

**SOUND THE SHOFAR IN LUXEMBOURG: CROSS-BORDER
RECOGNITION OF SAME-SEX SPOUSES IN THE EUROPEAN
UNION AND ISRAEL'S *BEN ARI V. DIRECTOR
OF POPULATION ADMINISTRATION****

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Nous voulons dire en particulier aux adolescentes, aux adolescents de ce pays qui ont été blessés, qui ont été désemparés ces derniers jours, qui ont été dans un désarroi profond, immense, qui ont découvert une société où une sublimation des égoïsmes permettait à certains de protester bruyamment contre les droits des autres.

Nous voulons leur dire simplement qu'ils sont dans leur singularité et dans leur place dans la société.

Que nous les reconnaissons dans leur place, dans la société. Avec leurs mystères, avec leur talents, avec leur défauts, leur qualités, leurs fragilités.

Christiane Taubira¹

INTRODUCTION

From the sandy Mediterranean beaches of Spain to the peaks of Poland's Tatra Mountains, the European Union stretches a continent divided not only by geographic barriers but also by linguistic, political, and cultural differences. It is surprising then, even to the most optimistic academics and politicians, that this

* On June 5, 2018, after this Article was in the publishing process, the European Court of Justice (ECJ) issued their Judgment in *Coman and Others* C-673/16, holding in very similar terms to that which is argued herein. As such, all facts, figures, and legal analyses herein pre-date the *Coman* decision. Thus, it is recommended that this Article be read in concert with that Judgment and now serve as helpful guidance in the proper implementation of the ECJ's holding.

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1. French Minister of Justice, Address to the National Assembly (Apr. 23, 2013) (“We would especially like to speak to the adolescents in our country who have been hurt during this debate. We speak to those children who found themselves in the midst of deep and frightening chaos. They discovered a society where a wave of selfishness led many to loudly protest against the rights of others. We simply want to tell these adolescents that they are at home in our society. We recognize them in this society. We recognize their contradictions, talents, shortcomings, qualities, and fragility.”).

European experiment has lasted for more than half a century, growing—until recently²—stronger in unity as the years progress. Nevertheless, the Union remains fatally disunited in certain areas of social politics—namely, in marriage law and in the rights afforded to gay and lesbian citizens.³

In the European Union, the freedom of movement for workers within the Member States is a fundamental right guaranteed to all citizens so long as certain employment criterion is met.⁴ This right, in general, extends to the immediate family and dependents of the worker asserting that right.⁵ This means that in a heterosexual marriage, the husband or wife of a worker who decides to relocate to another EU Member State to work can move with their partner and live without any major legal problems or immigration status concerns.⁶

While EU law currently guarantees these spousal rights, the definition of marriage is left to the individual Member States.⁷ In the United States, same-sex marriage has been growing in public acceptance; yet, unlike in the United States, the freedom to marry⁸ a partner of the same sex has been legally recognized in only a minority of Member States.⁹ Consequently, much like the pre-*Windsor*¹⁰ and *Obergefell*¹¹ era in the United States, there exists a patchwork quilt of legal “marriage” across the Union, in which gays and lesbians legally married to their

2. See, e.g., Peter Foster, *EU Summit: Another Show of Disunity Looms as Europe's Political Elite Fight to Keep Union from Tearing Itself Apart*, TELEGRAPH (Feb. 3, 2017), <http://www.telegraph.co.uk/news/2017/01/29/eu-summit-another-show-disunity-looms-europes-political-elite/>

3. *Infra* Part I.

4. See Consolidated Version of the Treaty on the Functioning of the European Union art. 45, May 9, 2008, 2008 O.J. (C 115) 47.

5. See 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) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 2004 O.J. (L 229) 35.

6. See *id.* (providing specific spousal rights of free movement).

7. See generally C. WAALDIJK & M. BONINI-BARALDI, *SEXUAL ORIENTATION DISCRIMINATION IN THE EUROPEAN UNION: NATIONAL LAWS AND THE EMPLOYMENT EQUALITY DIRECTIVE* (T.M.C. Asser Press ed. 2006).

8. *Infra* notes 27-32 and accompanying text detailing the diversity of marriage and marriage equivalent laws within the Union.

9. *Id.*

10. *United States v. Windsor*, 570 US 744 (2013) (ruling that Section 3 of the Defense of Marriage Act (DOMA), was unconstitutional under the Due Process Clause of the Fifth Amendment, thus forbidding the federal government's disparate treatment of same-sex spouses in state-sanctioned homosexual marriages from state-sanctioned same-sex marriages).

11. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution guarantees the right to marry as one of the fundamental liberties it protects, and that liberty applies to same-sex couples in the same manner as it does to opposite-sex couples).

spouses are not always guaranteed the same rights as their heterosexual counterparts in every Member State.¹²

Given this disparity in national recognition of same-sex marital status across the Union, it is no surprise that a case challenging the status quo has made its way to the European Court of Justice (ECJ).¹³ Adrian Coman, a Romanian gay rights activist who legally married his male partner—a U.S. citizen—in Belgium in 2010 was told that a residence permit would be refused to his American spouse on the grounds that the couple’s same-sex marriage could not be recognized in Romania as the Romanian Civil Code¹⁴ bans the recognition of same-sex marriages performed abroad.¹⁵ As a result, the couple brought an action claiming that the refusal of the residence permit due to the failure of the Romanian authorities to recognize same-sex marriages contracted abroad amounted to a breach of Mr. Coman’s EU free movement rights.¹⁶ The case was referred to the Romanian Constitutional Court which then asked the ECJ for a preliminary ruling to determine the proper interpretation of the terms “spouse” and “any other family member” as found in Directive 2004/38/EC.¹⁷ This case has the potential to either remove the barriers same-sex spouses face in exercising their free movement across the EU or to shore up those tenuous barriers with the steel of legal discrimination.

Across the Mediterranean, in the sun soaked Holy Land, connected to Europe by her people’s shared history, an illuminating court opinion may shed insight into this growing human rights debate. Unlike most Western nations, Israeli law severely limits the legal status of civil marriage.¹⁸ As a result, couples hoping to wed must do so through via their religious denomination and according to the religious laws of that denomination.¹⁹ Thus, inter-faith, same-sex, and irreligious

12. See, e.g., MARK BELL, ILGA—EUROPE, EU DIRECTIVE ON FREE MOVEMENT AND SAME-SEX FAMILIES: GUIDELINES ON THE IMPLEMENTATION PROCESS 1-5 (2005).

13. See, e.g., Alina Tryfonidou, *Awaiting the ECJ Judgment in Coman: Towards the Cross-Border Legal Recognition of Same-Sex Marriages in the EU?*, EU LAW ANALYSIS (March 5, 2017), <http://eulawanalysis.blogspot.com/2017/03/awaiting-ecj-judgment-in-coman-towards.html> (explaining the background and law surrounding the pending preliminary reference from Romania to the European Court of Justice).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. See generally Uri Regev, *Why is it so Difficult for Jews to Marry in Israel?*, THE HUFFINGTON POST: THE BLOG (May 1, 2013), http://www.huffingtonpost.com/rabbi-uri-regev/why-is-it-so-difficult-for-jews-to-marry-in-israel_b_3196200.html. While Israel recently approved a bill that allows couples with no identifiable religious affiliation to civilly marry in the State, this applies to a very limited demographic as it still offers no civil marriages to mixed-religion couples, or any couple in which one spouse has an identifiable religion. See also Michael Toiba, *Civil Unions Law to be Implemented Next Week*, THE JERUSALEM POST (Nov. 3, 2010), <http://www.jpost.com/Israel/Civil-unions-law-to-be-implemented-next-week>.

