9

All Paths Lead to Equality?

Same-Sex Couples and Rainbow Families under European Law

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9.1 INTRODUCTION

The European landscape remains very fragmented as regards recognition and protection of same-sex couples and rainbow families.[1] As regards couples, only twenty Council of Europe (CoE) States allow same-sex marriages,[2] whereas nine others recognise and protect same-sex relationships only through registered partnerships.[3] In the remaining jurisdictions, same-sex couples have no possibility of formalising their relationship[4]. As regards parent–child relationships, only nine States provide for a 'true' same-sex parenthood regime, similar to that applied to different-sex parents,[5] whereas twenty-one systems allow the establishment of adoptive same-sex parenthood at least in some cases.[6] In sixteen CoE States, same-sex partners may use assisted reproductive

[1] The figures below are based on ILGA-Europe, 'Rainbow Map and index 2023' <https://www.ilga-europe.org/report/rainbow-europe-2023/>.

[2] The Netherlands (2002), Belgium (2003), Spain (2005), Norway (2009), Sweden (2009), Portugal (2010), Iceland (2010), Denmark (2012), France (2013), the UK (2014), Luxembourg (2015), Ireland (2015), Germany (2017), Finland (2017), Malta (2017), Austria (2019), Slovenia (2022), Switzerland (2022), Andorra (2023), Estonia (2024).

[3] Czech Republic (2006), Hungary (2009), Liechtenstein (2011), Croatia (2014), Cyprus (2015), Greece (2015), Italy (2016), San Marino (2019), Montenegro (2021). A law on same-sex civil unions was passed in 2023 by the Latvian Parliament and is expected to enter into force on 1 July 2024.

[4] Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Georgia, Lithuania, the Republic of Moldova, North Macedonia, Poland, Romania, Serbia, Slovakia, Turkey, and Ukraine.

[5] Austria, Belgium, Denmark, Malta, the Netherlands, Portugal, Spain, Sweden, and the UK.

[6] Andorra, Austria, Belgium, Croatia, Denmark, Estonia, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, Switzerland, and the UK.

technology (ART) to found a family.[7] Against this background, this chapter aims to describe and analyse the role of the European Court of Human Rights (ECtHR) and EU law in the developing movement towards full recognition and protection of same-sex couples and rainbow families; it highlights the idea that their different and complementary approaches complement and consolidate each other in a way that appropriately leads to a gradual increase of the requirement for equal treatment of all families, regardless of sexual orientation.

First, Section 9.2 specifically considers the growing recognition and protection of same-sex couples. Significantly, it was only in 2010 that the ECtHR affirmed that same-sex parents enjoy a 'family life' within the meaning of Article 8 of the European Convention on Human Rights (ECHR).[8] The section contemplates a series of questions including the central issue of same-sex marriage, alternative forms of recognition and protection, allocation of couple-related social benefits, family reunification, and cross-border recognition of same-sex marriage.

In Section 9.3, a similar panoramic view of European developments is proposed as regards the progressive recognition and protection of rainbow families. Starting with the fundamental question of same-sex parenthood and same-sex adoption, it will also consider parental responsibility as an alternative way of offering some protection and recognition to same-sex parents and their children and social benefits as a significant dimension of family policy, before – finally – turning to the issues of family reunification and cross-border recognition, which have recently given rise to substantial developments.

As a whole, the developments below emphasise that recognition and protection of same-sex relationships and rainbow families can follow multiple paths and that the ECtHR case law and EU law (including EU legislation and the CJEU case law) are mutually reinforcing for the benefit of the rights of same-sex couples and their children. They also reflect the fact that, while the consecration of the right to same-sex marriage and same-sex parenthood may be considered as the final objective to be achieved, subsidiarity considerations necessarily lead European bodies to favour, at least temporarily, more modest ways.

[7] Austria, Belgium, Denmark, Finland, France, Iceland, Ireland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the UK.

