [Citizens’ Rights Directive](#) (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 amending Regulation - EEC).

their marriage<sup>183</sup> and authorities denied a residence permit to the American spouse based on the Citizens Directive.

This judgment is of great significance in many ways. The CJEU confirmed that “spouse” is “a person joined to another person by the bonds of marriage”,<sup>184</sup> and clarified that the term “is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned”.<sup>185</sup> This was a huge shift in Court’s approach from an earlier one, where it had defined marriage as “generally accepted by the Member States”, to mean “a union between two persons of the opposite sex”.<sup>186</sup>

However, as an EU body, the CJEU lacks competence to rule on marriage laws of member states. Therefore, this ruling is confined to recognition for the purposes of freedom of movement only.<sup>187</sup> This was also to address the concerns raised by a few Member States around public policy or “national identity” if they allowed same-sex couples to use the Citizen’s Directive.<sup>188</sup> In this regard, the CJEU made it clear that as “such recognition does not require that a Member State [...] provide, in its national law, for the institution of marriage between persons of the same sex”. Having said that, the *Coman* case is a huge way forward as it cleared up the legal uncertainty that many LGBT families have been facing for years and it may be considered a first step in recognition of same-sex couples beyond residence rights, especially in those States that have no legal framework in place.<sup>189</sup>

In considerations on the family life of same-sex couples, in the *Coman* CJEU took on ECtHR’s approach. Among others, it looked at *Orlandi and*

*Others v Italy*,<sup>190</sup> where ECHR confirmed that States ought to provide *some form* of legal recognition to marriages of same-sex couples contracted abroad. While refusing to consider the claims under Article 12 on the right to marriage and referring to the notion of “margin of appreciation”,<sup>191</sup> the ECtHR relied on its earlier judgment of *Oliari and Others*<sup>192</sup> where it had established the need of legal recognition and protection of relationships of same sex couples.<sup>193</sup> Importantly, both CJEU Advocate General in *Coman*, and the ECtHR in *Orlandi* indicated the shift in interpretation of the concept “spouse” and “marriage”, rapid developments in recognition of same-sex unions in Europe, with majority legislation in favour of such recognitions.<sup>194</sup>

### “Propaganda laws” and freedom of expression

In summer 2017 the ECtHR’s delivered a strong worded judgment in *Bayev and Other v Russia*<sup>195</sup> concerning Russia’s infamous “gay propaganda laws”.<sup>196</sup> This case concerned three activists who argued that application of the laws for using slogans such as “Homosexuality is natural and normal”, “Children have a right to know”, “Great people are also sometimes gay” among others, during protests held outside schools or children’s libraries in Russia was in violation of their right to freedom of expression. The applicants were found guilty by domestic courts of an administrative offence (“public activities aimed at the promotion of homosexuality among minors”).

This judgment was a leap forward from a similar decision by UN HRC in *Fedotova* in 2012.<sup>197</sup> The

<sup>183</sup> Article 277(2) of the Romanian Civil Code states: “Same-sex marriage contracted abroad, whether between Romanian citizens or by foreign citizens, is not recognised in Romania”.

<sup>184</sup> *Coman and Others*, para 34.

<sup>185</sup> *Ibid*, para 35.

<sup>186</sup> CJEU, C-122/99 P and C-125/99, *P D and Kingdom of Sweden v Council of the European Union*, 31 May 2001m, para 34.

<sup>187</sup> N.B. The judgment is applicable in certain conditions: a) in freedom of movement cases only; b) the marriages must be those concluded in an EU MS with genuine residence of at least 3 months; c) the judgment concerns residence rights only, and any additional rights are under the discretion of the hosting MS.

<sup>188</sup> Hungary, Latvia, Poland intervened on these points before the CJEU.

<sup>189</sup> Romania, Bulgaria, Poland, Slovakia, Lithuania and Latvia.

<sup>190</sup> *Orlandi and Others v Italy* (Applications nos. 26431/12; 26742/12; 44057/12 and 60088/12), ECtHR, 14 December 2017.