19. E.g., Uri Regev, *Why is it so Difficult for Jews to Marry in Israel?*, THE HUFFINGTON

marriage is not possible within the State of Israel.²⁰ As a result, both heterosexual and homosexual couples seeking to marry under civil law must almost always do so abroad.²¹ Upon return, the Israeli Supreme Court, acting in its capacity as the High Court of Justice,²² has ruled that the government must record the couples as “married” in the official population registry.²³ This recording entitles the partners to the rights of married couples under Israeli law but does not constitute an official “marriage” under the laws of Israel.²⁴ Therefore, the Court has, through legal maneuverings, guaranteed that marriages conducted outside of the State are still, for all intents and purposes, recognized as valid within the confines of the legal barriers in place.²⁵

This Article argues that the European Court of Justice (ECJ) in answering the *Coman*²⁶ case preliminary reference concerning Member State implementation of Directive 2004/38/EC,²⁷ should look towards Israel as an example of how to execute the balance between a Member State’s exclusive competence in family law and obligation to guarantee the fundamental rights of all EU citizens. Furthermore, this Article argues that a proper ruling would force Member States to recognize—only to an extent necessary for purposes of providing and protecting those fundamental rights—marriages and equivalent partnership recognitions conducted and legally recognized in other Member States. Part I provides background information regarding same-sex marriage in the European Union, Directive 2004/38/EC, the freedom of movement of worker’s family members in the EU, the principles of subsidiarity and competences, as well as the Israeli High Court of Justice opinions in *Funk-Schlesinger v. Ministry of*

POST: THE BLOG (May 1, 2013, 6:08 PM), http://www.huffingtonpost.com/rabbi-uri-regev/why-is-it-so-difficult-for-jews-to-marry-in-israel_b_3196200.html.

20. *Id.*

21. See Ilan Lior, *As France becomes 14th Country to Approve Same-Sex Marriage, Israel Still Lags Behind*, HAARETZ (APR. 24, 2013), <http://www.haaretz.com/news/world/as-france-becomes-14th-country-to-approve-same-sex-marriage-israel-still-lags-behind.premium-1.517358> (“In Israel today, the religious establishment still has a monopoly over issues of marriage and divorce. To circumvent this, many Israeli citizens have a civil marriage overseas and then register it at Interior Ministry.”).

22. The Israeli Supreme Court has different roles, one of which is to act as the High Court of Justice. The court sits as the High Court of Justice when hearing cases of first instance primarily concerning State actions.

23. See HCJ 3045/05 Ben-Ari v. The Director of the Population Administration in the Ministry of the Interior 2006(4) PD 1725 [2006] (Isr.).

24. *Id.*

25. *Id.*

26. Case C-673/16, *Coman v. Inspector General of Romania*, 2016.

27. 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) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 2004 O.J. (L 229) 35.

*Interior*²⁸ and *Ben-Ari v. Director of Population Administration*.²⁹ Part II analyzes how Israeli jurisprudence could serve as a guiding force for the EU, the unique problems that the EU faces with regards to interstate recognition of same-sex marriages, and how the Israeli concepts can and should be applied in a European context. Lastly, Part III concludes that the ECJ can provide a balanced and nuanced opinion in the *Coman* case that appeals to the cultural sensitivities of the Member States and the federalism concerns at play within the Union, while simultaneously asserting and protecting the human rights guarantees of the overarching European society. That balance consists of a recognition by all Member States of marriages conducted in other Member States to the extent necessary to protect the rights guaranteed under EU law to married partners and their children but short of legitimizing those marriages under the specific marriage laws of each individual Member State.

I. IN WHICH *MATRIMONIO* IS NOT *MATRIMONIO*

A. *Same-Sex Marriage in the European Union*

On April 23, 2013, over the deafening chorus emanating from thousands of pink and blue-clad anti-gay marriage protesters crowded near Paris' *L'Hôtel national des Invalides*, the French National Assembly took a giant step forward into the small but growing league of nations that recognize the right of gay and lesbian citizens to marry their same-sex partners.³⁰ After months of debate and divided public opinion, Francois Hollande's Socialist Party gained a sweeping victory for French equality.³¹

Less than two years later, the media followed Irish citizens living in the United Kingdom as they made the journey home across the Irish Sea to join their compatriots as they cast their vote in what would be a historic referendum.³² In one strikingly emotional advertisement, the youth services group BeLonG To asked LGBT supporters to "bring your family with you" to the polls to create a different sort of Ireland for LGBT youth to grow up in.³³ Supported by all major

28. HCJ 143/62 Funk-Schlesinger v. Minister of Interior 17(1) PD 225 [1963] (Isr.).

29. HCJ 3045/05 Ben-Ari v. The Director of the Population Administration in the Ministry of the Interior 2006(4) PD 1725 [2006] (Isr.).

30. E.g., Scott Sayare, *Amid Much Tumult, France Approves 'Marriage for All,'* N.Y. TIMES, Apr. 24, 2013, at A4.

31. *Id.*

32. See, e.g., Lisa McNally, *Ireland Gay Marriage Referendum: Thousands Fly 'Home to Vote'*, NBS NEWS (May 22, 2015, 7:29 PM), <http://www.nbcnews.com/news/world/polls-closed-after-historic-irish-gay-marriage-vote-n363041> (reporting on the thousands of Irish citizens living abroad as they traveled home to cast their "Yes" vote for marriage equality and the popular #hometovote social media trend that documented the various paths Irish emigrants took to return home).

33. BeLonG To Youth Services, *Marriage Equality: Bring Your Family With You*, YOUTUBE (Apr. 15, 2015), <https://www.youtube.com/watch?v=AkwYEhjjZhs>.

political parties in Ireland only twenty-two years after homosexual acts were decriminalized in the small island nation, Ireland became the first country in the world to legalize same-sex marriage through a popular vote.³⁴ Thousands of revelers celebrated outside Dublin Castle as news broke that the Constitution of Ireland would be amended to provide that marriage is recognized irrespective of the sex of the partners.³⁵

Behind the shadow of the once formidable Iron Curtain, countries like Croatia, Hungary, and Slovakia still fight to enshrine laws that discriminate against gay and lesbian couples.³⁶ While France, Ireland, and most recently, Germany³⁷ forge the way forward in the community of nations, many of their fellow European Union Member States remain resolute in their opposition to the legal recognition of the fundamental right of marriage for gays and lesbians. This obviously puts these nations in direct conflict with those Member States that have liberalized their marriage laws.³⁸

While the European Union is a world leader in anti-discrimination legislation and public tolerance for members of the LGBT population, the European Union has a mixed record amongst its Member States with regard to recognizing same-sex marriage, civil partnerships, and other legally designated same-sex relationships.³⁹ Of the twenty-eight⁴⁰ current Member States of the EU, ten fully⁴¹

34. See, e.g., *Huge Republic of Ireland Vote for Gay Marriage*, BBC NEWS (May 23, 2015), <http://www.bbc.com/news/world-europe-32858501>.

35. *Id.* The measure was signed into law by the President of Ireland as the Thirty-fourth Amendment of the Constitution of Ireland on August 29, 2015. The Marriage Act 2015, passed by the Oireachtas on October 22, 2015 and signed into law by the Presidential Commission on October 29, 2015, gave legislative effect to the amendment. Marriages of same-sex couples in Ireland began being recognized from November 16, 2015 and the first marriage ceremonies of same-sex couples in Ireland occurred on November 17, 2015.