[8] *Schalk and Kopf v Austria*, Application no 30141/04, para 94.

9.2 SAME-SEX COUPLES

9.2.1 *Same-Sex Marriage: A Renewed Interpretation of the Right to Marry?*

At the time of the adoption of the ECHR in 1950, marriage was understood in the traditional sense of a union between a man and a woman. Accordingly, Article 12 ECHR unequivocally affirms that 'men and women of marriageable age have the right to marry and to found a family'.[9] The ECtHR case law confirmed that this provision was designed to protect the right to marry a person of the opposite gender even if, in *Goodwin*,[10] the Court precised that the terms man and woman did not necessarily refer to 'a determination of gender by purely biological criteria'. Similarly, in *D and Sweden*, the CJEU notoriously considered that 'according to the definition generally accepted by the Member States, the term marriage means a union between two persons of the opposite sex'.[11] At the time these decisions were issued, the Netherlands was the only jurisdiction allowing same-sex marriages.

The Charter of Fundamental Rights of the EU (the Charter) adopted in 2002[12] suggests a new approach to marriage. Article 9 of the Charter guarantees the right to marry without any reference to gender. The Charter official commentary explains that this reflects a deliberate choice to 'broaden the scope' of the right to marriage considering the 'diversity of domestic regulations on marriage' and, notably, the evolution in Dutch and Belgian law.[13] A few years later, in its landmark *Schalk and Kopf v Austria* decision, the Strasbourg Court strongly relied on the more 'modern',[14] or 'liberal',[15] wording of Article 9 of the Charter to deliver a 'renewed' interpretation of Article 12 ECHR. Based on the developments in EU law, the Court affirmed that it 'would no longer consider that the right to marry enshrined in Article

[9] See, however, for a detailed analysis: K. Waaldijk, 'The gender-neutrality of the international right to marry: Same-sex couples may still be excluded from marriage, but their exclusion – and their foreign marriages – must be recognised' (23 July 2018) <https://papers.ssrn.com/abstract=3218308>. The author argues that the *travaux préparatoires* of the ECHR do not seem to include any indication that these words were specifically intended to exclude or include same-sex couples from the right to marry and that they should rather be read as emphasising the dimension of equality between men and women.

[10] *Christine Goodwin v the United Kingdom*, Application no 28957/95, para 100.

[11] Joined Cases C-122/99 P and C-125/99 P *D and Sweden v Council* EU:C:2001:304, para 34.

[12] Charter of Fundamental Rights of the European Union [2012] OJ C326/2.

[13] *Schalk and Kopf v Austria* (n 8), para 25.

[14] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/02.

[15] P. Murat, 'Article II-69' in L. Burgorgue-Larsen, A. Levade, and F. Picod (eds), *Traité établissant une Constitution pour l'Europe. Commentaire article par article. Partie II: La Charte des droits fondamentaux de l'Union* (Bruylant 2005) 165.

12 must in all circumstances be limited to marriage between two persons of the opposite sex' and that, as a consequence, 'it [could not] be said that Article 12 is inapplicable to the applicants' complaint'.[16]

However, both the Commentary and *Schalk and Kopf* underline that the decision to allow same-sex marriage belongs to national authorities. According to the Explanation relating to the Charter of Fundamental Rights, 'Article [9] neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex.'[17] Similarly, *Schalk and Kopf* affirmed that 'marriage has deep-rooted social and cultural connotations which may differ largely from one society to another' and that 'it must not rush to substitute its own judgment in place of that of the national authorities'.[18] The ECtHR decision has been rightly criticised as the Court did not engage in a true proportionality review. More specifically, it did not explain the relative weight of the applicants' right and the 'social and cultural connotations' put forward by the government nor why the latter should trump the former.[19] Having decided that Article 12 did not require State Parties to allow same-sex marriages, the Court also refused to discuss the matter under Articles 8 and 14 as 'the Convention is to be read as a whole'.[20]

The subsequent case law of the CJEU and the ECtHR confirms this subsidiary approach leaving the issue of same-sex marriage to the discretion of national authorities. The CJEU has frequently recalled that 'a person's status, which is relevant to the rules on marriage, is a matter that falls within the competence of the Member States and EU law does not detract from that competence'.[21] In the same vein, the ECtHR has repeatedly confirmed that 'while it is true that some Contracting States have extended marriage to same-

[16] *Schalk and Kopf v Austria* (n 8), para 61.