<sup>191</sup> Margin of appreciation doctrine is developed by the ECtHR. It means that a member state is permitted a degree of discretion, subject to ECtHR’s supervision, when it takes legislative, administrative or judicial action in the area of a Convention right. For further details see [OSJI Factsheet](#).

<sup>192</sup> *Oliari and Others v Italy* (Applications nos. 18766/11 and 36030/11), ECtHR, 21 July 2015.

<sup>193</sup> *Orlandi*, para 192.

<sup>194</sup> *Advocate General Opinion in Coman and Others*, 11 January 2018, para 56; *Orlandi*, paras 204-206.

<sup>195</sup> *Bayev and Others v Russia* (Appl. Nos 67667/09, 44092/12 and 56717/12), ECtHR, 20 June 2017.

<sup>196</sup> Series of legislative acts (most recently in 2013) “promoting non-traditional sexual relationships” among minors was made an offence punishable by a fine. For details, see *Bayev and Others*, paras 26-34, relevant domestic laws.

<sup>197</sup> Human Rights Committee, *Fedotova v. Russian Federation*, Merits, Communication No 1932/2010, UN Doc CCPR/C/106/D/1932/2010, 31 October 2012.

ECtHR found that these laws were not only in violation of applicants' right to freedom of expression, but also had reinforced stigma and prejudice, and encouraged homophobia, which was incompatible with the values of a democratic society and the European Convention.

Interestingly, while considering how far interference in the right to freedom of expression could be justified based on the protection of morals (as argued by the Russian government), the ECtHR acknowledged the commitment to family values by LGBTI community members and in so doing reinforced the notion that the right to "family life" equally applies to them. It referred to the steady flow of cases coming to its attention on various aspects of family life (access to marriage, parenthood and adoption), in effect rejecting the Government's argument that exercising freedom of expression on this question could devalue or otherwise adversely affect the existence of "traditional families" or compromise their future.<sup>198</sup>

Importantly, the ECtHR reiterated that "it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority".<sup>199</sup>

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Lastly, in relation to the argument of the protection of the rights of others, the risk of minors being

"converted" to homosexuality, the Court found that the Government had been unable to provide any explanation of the mechanism by which a minor could be enticed into "[a] homosexual lifestyle", let alone science-based evidence that one's sexual orientation or identity was susceptible to change under external influence. In addition to significant jurisprudential development, this judgment is also important means in pre-empting similar initiatives of introducing propaganda laws occurring regularly in various European countries.<sup>200</sup>

### *Sterilisation and bodily integrity*

The ECtHR had already ruled in a number of cases concerning rights of trans people seeking legal gender recognition (LGR), but it was not until the case of the *A.P., Garçon and Nicot v. France* that the Court established that the sterilisation requirement as part of LGR violates human rights.<sup>201</sup> The applicants in this case complained that they needed to prove infertility and genital surgery, as well as undergoing excessive and lengthy discriminatory examinations in order to satisfy the condition. The ECtHR held that requiring that individuals undergo sterilisation against their will for the purpose of achieving LGR puts those individuals in a situation of an insoluble dilemma: that of choosing full exercise of the right to private life (for LGR) at the expense of their right to physical integrity, also guaranteed by the same right.<sup>202</sup>

This line of reasoning resonated in the decision of *Transgender Europe and ILGA-Europe v. the Czech Republic*,<sup>203</sup> by the European Committee on Social Rights (ECSR).<sup>204</sup> So far this is the first discrimination case relating to GI decided under this procedure. The ECSR found that the legal requirement for transgender persons in the Czech Republic to undergo medical sterilisation in order to have their gender identity recognised seriously impacts a person's health, physical and psychological integrity, and dignity, therefore is in violation of the right to health under the Charter. The Committee reiterated that gender recognition in itself is a right recognised under international human rights law.

<sup>198</sup> *Bayev and Others*, para 67.

<sup>199</sup> *Ibid*, para 70.

<sup>200</sup> See e.g. ILGA-Europe, *Annual Review 2018*, 26 (Moldova), 72 (Hungary).

<sup>201</sup> *A.P., Garçon and Nicot v France* (Appl nos. 79885/12, 52471/13 and 52596/13), ECtHR, 6 April 2017.