36. See BELL, *supra* note 12.

37. See, e.g., Michael Lipka, *Where Europe Stands on Gay Marriage and Civil Unions*, Pew Research Center: Fact Tank (June 30, 2017), <http://www.pewresearch.org/fact-tank/2017/06/30/where-europe-stands-on-gay-marriage-and-civil-unions/>.

38. See, e.g., BELL, *supra* note 12 (reporting on the differing EU Member State marriage laws and the ramifications of non-unity).

39. E.g., Adam Weiss, *Federalism and the Gay Family: Free Movement of Same-Sex Couples in the United States and the European Union*, 41 COLUM. J.L. & SOC. PROBS. 81, 82-84 (2007) (explaining the difficulties faced by same-sex couples when confronted by internal borders that place barriers to the exercise of their rights throughout Europe and the United States).

40. At the time of writing, though Article 50 has been triggered by the United Kingdom, their withdrawal of membership in the European Union has yet to be finalized between the two parties.

41. See, e.g., Lipka, *supra* note 37 (listing which countries have the status of legal or soon to be legal same-sex marriage, other forms of legal same-sex unions/civil partnerships, and those with no legal same-sex unions of any kind in the various countries of Europe). This number includes Belgium, Denmark, France, Ireland, Luxembourg, Netherlands, Portugal, Spain, and Sweden. This number also includes Finland, where same-sex marriage legislation became legal March 1, 2017.

recognize same-sex marriages and Germany's Bundestag⁴² voted to legalize same-sex marriage at the end of June 2017, the law will go into effect "on the first day of the third month following the declaration," which was October 2017.⁴³ Additionally, all of the United Kingdom's component countries except Northern Ireland have legalized same-sex marriage.⁴⁴ Ten more Member States, while not permitting same-sex marriage, legally recognize same-sex partnerships and the rights that coincide with that recognition in some capacity.⁴⁵ Meanwhile, one Member State currently has no legal recognition for same-sex partnerships or marriage⁴⁶ and seven Member States have constitutionally defined marriage as exclusively between one man and one woman, though two of those countries—Croatia and Hungary—have recognized alternative partnerships.⁴⁷

Civil marriage, meaning a marriage defined and recognized outside the scope of a religious affiliation or religious law, is a legal status recognized in all EU

42. The Bundestag is Germany's federal parliament.

43. See Frank-Walter Steinmeier, *Gesetz zur Ehe für alle unterzeichnet*, ZEIT ONLINE (July 21, 2017, 10:45 AM), <http://www.zeit.de/gesellschaft/zeitgeschehen/2017-07/ehe-fuer-alle-frank-walter-steinmeier-bundespraesident-unterzeichnung> (relaying the legislative path of the same-sex marriage law and offering an estimated timeline for enforcement).

44. See, e.g., Lipka, *supra* note 37 ("England and Wales . . . and Scotland . . . passed two separate pieces of legislation on same-sex marriage [while] Northern Ireland, the other UK constituent state, has not legalized such marriages.").

45. See, e.g., *id.* (listing these countries as Austria, Croatia, Cyprus, Czech Republic, Estonia, Greece, Hungary, Italy, Malta, and Slovenia); see also KEES WAALDIJK & MATTEO BONINI-BARALDI, *SEXUAL ORIENTATION DISCRIMINATION IN THE EUROPEAN UNION: NATIONAL LAWS AND THE EMPLOYMENT EQUALITY DIRECTIVE (2006)* (providing an overview of cross-border marriage and civil union laws across the European Union).

46. Romania. See, e.g., Alina Tryfonidou, *Awaiting the ECJ Judgment in Coman: Towards the Cross-Border Legal Recognition of Same-Sex Marriages in the EU?*, EU LAW ANALYSIS (Mar. 5, 2017), <http://eulawanalysis.blogspot.com/2017/03/awaiting-ecj-judgment-in-coman-towards.html>.

47. See European Union, *Civil Unions and Registered Partnerships*, Europa: Your Europe, http://europa.eu/youreurope/citizens/family/couple/registered-partners/index_en.htm (listing the countries that do not provide for registered partnerships as Bulgaria, Latvia, Lithuania, Poland, Romania, and Slovakia); see also *Croats Reject Gay Marriage in Referendum*, EURACTIV (Dec. 2, 2013), <http://www.euractiv.com/section/social-europe-jobs/news/croats-reject-gay-marriage-in-referendum/> (discussing the successful vote to constitutionally prohibit same-sex marriage in Croatia); and Stephen Gray, *New Hungarian Constitution Comes into Effect with Same-Sex Marriage Ban*, PINK NEWS (Jan. 3, 2012, 5:13 PM), <http://www.pinknews.co.uk/2012/01/03/new-hungarian-constitution-comes-into-effect-with-same-sex-marriage-ban/> ("Hungary's new constitution, which bans gay marriage . . . was enacted 262-44 in April of [2011] . . . and took effect on 1 January 2012."); cf. *Slovakia Referendum to Strengthen Same-Sex Marriage Ban Fails*, BBC NEWS (Feb. 8, 2015), <http://www.bbc.com/news/world-europe-31170464> (extrapolating on the failed expansion of a pre-existing constitutional prohibition against same-sex marriage while noting that "Conservatives fear that although the gay marriage ban remains in place, it is being undermined by liberal policies spreading eastwards from western Europe.").

countries.⁴⁸ Furthermore, most Member States provide legal recognition for other relationships.⁴⁹ Different rules apply to these non-marriage partnerships, such as registered partnerships and de facto unions.⁵⁰ Additionally, national rules and practices for marriage differ from one country to another, mainly regarding the rights and obligations of married couples, the relationship between religious and civil marriage, and the requirements and restrictions of marriage.⁵¹ For instance, rights concerning property, the role as parents, and marital name are all left to specific national law.⁵² Further, some Member States of the EU recognize religious marriage as equivalent to civil marriage, while others do not.⁵³ Lastly, regarding requirements for marriage, the most notable difference is the right of same-sex couples to get married. A handful of non-EU European nations also recognize same-sex marriage and a majority of Member States legally recognize same-sex partnerships in some capacity.⁵⁴

In theory, marriage in one EU Member State is guaranteed recognition by all other Member States to the extent necessary for a couple to exert their fundamental EU citizen's rights.⁵⁵ Thus, if one spouse moves to another EU country for work, his or her spouse, by law, is guaranteed the right to live there if they are also an EU citizen.⁵⁶ Nevertheless, the definition of marriage is left to the individual Member States because the European Union does not currently have competence to legislate in the area of family law.⁵⁷ Thus, because different marriage rules apply across the Union, as evidenced above, same-sex spouses are not always guaranteed the right to marry.⁵⁸ Thus, *matrimonio* in Spain does not have the same meaning as *matrimonio* in Italy.⁵⁹

B. Same-Sex Marriage in Israel

As previously stated, Israeli law provides solely for religious marriage.⁶⁰ In

48. BELL, *supra* note 12.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. See 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) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 2004 O.J. (L. 229) 35.

57. See BELL, *supra* note 12.

58. See *id.*

59. *Matrimonio* translates to "marriage" in Spanish and Italian.