[17] Explanations relating to the Charter of Fundamental Rights (n 14) 21.

[18] *Schalk and Kopf v Austria* (n 8), para 62.

[19] See, in contrast, the review carried out with regards to the marriage of transsexuals (*Christine Goodwin v the United Kingdom* (n 10), paras 97–103) or the marriage between a father-in-law and his daughter-in-law (*B and L v the United Kingdom*, Application no 36536/02, paras 34–41).

[20] *Schalk and Kopf v Austria* (n 8), para 101. This 'systemic' approach, which subordinates the interpretation of Article 8 to that of Article 12, is certainly well established in the Court's case law (see *Johnston and Others v Ireland*, Application no 9697/82, para 57) but has recently been called into question by Judge Angelika Nussberger. In her view, reading the Convention 'as a whole' implies understanding the right to marriage in the light of the rapid transformations of family life, rather than corseting the interpretation of Article 8 by aligning it with the perhaps overly restrained interpretation of Article 12 (*Delecolle v France*, Application no 37646/13, separate opinion of Judge Nussberger, 17).

[21] Case C-267/06 *Maruko* EU:C:2008:179, para 59; Case C-443/15 *Parris* EU:C:2016:897, para 58; Case C-673/16 *Coman and others* EU:C:2018:385, para 37. See also Chapter 6 by Xavier Groussot, Gunnar Thor Petursson, and Alezini Loxa.

sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples' and even specified that 'it enshrines the traditional concept of marriage as being between a man and a woman'.[22] This reiterated reference to the heterosexual nature of marriage might be considered as a step backward in comparison with the more open-ended considerations expressed in *Schalk and Kopf*.

However, some positive trends may be observed in the recent case law of both courts. In its landmark decision in *Coman v Inspectoratul Genral Pentru imigrari*,[23] the CJEU delivered a progressive interpretation of the term 'spouse'. In the Court's view 'the term "spouse" within the meaning of Directive 2004/38 is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned'.[24] For its part, in *Orlandi and Others v Italy*, the ECtHR slightly amended its way of referring to State Parties' discretion regarding the issue of same-sex marriage by affirming that they 'are *still* free … to restrict access to marriage to different-sex couples' (emphasis added).[25] This might be considered as a first tangible indication of a possible tightening of European control linked to the evolution of national legislations.[26]

[22] *Hämäläinen v Finland*, Application no 37359/09, para 96; *Chapin and Charpentier v France*, Application no 40183/07, para 37.

[23] *Coman and others* (n 21). See A. Caiola, 'Une acception large de la notion de "conjoint" pour garantir la liberté de séjour des citoyens européens' (2018) Revue des affaires européennes 335; E. Bribosia and I. Rorive, 'L'arrêt Coman: Quand la Cour de justice contribue à la reconnaissance du mariage homosexuel' (2018) n 253 Journal de droit européen 344–347; M. Fallon, 'Observations sous CJUE, 5 juin 2018, Gr. Ch., Coman, C-673/16, EU: C:2018:385' (Cahiers de l'EDEM, June 2018) <http://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/observations-sous-cjue-5-juin-2018-gr-ch-coman-c-673-16-eu-c-2018-385.html>; H. Fulchiron, 'Citoyenneté européenne, liberté de circulation et reconnaissance des situations familiales créées dans un État membre: Un petit pas pour de grandes enjambées?' (2018) Recueil Dalloz 1678; P. Hammje, 'Obligation de reconnaissance d'un mariage entre personnes de même sexe conclu dans un État membre aux fins d'octroi d'un droit de séjour dérivé' (2018) Revue critique de droit international privé 816; A. Tryfonidou, 'An analysis of the ECJ ruling in Case C-673/16 Coman: The right of same-sex spouses under EU law to move freely between EU Member States' (2019) Research report prepared for NELFA <http://nelfa.org/inprogress/wp-content/uploads/2019/01/NELFA-Tryfonidou-report-Coman-final-NEW.pdf>; G. Willems, 'Le droit au regroupement familial des époux homosexuels consacré par la Cour de justice de l'Union européenne' (2018) La semaine juridique (édition générale). See also Chapter 7 by Michael Bogdan.