<sup>202</sup> Although not systematically, but ECHR cases are also directly applied in domestic courts, e.g. in the [case of two trans persons in Lithuania](#).

<sup>203</sup> *Transgender Europe and ILGA-Europe v Czech Republic*, Complaint No. 117/2015, ECSR, made public 1 October 2018.

<sup>204</sup> This case was brought under the [Collective Complaints Procedure](#).

This case will serve as a basis for reinforced advocacy efforts before this Council of Europe body, and will allow the Committee to find violations of the right to health under its national reporting system against the many other Council of Europe Member States which still require sterilisation as part of the LGR process.<sup>205</sup>

Regrettably, these rulings did not go far enough to address ending forced medical examinations ordered by the national courts or a mental health diagnosis as a violation of the European Convention or the Charter. Another drawback is the reluctance by these two bodies to consider discriminatory aspect of sterilisation requirement. It is much hoped however, that in light of World Health Organisation's recent removal of trans identities from the mental health disorders chapter<sup>206</sup>, both European and national courts will adopt the same approach.

### *Asylum and non-refoulement*

In the area of asylum and migration, there has been different dynamics between various European Courts. To date, CJEU has ruled in three judgments,<sup>207</sup> the latest being *F. v Bevándorlási és Állampolgársági Hivatal*.<sup>208</sup> The latter concerned subjecting "F" – a Nigerian man claiming international protection in Hungary due to persecution based on his sexual orientation – to psychological tests in order to "determine his homosexuality". The CJEU established that the use of psychological tests to determine the sexual orientation of an asylum seeker "amounts to a disproportionate interference"<sup>209</sup> in their private life. While the CJEU upheld that national governments can use experts' reports as part of an asylum seekers' credibility assessment, they cannot do so in a way that violates the fundamental rights guaranteed by the Charter of Fundamental Rights of the EU and they cannot base a decision solely on

the conclusions of such a report or be considered bound by it. What is remarkable, is that in addition to applicable EU law in this case CJEU relied on the *Yogyakarta Principles*,<sup>210</sup> in particular "that no person may be forced to undergo any form of psychological test on account of his sexual orientation or gender identity".<sup>211</sup> This is especially significant in the context of CJEU's repeatedly claimed role of adjudicator of EU law, and not being a human rights court. In comparison, the ECtHR has not yet decided in any *non-refoulement* related cases based on applicants' SOGIE. These cases have either been declared inadmissible or struck out as a result of friendly settlement. Such cases are regularly submitted to ECtHR's scrutiny, and hopefully this Court will also provide further guidance with a positive judgment in this area.<sup>212</sup>

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The cases discussed above are a huge milestone in development of SOGIE issues, and important foundation to continue building on further. The notion of majority versus minority comes up in most of them, especially concerning SO. Although these developments cannot be taken for granted especially in light of several strong dissenting opinions voiced in these judgments, it is encouraging to see litigation as a means for protections of LGBTI people, followed with positive rulings from European Courts.

<sup>205</sup> For further details, see "Reporting system of the European Social Charter".

<sup>206</sup> "World Health Organisation moves to end classifying trans identities as mental illness", TGEU; WHO, *International Classification of Diseases*.

<sup>207</sup> CJEU, Joint cases C-199/12 to C-201/12, *Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel*, 7 November 2013 (concerning concealment of one's SO); Joint Cases C-148/13 to C-150/13, A, B, C v *Staatssecretaris van Veiligheid en Justitie*, 2 December 2014 (on credibility assessments).

<sup>208</sup> CJEU, C-473/16, *F. v Bevándorlási és Állampolgársági Hivatal*, 25 January 2018.

<sup>209</sup> *Ibid.*, para 60.

<sup>210</sup> *Yogyakarta principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (2007).

<sup>211</sup> *F v Bevándorlási és Állampolgársági Hivatal*, para. 62.

<sup>212</sup> It is noteworthy, that in a recent case, *S.A.C. v UK*, currently communicated to the UK Government for response, for the first time ECtHR has asked about concealment of one's SO upon returning to their home country where they are at risk of persecution.