60. See generally Uri Regev, *Why is it so Difficult for Jews to Marry in Israel?*, THE HUFFINGTON POST: THE BLOG (May 1, 2013, 6:08 PM), <http://www.huffingtonpost.com/rabbi-uri>

order to be legally married, Israeli citizens must fall into one of twelve officially recognized religious denominations—nine Christian, one Jewish, one Druze, and one Muslim.⁶¹ This requirement severely restricts the ability of Israelis to legally marry within their borders, even amongst the majority Jewish population, as Israel only recognizes Orthodox rabbinic authorities when it comes to marriage.⁶² No Reform, Conservative, or Reconstructionist rabbi has the legal right to officiate weddings, thus denying hundreds of thousands of Israeli citizens the basic civil and human right of marriage, homosexual and heterosexual alike.⁶³ Consequently, the Israeli Knesset⁶⁴ and judiciary have extended the rights of committed couples to nearly equal status with their religiously married counterparts.⁶⁵ Nevertheless, couples that fall outside the barriers allotted via Israeli marriage laws oftentimes desire the designation of “married” and therefore look beyond their borders to nations that provide civil marriage.⁶⁶

Stemming from a long line of jurisprudence, upon return, civil marriage certificate in hand, Israelis have been provided the right to have their status in the national register changed from “single” to “married.”⁶⁷ This right was first provided to heterosexual couples in the 1962 case *Funk-Schlesinger v. Ministry of Interior*.⁶⁸ The High Court of Justice, in *Funk-Schlesinger*, ruled that “the function of a registration official . . . is merely the function of a collector of statistical material for the purpose of managing the register of residents.”⁶⁹ The Court further ruled that the registration official had “not been given any judicial power” and was therefore “obliged to register what the citizen tells him” unless this information amounts to “a manifestly incorrect registration, which is not subject to *any* reasonable doubt.”⁷⁰ The Court has extended this ruling in numerous cases throughout its long precedential history—applying this same

regev/why-is-it-so-difficult-for-jews-to-marry-in-israel_b_3196200.html.

61. *E.g., id.*

62. *E.g., id.*

63. *See* Lior, *supra* note 21.

64. The Knesset is the unicameral national parliament, or legislature, located in Jerusalem.

65. *See* HCJ 3045/05 Ben-Ari v. The Director of the Population Administration in the Ministry of the Interior 2006(4) PD 1725 [2006] (Isr.) (elaborating on the rights guaranteed to committed yet unmarried couples).

66. *See, e.g.,* Ilan Lior, *As France becomes 14th Country to Approve Same-Sex Marriage, Israel Still Lags Behind*, HAARETZ (APR. 24, 2013), <http://www.haaretz.com/news/world/as-france-becomes-14th-country-to-approve-same-sex-marriage-israel-still-lags-behind.premium-1.517358>.

67. *E.g.,* HCJ 143/62 Funk-Schlesinger v. Minister of Interior 17(1) PD 225 [1963] (Isr.) (providing the rule with which the Court has held valid through a long history of litigation regarding this topic).

68. *Id.*

69. *Id.*

70. *Id.* (emphasis added).

reasoning to the recording of religion post-conversion,⁷¹ ethnicity,⁷² extraterritorial adoption by gay and lesbians,⁷³ consular civil marriage conducted within Israel⁷⁴ and most recently same-sex marriage in the groundbreaking case *Ben-Ari v. Director of Population Administration*.⁷⁵

In *Ben-Ari*, five same-sex Israeli couples were legally wed in Toronto, Canada.⁷⁶ Upon their return home the couples attempted to have their statuses changed in the National Population Registry to indicate their status as “married.”⁷⁷ Their request was denied by the registration official who deemed the Canadian civil marriage certificates as invalid, stating that “marriages of this kind are not legally recognized in the State of Israel, and therefore it is not possible to register them in the register.”⁷⁸ The Court, extending their reasoning from *Funk-Schlesinger*, looked at the registration official’s authority to deny changes in the Population Registry when provided evidence of its truthfulness.⁷⁹ The Court further emphasized that neither it nor the registration official was tasked with evaluating the validity of the marriage under Israeli law.⁸⁰ Accordingly, the Court ruled that the registry application and supporting documentation—the Canadian civil marriage certificates—did not leave room for reasonable doubt as to their validity.⁸¹ Thus, the registration official was ordered to register the petitioners as married under item 2(a)(7) of the Population Registry.⁸²

Further, the Court specifically emphasized that the ruling did not concern recognition in Israel of civil marriage conducted outside of the State, but merely the recording of that marriage.⁸³ Nevertheless, the State argued—correctly—the special status that the Population Registry has within the state and its de facto function within the state apparatus as prima facie evidence of the validity of information contained within it.⁸⁴ The Court disregarded these arguments as issues best left to the Knesset,⁸⁵ leaving Israel as a unique case study of a state

71. See, e.g., HCJ 264/87 Federation of Sefaradim Torah Guardians—SHAS Movement v. Director of Population Administration, Ministry of Interior 43(2) PD 723 [1989] (Isr.).

72. See HCJ 5070/95 Naamat, Working and Volunteer Women’s Movement v. Minister of Interior 56(2) PD 721 [2002] (Isr.).

73. See HCJ 1779/99 Brenner-Kaddish v. Minister of Interior 54(2) PD 368 [2000] (Isr.).

74. See HCJ 2888/92 Goldstein v. Minister of Interior 50(5) PD 89 [1996] (Isr.).

75. HCJ 3045/05 Ben-Ari v. The Director of the Population Administration in the Ministry of the Interior 2006(4) PD 1725 [2006] (Isr.)

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

with quasi-recognition of same-sex marriage.⁸⁶

*C. Freedom of Movement for Family Members of Workers and
the European Union*

EU citizens and their family members can move within the Union for three months without any formalities, other than needing to produce identity documents.⁸⁷ EU citizens may stay for longer than three months in order to work, study, or if they possess sufficient resources to support themselves and their family members.⁸⁸ After five years, EU citizens and their family members are eligible to acquire the right of permanent residence within their adopted Member State.⁸⁹ EU citizens and their family members can then only be expelled from the Member State that they have moved to in very narrow circumstances; namely, where there are serious reasons relating to public policy or public security.⁹⁰

Before a discussion of the specific law relating to the freedom of movement of workers, it is important to quickly discuss the legal framework within which the EU functions. The foundation of law in the European Union is the combined Treaties. All significant rights and legal principles tend to be found in a founding treaty and are then expounded via regulations, directives, reports, and case law. The year 2009 saw a major development in EU law with the adoption of the Treaty on the Functioning of the European Union (TFEU), better known as the Treaty of Lisbon, which is the most current treaty of the EU. The relevant portion of the TFEU with respect to the free movement of workers is Article 45, which states that the “freedom of movement for workers shall be secured within the Union” subject to certain limitations as well as additional rights that coincide with general free movement.⁹¹

As mentioned, treaty law is expounded and expanded via legislation, such as regulations and directives. Like a statute created by Congress in the United States, a directive is binding law. Although a directive is binding as to the result to be achieved upon each Member State it is addressed, it leaves to the national authorities the choice of form and methods of implementation.⁹² The issue of same-sex partners’ rights to free movement with their spouse who is asserting his

86. *Id.*

87. *See* 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) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 2004 O.J. (L 229) 35.

88. *Id.*

89. *Id.*

90. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 45, May 9, 2008, 2008 O.J. (C 115) 47 (providing for the acceptable limitations on free movement).