[24] *Coman and others* (n 21), para 35.

[25] *Orlandi and Others v Italy*, Application no 26431/12.

[26] See J.-Y. Carlier. 'Vers un ordre public européen des droits fondamentaux – L'exemple de la reconnaissance des mariages de personnes de même sexe dans l'arrêt Coman', (2019) Revue trimestrielle des droits de l'homme 220.

9.2.2 *Transgender Spouses: A Particular Case of Same-Sex Marriage*

In recent years, both the ECtHR and the CJEU have had to deal with a particular configuration of the claim for authorising same-sex marriage, arising from situations where individuals married to a different sex spouse have subsequently changed their gender identity.

In the ECtHR case *Hämäläinen v Finland*,[27] the applicant was a trans woman denouncing the fact that she could not be officially registered as a woman without ending her marriage with the woman whom she had married before her transition because, at the time, Finland did not allow same-sex marriage. She could either divorce or consent to her marriage being converted into a registered partnership. In its 2014 decision, the Court considered that such alternative was not in breach of the ECHR, considering the lack of European consensus on allowing same-sex marriage or dealing with the pre-existing marriage of trans persons.[28] The Court also endorsed the government's view that when a marriage was 'converted' into a registered partnership 'the original legal relationship [continued] with only a change of title and minor changes to the content of the relationship'.[29] The Court finally considered that 'the effects of the conversion of the applicant's marriage into a registered partnership would be minimal or non-existent as far as the applicant's family life is concerned'[30] and that no separate issue arose under Article 12 of the ECHR.[31] These explanations equating marriage with registered partnership can hardly be reconciled with the Court's classic rhetoric that 'marriage confers a special status on those who enter into it'.[32] This contradiction arguably makes the whole reasoning unsatisfactory as it biased the proportionality test. Indeed, three dissenting judges found it very problematic to force the applicant to choose between having her gender identity recognised and keeping her civil status. In their opinion, persons in the applicant's situation should be allowed to remain married after the acknowledgment of the acquired gender. This is one of the very rare occasions where Strasbourg judges expressly took a position in favour of (a very specific type of) same-sex marriage.

A few years later, in *M.B. v Secretary of State for Work and Pensions*,[33] the CJEU was faced with a similar situation but in the context of Directive 79/7/

[27] *Hämäläinen v Finland* (n 22).
[28] Ibid, para 74.
[29] Ibid, para 84.
[30] Ibid, para 85.
[31] Ibid, para 97.
[32] See, for example, *Gas and Dubois v France*, Application no 25951/07, para 68.
[33] Case C-451/16 *MB v Secretary of State for Work and Pensions* EU:C:2018:492.

EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security.[34] The applicant in the main proceedings was a trans woman who was faced with the same cruel alternative as Mrs Hämäläinen, before same-sex marriage was introduced in the UK in 2014. For religious reasons, she decided to remain married with her wife and renounced having her acquired female gender officially registered. However, when she reached the age of sixty at which women were entitled to retirement pension, the applicant applied for such a pension but was refused. Referring, among others, to *Maruko*[35] and *Coman*[36], the Court admitted that 'EU law does not detract from the competence of the Member States in matters of civil status and legal recognition of the change of a person's gender'.[37] Differently from *Hämäläinen*, the applicant 'only' claimed entitlement to a retirement pension rather than the recognition of gender as such. Accordingly, the Court ruled that Article 4 of Directive 79/7 that prohibits sex-based discrimination precluded national legislation obliging a transgender person to end their marriage to benefit from a retirement pension at the age corresponding to their new identity.