91. *Id.*

92. *See* PAUL CRAIG & GRAINNE DE BURCA, EU LAW: TEXTS, CASES, AND MATERIALS (5th ed. 2011) (summarizing the structure of the Union and the legislation that is possible).

or her right to free movement as a worker is directly impacted by Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.⁹³

Lastly, ECJ case law has precedential value not unlike that of common law jurisdictions such as the United States.⁹⁴ Unfortunately, the European courts have not provided much guidance in the area of free movement of workers' same-sex spouses, thus making the pending decision in the *Coman* case⁹⁵ more difficult to ascertain. Nevertheless, the court has provided some limited guidance in two cases: *D and Sweden v. Council*⁹⁶ and *Reed v. Netherlands*.⁹⁷ In *D and Sweden v. Council*, the ECJ ruled that, "according to the definition generally accepted by the Member States, the term marriage means a union between two persons of the opposite sex."⁹⁸ Nevertheless, unlike the current state of marriage in the Union, this ruling came at a time when no Member State had legalized same-sex marriage.⁹⁹ Thus, the legal reasoning that it purports—that of looking at the accepted definition of marriage across the Union—has changed and is no longer as homogeneous as it once was.¹⁰⁰ Further, the ambiguity at issue in *Reed v. Netherlands*—whether unmarried opposite-sex partners should be entitled spousal free movement benefits—was addressed in the EU Citizens Directive and is thus no longer a significant guidepost for future ECJ rulings.¹⁰¹

Looking now towards the specific rights guaranteed by this collection of EU treaty law, legislation, and jurisprudence, it is evident that the glaring uncertainties in Union law present themselves when implementation is attempted. The right to free movement was originally limited to those moving for the purposes of work or self-employment, but in the early 1990s free movement rights were extended to students, retired persons, and those who are economically self-sufficient and thus outside the need of public welfare.¹⁰² Since this change, the ECJ has emphasized that free movement is a fundamental right of EU citizens, regardless of the reason why an individual decides to live in another Member State.¹⁰³ Consequently, in 2001, the European Commission proposed

93. See YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES (2002).

94. See, e.g., P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN UNION LAW: AS AMENDED BY THE TREATY OF LISBON (10th ed. 2010).

95. Case C-673/16.

96. Case C-122/99P and 125/99P, *D and Sweden v. Council*, [2001] ECR I-4319.

97. Case C-59/85, *Reed v. Netherlands*, [1986] ECR I-1283.

98. Case C-122/99P and 125/99P, *D and Sweden v. Council*, [2001] ECR I-4319.

99. See MARK BELL, EU DIRECTIVE ON FREE MOVEMENT AND SAME-SEX FAMILIES: GUIDELINES ON THE IMPLEMENTATION PROCESS, THE EUROPEAN REGION OF THE INTERNATIONAL LESBIAN AND GAY ASSOCIATION (OCT. 2005).

100. *Id.* at 5.

101. *Id.* at 3.

102. See MORTEN BROBERG & NINA HOLST-CHRISTENSEN, FREE MOVEMENT IN THE EUROPEAN UNION: CASES, COMMENTARIES AND QUESTIONS (2nd ed. 2007).

103. See, e.g., *id.*

replacing the various laws covering free movement with a single Directive on the free movement rights of all EU citizens: Directive 2004/38/EC.¹⁰⁴

Directive 2004/38/EC, known as the EU Citizens Directive, sets out the basic conditions under which EU citizens may move to another Member State and take up residence there.¹⁰⁵ According to the Directive, an EU citizen is defined simply as a person holding the nationality of any Member State while a “family member” has been defined as “the spouse” under Article 2(2).¹⁰⁶ This, when taken with the non-legally binding preamble of the Directive, which states that Member States “should implement th[e] Directive without discrimination between the beneficiaries of this Directive on grounds such as... sexual orientation,” provides an ambiguity as to how the ECJ may construct a proper definition of “spouse” in the *Coman* case.¹⁰⁷

On the ground, the current laws throughout the Union leave same-sex couples without the ability to fully exercise their fundamental rights as provided by their status as EU citizens. This is evidenced most clearly by the pending preliminary reference in the *Coman* case. As mentioned above, the Romanian Constitutional Court is currently seeking clarification in the following matters connected to Directive 2004/38:

- (1) Whether the word ‘spouse’ in Article 2(2)(a) of Directive 2004/38 includes a same-sex spouse and, if yes, whether the host Member State is required by the Directive to grant the right of residence on its territory for more than three months to the same-sex spouse of a migrant Union citizen; and,
- (2) In case the previous question is answered in the negative, whether the same-sex spouse of a migrant Union citizen can qualify as “any other family member” under Article 3(2)(a) of the 2004 Directive or as “the partner with whom the EU citizen has a stable relationship” under Article 3(2)(b) of the Directive; and,
- (3) If yes, whether the host Member State is required to facilitate entry and residence on its territory by the same-sex spouse of a migrant Union citizen, even if it does not recognize same-sex marriage and does not provide for an alternative form of legal recognition for same-sex couples.¹⁰⁸

These questions are being asked because a Romanian citizen seeks to live in his home nation with his American husband, whom he married legally in Belgium. Unfortunately, “Romania does not provide any form of legal

104. Directive 2004/38, 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) No 1612/68 and Repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 2004 O.J. (L 229) 77.

105. *Id.* at 87.

106. *Id.*

107. *Id.* at 86.

108. Case C-673/16, *Coman v. Inspector General of Romania*, 2016.

recognition for same-sex couples and two draft bills on the matter have been recently rejected by the Romanian Parliament with large majorities. In addition, the country's Civil Code expressly bans same-sex marriages and registered partnerships and prohibits the recognition of same-sex marriages and registered partnerships entered into abroad.¹⁰⁹ Yet, these inequities do not merely apply to third-party non-EU citizens, as Directive 2004/38's ambiguous terms "spouse" and "any other family member" also are applicable to scenarios wherein both spouses are EU citizens. For example, take the hypothetical couple Roberto and Miguel. Both Roberto and Miguel are Spanish citizens who were legally married in Spain. In Spain, under national law, same-sex marriage is legally recognized and married couples enjoy all the rights as their heterosexual counterparts.¹¹⁰ Additionally, same-sex partners from other EU Member States currently find no additional burdens imposed when attempting to relocate to Spain if utilizing their right to freedom of movement of workers' family members.¹¹¹ The same cannot be said for Spaniards relocating to Member States that do not recognize same-sex relationships.¹¹²

The current legal apparatus that same-sex spouses face in their relocation within the Union provides for severe inequalities for gay and lesbian Europeans.¹¹³ Looking again at Roberto and Miguel, we can see an example of this inequity. After their wedding, Miguel decided to leave his job in Madrid after Roberto was offered employment in Poland. Roberto accepted his position and Miguel plans to relocate with his husband but does not speak Polish well enough to find employment in Poland, nor does he plan to seek individual employment. Unfortunately Poland does not recognize same-sex marriage or any other equivalent same-sex partnership.¹¹⁴ As such, Miguel will not be able to relocate to Italy without exerting one of his separate, individual rights to free movement.¹¹⁵ Meaning, if he does not attain employment of some sort, prove that he is independently economically sound, or become a student, he will have to leave Italy after three months.¹¹⁶ This, of course, would not be the case if he were in a heterosexual marriage.¹¹⁷

109. Alina Tryfonidou, *Awaiting the ECJ Judgment in Coman: Towards the Cross-Border Legal Recognition of Same-Sex Marriages in the EU?*, EU LAW ANALYSIS (Mar. 5, 2017), <http://eulawanalysis.blogspot.com/2017/03/awaiting-ecj-judgment-in-coman-towards.html>.

110. See, e.g., *Spain Legalises Gay Marriage*, THE GUARDIAN (Jun. 30, 2005), <http://www.guardian.co.uk/world/2005/jun/30/gayrights.spain>.

111. See ANJA WIESBROCK, LEGAL MIGRATION TO THE EUROPEAN UNION (2010).

112. *Id.*

113. *Id.*

114. E.g., *id.*

115. *Id.*

116. *Id.*

117. *Id.*

II. ISRAEL THE TEACHER, EUROPE THE PUPIL

A. *What Israel Can Teach Europe*

Israel enjoys referring to itself as an island of democracy within the Middle East.¹¹⁸ Its government prides itself on being both a Jewish and Democratic state,¹¹⁹ governed by a mixture of religious and civil codes.¹²⁰ Without diverting into the minefield that is Israeli democracy, this idea of Israel as an island provides an intriguing framework for looking at its same-sex marriage laws. It is surprising that a nation such as Israel—surrounded by countries that discourage, prohibit, and even punish homosexuality¹²¹—allows for legally married gay and lesbian couples to register their marriage. This fact is equally surprising given the current inability for many heterosexual couples to legally marry within Israel as a result of the religious laws governing marriage within the state.¹²² Yet, the Israeli High Court of Justice crafted an opinion that allows for this quasi-recognition.¹²³ Thus, providing an avenue for gay and lesbian couples to be recognized as “married” without provoking an upheaval by the Knesset, disrupting the delicate balance between religion and the state, or overstepping the bounds of their delegated judicial powers.

The European Union and her Member States are obviously different from Israel in many ways. Israeli court opinions do not set precedent that binds the ECJ.¹²⁴ Israel is not a Member State of the EU, nor is it even a candidate state.¹²⁵ And, unlike Israel, all European Union Member States provide for civil marriage.¹²⁶ Nevertheless, the lessons of Israel’s *Ben-Ari* are worth Europe’s attention as they provide a unique example approach towards tackling the issue of the free movement of same-sex spouses.

In *Ben-Ari*, the Israeli High Court of Justice took a rigid marital system to task and found a functional means of working around the complex and controversial barriers in place through a nuanced and legally sound ruling. The Court saw a legal conundrum—the issue of same-sex legal marriages conducted

118. *C.f.* Anshel Pfeffer, *Why Should Israel be the Only Democracy in the Mideast?*, HAARETZ (Feb. 2, 2011) <http://www.haaretz.com/print-edition/opinion/why-should-israel-be-the-only-democracy-in-the-mideast-1.340717>.

119. *Supra* Part I.

120. *Id.*

121. *See* LUCAS PAOLI ITABORAHY, STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS CRIMINALISING SAME-SEX SEXUAL ACTS BETWEEN CONSENTING ADULTS, 5 (ILGA 2012) (surveying laws around the world with regard to homosexuality and highlighting the laws of the Mideast).

122. *Supra* Part I.

123. *Id.*

124. *See* PAUL CRAIG & GRAINNE DE BURCA, EU LAW: TEXTS, CASES, AND MATERIALS (5th ed. 2011).

125. *See id.* (listing the EU Member States and candidate states).

126. *Id.*

abroad and to what extent the Israeli government should recognize those marriages—and solved it with due deference to the Knesset and the realities of Israeli cultural norms, while simultaneously providing a new legal avenue for same-sex couples to receive government acknowledgment.¹²⁷

Moreover, the Israeli High Court of Justice presented Israel with a decision in *Ben-Ari* that balanced respect for concerns of the domestic legal system with concerns of same-sex partners married outside the State.¹²⁸ This opinion narrowly tailored the rights accorded to these civilly married partners in line with the limitations of that domestic system while simultaneously according them rights that derive from their legal marriages.¹²⁹ This nuanced approach towards the subject, fitting something alien to domestic law within that same framework provides an incredible example for Europe of a creative court that remains free of the taint of activism whilst simultaneously providing beneficial remedy to a group that has suffered discrimination.

Lastly, while Israel may seem a distant and foreign place that the EU should disregard, the ECJ could learn much from her example. The manner in which the High Court of Justice tackled recognition of same-sex marriages conducted outside the State offers an illuminating guide for potential avenues the ECJ could take if confronted with the EU's own shortcomings in the protection of legally married same-sex spouses. Thus, while different from the EU in many ways, Israel and her jurisprudence have much to offer a divided Europe.

B. The European Context

Opponents of an inclusive free movement of workers' family members that includes and protects the rights of same-sex spouses largely point to two specific arguments: the ability of all gay and lesbian EU citizens to individually exert their right to free movement, and the exclusive competence of EU Member States to legislate in the area of family law. These arguments fail to grasp the complexity of the issue or the inequities that gay and lesbian couples face because of the current failure of Member States to provide reciprocal recognition of marriage.

Following a poster campaign by the International Lesbian, Gay, Bisexual, Trans and Intersex Association of Europe that attempted to bring attention to the current struggles gay and lesbian couples face in exerting their fundamental EU derived spousal rights, a common counter-argument focused on the rights that all EU citizens had regardless of sexual-orientation. These arguments correctly emphasized, "that freedom of movement and of residence are fundamental rights accorded to every citizen of the EU."¹³⁰ Counter advocacy measures noted that

127. See HCJ 3045/05 *Ben-Ari v. The Director of the Population Administration in the Ministry of the Interior* 2006(4) PD 1725 [2006] (Isr.).

128. *Supra* Part I.

129. *Id.*

130. *No Freedom of Movement for LGBT Persons? – Part Four*, EUROPEAN DIGNITY WATCH (Jul. 5, 2012), <http://www.europeandignitywatch.org/es/el-dia-dia/detail/article/no-freedom-of-movement-for-lgbt-persons-part-four.html>.

even further laws protected the LGBT population of the Union by noting, “discrimination based on sexual orientation is prohibited by Article 21 of the Charter of Fundamental Rights.”¹³¹ Therefore, according to some, a system of inequality does not exist in the Union because “gay and lesbian people in the EU . . . enjoy freedom of movement in the same manner and extent as any other EU citizens.”¹³² Legal bloggers emphasized:

What freedom of movement of EU citizens really means is that EU citizens have the right to move and settle in any other Member State — provided they have a job and a domicile. It doesn’t mean any more or any less than this. It does not require an EU Member State to receive citizens from other Member States who do not fulfil [sic] these requirements and then provide them with social security or other similar benefits.¹³³

Unfortunately, while these bloggers purport to understand as well as have the ability to analyze and apply the complexities of Union law, they fail to grasp the simple concept of discriminatory application of laws. Namely, the current reality that lesbian and gay couples legally married in certain Member States face when trying to exert spousal rights protected for all legally married heterosexual couples. In this failure lies the death knell of their argument. The law, as currently applied throughout the Union, provides a separate and unequal system of fundamental liberties—leaving gay and lesbian EU citizens with fewer rights than their heterosexual counterparts.¹³⁴

Nevertheless, advocates for the gay and lesbian couples in the European Union face a true hurdle with regard to another commonly purported reason for the ongoing inequality that same-sex couples face—Union competence in family law. Matters of marriage and family are currently the exclusive competence of each EU Member State, thus, under the current legal regime the European Commission finds that it is still perfectly legitimate for a Member State not to recognize same-sex marriages, whether conducted in another EU Member State or in a non-EU country.¹³⁵ Additionally, according to some, the freedom of movement principle does not include an implicit obligation for a receiving Member State to legally recognize same-sex marriages conducted in another Member State—especially if same-sex marriage is not part of the receiving country’s domestic legal order.¹³⁶

While the fundamental freedom of movement of workers is derived from Article 45 of the Treaty on the Functioning of the European Union, Directive 2004/38/EC expounded that fundamental right as one that includes family

131. *Id.*

132. *Id.*

133. *Id.*

134. *Supra* Part I.