This case demonstrates how, through the specifics of EU law, the ECtHR decision allowing a State to require dissolution of marriage as a condition for gender recognition is somewhat softened by a CJEU decision providing the persons who refuse to end their marriage with at least some of the benefits associated with the unrecognised acquired gender.

9.2.3 *Registered Partnerships: Official Recognition as a Basic Right*

While the CJEU does not consider itself legitimate to impose on states the creation of a legal status accessible to same-sex couples, the Strasbourg Court has recently confirmed that such a positive obligation exists under Article 8 ECHR.

Already in 2001, the CJEU found in *D and Sweden v Council of the European Union*, that 'since 1989 an increasing number of Member States have introduced, alongside marriage, statutory arrangements granting legal recognition to various forms of union between partners of the same sex or of the opposite sex and conferring on such unions certain effects'.[38] At the time,

[34] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L6/24.
[35] *Maruko* (n 21).
[36] See *Coman and others* (n 21).
[37] *MB v Secretary of State for Work and Pensions* (n 33), para 29.
[38] *D and Sweden* (n 11), para 35.

the Court considered that this did not imply that registered partners could be covered by the term 'married official' used in the Community Staff Regulations.[39] Since then, the EU has extended the benefits associated with marriage to registered EU officials as far as they do not have access to marriage.[40] However, in *Parris v Trinity College Dublin*,[41] the Court recalled that 'Member States are … free to provide or not provide … an alternative form of legal recognition of [same-sex relationships], and, if they do so provide, to lay down the date from which such a marriage or alternative form is to have effect'.[42] This is an obvious consequence of 'the lack of EU competence with regard to these matters which … means that the EU cannot legislate in order to require all EU Member States to afford legal recognition to the familial ties among the members of rainbow families in their own territory'.[43]

The ECtHR, however, has progressively affirmed the right for same-sex couples to an alternative legal status. In *Schalk and Kopf*, the ECtHR considered that states enjoyed a margin of appreciation 'in the timing of the introduction of legislative changes'[44] as well as 'as regards the exact status conferred by alternative means of recognition'.[45] As the European consensus on partnerships grew stronger, the Court reconsidered its initial position. In the 2015 *Oliari and others v Italy* decision,[46] the ECtHR ruled that the lack of any form of official registration available to same-sex partners was in breach of the right to family life guaranteed by Article 8 ECHR. The Court insisted that 'same-sex couples … are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship'.[47] It also underlined that, given the impossibility to

[39] Ibid, para 39.

[40] Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities [2004] OJ L124/1.

[41] *Parris* (n 21).

[42] Ibid, para 59.

[43] A. Tryfonidou and R. Wintemute, 'Obstacles to the free movement of rainbow families in the EU'. Study requested by the European Parliament PETI Committee (2021) <www.europarl.europa.eu/supporting-analyses>.

[44] *Schalk and Kopf v Austria* (n 8), para 105.

[45] Ibid, para 108.

[46] *Oliari and Others v Italy*, Application nos 18766/11 and 36030/11. See also A. Hayward, 'Same-sex registered partnerships – A right to be recognized' (2016) 75 Cambridge Law Journal 27; V. J. Marzano, 'Oliari and the European Court of Human Rights: Where the court failed' (2017) Pace International Law Review 241; S. Ragone and V. Volpe, 'An emerging right to a "gay" family life? The Case Oliari v. Italy in a comparative perspective' (2016) 17 German Law Journal 451.

[47] *Oliari and Others v Italy* (n 46), para 165.

marry, same-sex couples had a 'particular interest' in an alternative status providing them 'core rights' relevant to a couple and endowed with an 'intrinsic value' irrespective of its specific legal effects.[48] In the Court's view, the Italian Government failed to indicate the 'community interest' that would have justified the absence of a statute.[49] Moreover, the Court considered that while a wide margin of discretion must be recognised as to the 'exact status' conferred, such large margin did not apply to the 'general need' for legal recognition, especially in a European context where legal recognition of same-sex couples was rapidly gaining ground.[50]

Since *Oliari* was based on several very specific aspects of the Italian context,[51] it was not clear whether it imposed a positive obligation on all CoE States to create an alternative form of union.[52] In 2017, the CoE Commissioner for Human Rights, Nils Muižnieks, observed that 'it is difficult to read the Oliari judgment, and concurring opinion, as anything else than placing a positive obligation on states parties to the ECHR to provide legal recognition to same-sex couples as a way to protect their right to family life'.[53] This positive obligation to provide a legal framework was confirmed by the Court in *Fedotova and others v Russia*, first in a chamber judgment issued on 13 July 2021,[54] and subsequently in a Grand Chamber decision issued on 17 January 2023.[55]

9.2.4 *Social Benefits: Piercing the Veil of Marriage*

While lacking the legitimacy to require States to set up registered partnership formulas, the CJEU has proven particularly committed to the defence and development of the rights of registered partners. In several cases, the Court has considered, on the basis of the Employment Equality Directive (Directive

[48] Ibid, para 174.
[49] Ibid, para 176.
[50] Ibid, paras 177–178.
[51] The Constitutional Court and the Court of Cassation had both affirmed the need to recognise and protect same-sex couples (ibid, para 180), in line with the sentiment of the Italian population as reflected in official surveys (ibid, para 181).
[52] Hayward (n 46).
[53] Commissioner for Human Rights, 'Access to registered same-sex partnerships: It's a question of equality' (Council of Europe 2017) <www.coe.int/en/web/commissioner/-/access-to-registered-same-sex-partnerships-it-s-a-question-of-equality>.
[54] *Fedotova and Others v Russia* (Chamber judgment), Application nos 40792/10, 30538/14 and 43439/10, para 56.
[55] *Fedotova and Others v Russia* (Grand Chamber judgment), Application nos 40792/10, 30538/14 and 43439/10, para 178. See also *Buhuceanu and Others v Romania*, Application nos 20081/19 and 20 others, Maymulakhin and Markiv v. Ukraine, Application no. 75135/14, and *Przybyszewska and Others v. Poland*, Applications nos. 11454/17 and 9 others.

2000/78/EC),[56] that same-sex couples who could not marry but only enter into a registered partnership should be granted the same social benefits as different-sex spouses. First, in *Maruko* and *Römer*,[57] the Court decided that German *Lebenspartners* should be able to benefit from a survivor's or retirement pension under the same conditions as heterosexual spouses. It emphasised, however, that its ruling only applied to partnerships that, as the German status, were reserved for same-sex couples and provided effects very similar to those associated with marriage. However, this approach was expanded, in *Hay v Crédit Agricole*,[58] to partnerships available to both different-sex and same-sex couples and less close to marriage regarding legal effects, as the French *Pacte civil de solidarité* (PACS). In this case, the Court indeed decided that a gay employee entering into a PACS with a person of the same sex should be entitled to the same bonus and leave as those provided to heterosexual persons on the occasion of their marriage. This string of case law constitutes an important step forward for same-sex couples by implying that same-sex registered partners deprived of access to marriage must as a minimum enjoy the same benefits as spouses. Nevertheless, its scope remains limited to situations where same-sex partners have access to at least some form of official registration.

For its part, the ECtHR was prompt to require equal rights for same-sex and different-sex *de facto* partners, but durably allowed States to favour different-sex spouses over unmarried same-sex partners deprived of access to marriage.