135. See MARK BELL, ILGA – EUROPE, EU DIRECTIVE ON FREE MOVEMENT AND SAME-SEX FAMILIES: GUIDELINES ON THE IMPLEMENTATION PROCESS 1-5 (2005).

136. *Id.*

members of the worker.¹³⁷ Looking at the text of the Directive, Article 2 defines, in part, the Union's understanding of a "family member" as "the spouse" of the worker.¹³⁸ Furthermore, the preamble of the Directive includes the following statement: "Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as . . . sexual orientation."¹³⁹ While the preamble is not legally binding statutory text, the ECJ should rely upon it when interpreting the definition of "spouse" within the Union.¹⁴⁰

Given that Directive 2004/38/EC does not elaborate on the designation of "spouse" the ECJ, in any ruling regarding its definition, will be forced to balance the weighty arguments for Member State sovereignty in marital sphere with the fundamental rights protections for its lesbian and gay citizens. While a sea of European jurisprudence and legislation regarding this balance exists, if the court properly wades through it all only one result can be legally justified—equality. As will be shown below, this balance by the ECJ must give more weight to the fundamental rights enshrined in Union law at the expense of Member State sovereignty as Union law, when it is applicable, is the highest law of the land and its fundamental guarantees cannot be overshadowed by less weighty Member State competence or sovereignty concerns. So as to best defend such a ruling by the ECJ, and because this conclusion is hardest to justify when dealing with Member States that have constitutionally defined marriage, the following analysis will look exclusively at such a situation.

III. UNITING THE UNION

A. *The Balancing Act*

The National Identity Clause of Article 4 of the Treaty on European Union obliges the Union to respect fundamental political and constitutional structures

137. See 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) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 2004 O.J. (L. 229) 35.

138. *Id.*

139. *Id.*

140. See MARK BELL, ILGA – EUROPE, EU DIRECTIVE ON FREE MOVEMENT AND SAME-SEX FAMILIES: GUIDELINES ON THE IMPLEMENTATION PROCESS 1-5 (2005). Additionally, the drafters of the EU Charter of Fundamental Rights seemed to share the same view, when in the Explanations Relating to the Charter of Fundamental Rights, it was pointed out that the Charter Article providing the right to marry (Article 9) 'neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex'. See Explanations Relating To The Charter Of Fundamental Rights (2007/C 303/02), eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF [<https://perma.cc/CXT5-JHYM>].

of Member States.¹⁴¹ However, it does not allow a Member State to deviate from an obligation imposed by European Union law, regardless of its necessity to protect the material core of its constitutional legal order. Hence, given the obligation of Member States to guarantee the rights of EU citizens as provided for in the Treaties and other legislation, the rights specified in Directive 2004/38/EC should apply to all legal spouses—same-sex or otherwise. Furthermore, though the European Union does not have competence with regard to family law matters—of which marriage is a lynchpin—the definition of “spouse” for purposes of exercising an EU-derived fundamental right allows the ECJ to side-step this competence concern as defining “spouse” in a manner that is not discriminatory shifts the core of the legislation into a sphere where the EU has competence to legislate. Thus, the analysis the ECJ would be tasked with is not whether the Union has the ability to define “spouse” for purposes of free movement, but whether the Member States have the ability to trump that definition with their own domestic marital definition.

Nationality identity is to be understood as a legitimate aim that, as an exception to the freedom of movement, has to be interpreted restrictively and subject to a proportionality test. Article 4(2) of the Treaty on European Union (TEU), establishes that the Union shall respect the national identity and the fundamental political and constitutional structures of Member States.¹⁴² In determining what constitutes national identity, the European institutions are to determine what fundamental structures should be regarded as the core of Member States’ legal order.¹⁴³ The European institutions have the competence to determine what constitutes national identity in an effort of harmonization of the Union.¹⁴⁴ As a public policy argument, the national identity clause must not undermine the fundamental principle of primacy of EU law, and the division of competences. While the Court could accept that constitutionally some Member States have defined marriage as between one man and one woman, the national identity of those states is not formulated in the same way, and therefore those constitutional definitions would only amount to a regrouping of cultural identity—and not political and constitutional structures.¹⁴⁵

The National Identity Clause should be read as a rule, among others, to establish a general system of co-operation between the Union and the Member States. Article 4(1) TEU establishes the competence rule, and 4(2) acts like as a system of checks and balances for the division of competence along with Article 3;¹⁴⁶ however, even in areas where Member States have exclusive competence,

141. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) Article 4.

142. *Id.*

143. *Id.*

144. See PAUL CRAIG & GRAINNE DE BURCA, EU LAW: TEXTS, CASES, AND MATERIALS (5th ed. 2011).

145. *See id.*

146. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) Article 4(3)

as with family law, their competence cannot be exercised against the EU.¹⁴⁷ In parallel to the national identity clause of Article 4(2) TEU, the Treaty on the European Union also sets a basis of rights that should be understood as part of the national identity of the Member States in Article 2 TEU.¹⁴⁸ Even though the concept of national identity can be broader than the principles enshrined in Article 2, it still has to comply with and promote the values of Article 2.¹⁴⁹ In *Michaniki AE v. Ethniko Symvoulío Radiotileorasis and Ypourgos Epikrateias*,¹⁵⁰ the ECJ assessed the contested rule according to the proportionality test; its legitimacy depended on the extent it pursued principles of EU law.¹⁵¹ Further, in *Sayn-Wittgenstein v. Landeshauptmann von Wien*,¹⁵² the ECJ recognized that national identity could be taken into consideration in a proportionality analysis; the Court added that reliance on national identity should be treated as a public policy justification.¹⁵³ Public policy justifications are interpreted strictly as a “genuine and sufficiently serious threat to a fundamental interest of society”.¹⁵⁴ Most importantly, the Court performs this test itself because the question as to who determines what constitutes a national identity is, for the sake of European harmonization, to be construed by European institutions in accordance with the principles set forth in the Lisbon Treaty.¹⁵⁵

As succinctly stated by Dr. Alina Tryfonidou, Associate Professor of EU Law at the University of Reading:

The ECJ cannot interpret a provision of EU law (namely, Article 2(2)(a) of Directive 2004/38) in a way which permits Member States to breach

(stating the principle of sincere cooperation between the Union and the Member States, who will assist each other in carrying out tasks which flow from the Treaties).

147. See Case C-135/08, *Janko Rottman*; see also Case C-267/06, *Tadao Maruko*, para. 55 (holding that “it must be recalled that in the exercise of that competence the Member States must comply with Community law”).

148. TFEU Art. 2 (stating the national identities of the Member States are understood to comprise the values on which the European Union is founded, in particular “values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including rights of persons belonging to minorities . . . in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail”).

149. SINIŠA RODIN, NATIONAL IDENTITY AND MARKET FREEDOMS AFTER THE TREATY OF LISBON, in UACES CONFERENCE EXCHANGING IDEAS ON EUROPE (2011).