In 2003, the Court decided in *Karner*[59] that a surviving same-sex *de facto* partner should have the right to continue his deceased partner's tenancy in the same way as a surviving different-sex *de facto* partner. Considering that the issue fell into the ambit of the protection of 'home' under Article 8 ECHR (as the Court did not yet recognise that same-sex couples can enjoy 'family life' as such), the Court stated that differences in treatment on the basis of sexual orientation must be justified by 'particularly serious reasons'[60] and that the aim of protecting the traditional family was legitimate but 'rather abstract' and pursuable through 'a broad variety of concrete measures'.[61] In the Court's

[56] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

[57] Case C-147/08 *Römer* EU:C:2011:286.

[58] Case C-267/12 *Hay* EU:C:2013:823. See F. Lambinet and S. Gilson, 'Arrêt "Hay": Les partenaires (de même sexe) pacsés doivent-ils être traités comme des (hétérosexuels) mariés' 2014 Journal de droit européen 243.

[59] *Karner v Austria*, Application no 40016/98. See also *Kozak v Poland*, Application no 13102/02; *P.B. and J.S. v Austria*, Application no 18984/02.

[60] *Karner v Austria* (n 59), para 37.

[61] Ibid, para 41.

view, Austria did not demonstrate the necessity to exclude same-sex partners to achieve that aim. This requirement that unmarried couples be treated equally, regardless of their sexual orientation, was confirmed in subsequent decisions, such as *Kozak v Poland*[62] and *P.B. and J.S. v Austria*.[63]

However, when the ECtHR was faced with the question of whether same-sex partners deprived of the possibility of marrying should be granted the same social benefits as married opposite-sex couples, it was not as bold as the CJEU and refused – for *de facto* partners as well as for registered partners – to pierce the veil of marriage. In *Manenc v France*[64] and *Mata Estevez v Spain*,[65] the Court indeed accepted the State's choice to provide a survivor's pension only to spouses, even if that implied that same-sex partners were necessarily deprived of such pension as, at the time, it was impossible for them to marry. The Court thus failed to recognise the discrimination based on sexual orientation hiding behind the distinction based on civil status. Despite strong criticism,[66] this approach has also been applied later in *Gas and Dubois*, as regards access to adoption.[67] Fortunately, it seems to have been abandoned in the *Taddeucci and McCall*[68] decision relating to family reunification, in which the court decided that same-sex *de facto* partners who cannot marry should have the same right to family reunification as different-sex

[62] *Kozak v Poland* (n 59), para 43 (eviction from the deceased partner's social housing).

[63] *P.B. and J.S. v Austria* (n 59), para 43 (extension of sickness and accident insurance for civil servants).

[64] In its decision in *Manenc v France* (Application no 66686/09) issued on 21 September 2010, the ECtHR decided that France could, without infringing Article 14 of the ECHR, refuse to grant a survivor's pension to a homosexual man after the death of his partner with whom he had entered into a civil partnership five years earlier. The Court emphasised that the PACS remained 'alien to marriage' and that the fact that France did not allow same-sex marriage 'could not of itself suffice to place the applicant in a situation analogous or comparable to that of a surviving spouse' with regard to the right to a pension. (The law on *mariage pour tous* was adopted in 2013.)

[65] In its *Mata Estevez v Spain* decision (Application no 56501/00) issued on 10 May 2001, the Court ruled that Spain could, without violating the Convention, deny a homosexual man whose de facto partner had died the benefit of a survivor's pension, since this benefit was reserved for spouses, even though homosexuals were not able to marry (the ley on *matrimonio igualitario* was adopted in 2005).

[66] Lambinet and Gilson (n 58); C. Tobler, 'Equality and non-discrimination under the ECHR and EU law: A comparison focusing on discrimination against LGBTI persons' (2014) 74 Heidelberg Journal of International Law 521.

[67] *Gas and Dubois v France* (n 32), paras 66-71.