150. Case C-213/07, *Michaniki AE v. Ethniko Symvoulío Radiotileorasis and Ypourgos Epikrateias*, 2008 E.C.R. I-9999.

151. Case C-213/07, *Michaniki*.

152. Case C-208/09 *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, 2010 E.C.R. I-13718.

153. *Id.*

154. *Id.*

155. Case C-208/09 *Ilonka Sayn-Wittgenstein*; but see Case C-391/09 *Runevič-Vardyn v. Vilniaus Miesto Savivaldybės Administracija*, 2011 (deferring the proportionality test to the national court because language represents a negotiable issue that can be decided domestically).

other provisions of EU law (namely, the EU free movement provisions). A measure which impedes the exercise of free movement rights cannot be justified if it violates fundamental human rights protected under EU law.¹⁵⁶ Hence, a restriction on free movement which emerges as a result of the failure of a Member State to recognise a same-sex marriage, cannot be justified since. . . it breaches a number of fundamental human rights protected under EU law. Second, the ECJ – as one of the EU institutions – is bound by the [EU Charter of Fundamental Rights] EUCFR (see Art. 51(1) EUCFR), in interpreting EU law provisions (including Article 2(2)(a) of Directive 2004/38) it must ensure that it does not breach the prohibition of discrimination on the ground of sexual orientation, laid down in Article 21 EUCFR. An interpretation of the term ‘spouse’ which excludes from it same-sex spouses is, clearly, directly discriminatory on the ground of sexual orientation and is, thus, contrary to Article 21 of the Charter. Furthermore, the 2004 Directive itself provides in its Recital 31 that in accordance with the prohibition of discrimination contained in the Charter (in Article 21), Member States must implement it without discrimination between its beneficiaries on, inter alia, the ground of sexual orientation. Accordingly, the Directive itself appears to be requiring an interpretation of its provisions – including of the term ‘spouse’ – which does not give rise to discrimination against same-sex couples.¹⁵⁷

Thus, Constitutional definitions of marriage that would result in discrimination against married spouses from Member States that recognize the right of same-sex partners to legally wed do not comply with the European Union principles regarded as fundamental to the Union and therefore must be disregarded insofar as they limit lesbian and gay EU citizens from exercising their spousal free movement rights. In that these constitutional definitions are not an essential element of national identity, the ECJ should perform a proportionality test under which a national identity—marriage being between one man and one woman—would not be an automatic justification for departure from the economic freedoms, of which free movement is foundational.¹⁵⁸ This test, also called the least restrictive alternative test, mandates that a Member State may not invoke national identity in order to derogate from the market freedom as long as there is a less restrictive alternative.¹⁵⁹ Under this test, the current Member States that

156. See, e.g., Case C-60/00 *Mary Carpenter and Secretary of State for the Home Department* para. 40, [2002] (“A Member State may invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide services only if that measure is compatible with the fundamental rights whose observance the Court.”)

157. Alina Tryfonidou, *Awaiting the ECJ Judgment in Coman: Towards the Cross-Border Legal Recognition of Same-Sex Marriages in the EU?*, EU LAW ANALYSIS (March 5, 2017), <http://eulawanalysis.blogspot.com/2017/03/awaiting-ecj-judgment-in-coman-towards.html>.

158. Case C-473/03 *Commission v. Luxembourg*, 1996 E.C.R. I-3248.

159. *Id.*

prohibit the recognition of same-sex marriages legally conducted within the Union cannot justify the resulting deviation from the freedom of movement established by the European Union because it substantially outweighs the benefits of protecting the constitutional legal orders that are discriminatory in nature and against other, more broad, EU-wide social and cultural ideals of anti-discrimination. Furthermore, these Member States can maintain a protection of their marital laws in a less restrictive manner—namely, as further detailed later, by recognizing extraterritorial, legally conducted, same-sex marriages *only to the extent necessary* for lesbian and gay spouses to exert solely their EU-derived fundamental rights.

Lastly, all previous cases before the ECJ concerning national identity dealt with the exercise of official authority, an area of law requiring a uniform and harmonized approach. The exception of official authority has to be given “uniform interpretation and application throughout the Community and cannot be left entirely to the discretion of the Member States”.¹⁶⁰ The States can help the court interpret the principles they regard as being part of their national identity, but it is the role of the ECJ to decide what constitutes national identity in the European Union.

For obvious policy reasons, European courts and institutions should discuss national identity issues. If not interpreted restrictively, the national identity clause defeats all purposes of the developments of the European Union. The national identity clause should not only be interpreted restrictively, but should also be interpreted in the light of the principle of sincere cooperation also found in Article 4 TEU. This is because the national identity clause has the potential of undermining and putting in jeopardy the effectiveness and the full application of the core of the EU legal order: the supremacy of the EU.

B. Applying Ben-Ari in the ECJ

As has been shown, the ECJ is fully capable of ruling in a fashion that forces Member States to recognize, to some extent, the same-sex marriages legally conducted in other Member States. Though the EU has no competence in areas of family law, in the matter of free movement of workers' same-sex spouses the definition of marriage is so intimately connected to the fundamental freedom of movement guaranteed under EU law that it enters into a sphere of EU competence.¹⁶¹ Thus, as detailed above, Member States that do not wish to provide a guarantee of that right must have a reason that overcomes the fundamental nature of that right via a proportionality analysis. Nonetheless, this analysis is only applicable in this matter if the Court were to deem the definition of “spouse” within Directive 2004/38/EC as inclusive of same-sex couples.¹⁶²

160. Case C-405/01, *Colegio Oficiales de la Marina Mercante Espanola*, 2001 E.C.R. I-10419.

161. *Id.*

162. 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) No 1612/68 and repealing Directives

Thus, the ECJ should look at the Israeli example and rule that “spouse” encompasses legally recognized same-sex married partners from any Member State insofar as their spousal rights are at issue as derived from Union law.

Therefore, a reasoned ECJ opinion would define the term “spouse” as encompassing any EU citizen partner legally married within the laws of any Member State. Upon recognizing that as the sole definition, the Court would be obliged to weigh the extent to which a Member State is required to guarantee spousal rights to that couple. As evidenced by the previous sections, a legally sound and responsible ECJ decision would take heed of the Israeli example and require Member States to acknowledge the prima facie validity of these same-sex marriages but not recognize them as valid within their own domestic legal framework. In so doing, the ECJ should require that this acknowledgment be to the extent domestically necessary to allow the Member State to provide the rights and protections guaranteed to spouses of workers under Union law. Thus, a ruling of this nature blends the illuminating concepts of Israel’s *Ben-Ari* with the political realities of the European Union quasi-federal framework.

CONCLUSION

This Article has shown that the European Court of Justice, in its analysis of the Member State implementation of Directive 2004/38/EC, should look towards Israel as an example of a properly executed balance of a Member State’s exclusive competence in family law and obligation to guarantee the fundamental rights of all EU citizens. Moreover, a proper ECJ ruling would force Member States to recognize, to an extent necessary for purposes of providing and protecting those Union-derived fundamental rights, all marriages conducted and legally recognized in other Member States.

Through background information regarding same-sex marriage in the European Union, Directive 2004/38/EC, the freedom of movement of worker’s family members in the EU, the principles of subsidiarity and competences, as well as the Israeli High Court of Justice opinions in *Funk-Schlesinger v. Ministry of Interior* and *Ben-Ari v. Director of Population Administration*, this article has provided an overview of the current framework such a case would navigate. Israeli jurisprudence could easily serve as a guiding force for the EU as it attempts to solve the unique problems it faces with regards to interstate recognition of same-sex marriages. These Israeli concepts can and should be applied in a European context.

Lastly, as evidenced throughout this article, the ECJ has the ability to craft a balanced and nuanced opinion that appeals to the cultural sensitivities of the Member States and the federalism concerns at play within the Union. Simultaneously, such an opinion can easily balance those concerns with a Union-wide full recognition of the human rights guarantees of the overarching European

society. That balance can only consist of a recognition by all Member States of marriages conducted in other Member States to the extent necessary to protect the rights guaranteed under EU law to married partners, but short of legitimizing those marriages under the specific domestic marriage laws of each individual Member State.