[68] *Taddeucci and McCall v Italy*, Application no 51362/09; See N. Koffeman, 'Taddeucci and McCall v. Italy: Welcome novelty in the ECtHR's case-law on equal treatment of same-sex couples' (*Strasbourg Observers*, 27 July 2016) <https://strasbourgobservers.com/2016/07/27/taddeucci-and-mccall-v-italy-welcome-novelty-in-the-ecthrs-case-law-on-equal-treatment-of-same-sex-couples/>.

spouses.[69] It shall be seen whether the Court will, in the future, transpose this new reasoning to the issue of social benefits that was at stake in *Manenc* and *Mata Estevez*. In such case, the ECtHR case law would provide a useful complement to the *Hay* case law by expanding its egalitarian dynamic to *de facto* partners.

It should be mentioned, finally, that, in two decisions issued in 2016, the CJEU as well as the ECtHR still refused to extend spouses' survivor's pension rights to same-sex partners, even if the specificity of these cases may limit their significance. In *Parris v Trinity College Dublin*,[70] the CJEU decided that the denial of a survivor's pension to the applicant's same-sex registered partner on the ground that at the time of his retirement in 2010 such pension was reserved for spouses was not in breach of the provisions of Directive 2000/78/EC, even if at that time same-sex couples could not marry (Ireland allowed same-sex marriage in 2015). In *Aldeguer Tomas v Spain*,[71] the ECtHR similarly ruled that the denial of a survivor's pension to a surviving same-sex *de facto* partner on the ground that at the time of the death in 2002 such pension was reserved for spouses was not in breach of the ECHR, even if at that time same-sex couples could not choose to marry (Spain allowed same-sex marriages in 2005). As mentioned above, the relevance of both cases is arguably limited due to their specific circumstances. Indeed, both Spain and Ireland had in the meantime taken effective steps to expand the right to a survivor's pension to same-sex partners either through the institution of a civil partnership scheme providing for a survivor's pension (Ireland)[72] or through access to marriage and all associated benefits (Spain). Thus, the courts might take a different approach in cases where the State has not taken such steps in view of guaranteeing equality between couples in the enjoyment of social benefits.

[69] *Taddeucci and McCall v Italy* (n 68), para 83.

[70] *Parris* (n 21); A. Tryfonidou, 'Another failed opportunity for the effective protection of LGB rights under EU law: Dr David. L. Parris v. Trinity College Dublin and Others' (*EU Law Analysis*, 1 December 2016) <http://eulawanalysis.blogspot.com/2016/12/another-failed-opportunity-for.html>.

[71] *Aldeguer Tomás v Spain*, Application no 35214/09.

[72] It should be mentioned, in this respect, that Mr Parris did not benefit directly from this evolution. In 2011, registered partnership was introduced and the survivor's pension scheme was extended to the registered partner, but only if the beneficiary of the pension had entered into a registered partnership with his/her same-sex partner prior to turning sixty. Mr Parris, who was already sixty-five in 2011, did and could obviously not meet this requirement. However, the Court found that this did not amount to discrimination on the basis of sexual orientation or age.

9.2.5 *Family Reunification: The Strong Protection of the Partners' Core Right to Simply Be Together*

In the spectacular *Coman* judgment issued on 5 June 2018, the CJEU decided that, to determine the beneficiaries of the right to family reunification of EU citizens, the term 'spouse' referred to in Article 2(2)(b) of the 2004/38 directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[73] must be understood as including same-sex spouses as well as different-sex spouses, even if the host state does not allow same-sex marriages. Accordingly, Romania must provide a residence permit to the American spouse with whom a Romanian citizen had been validly married in Brussels where they effectively resided together before moving to Romania. This does not amount to a full recognition of the marriage as it must only be taken into account in the application of EU family reunification law. The judgment is, nevertheless, significant in clearly recognising the right to family reunification for same-sex spouses of EU citizens in all EU Member States. In particular, the Court stressed that the concept of spouse was gender-neutral and had to be interpreted in the light of the aim of directive 2004/38 and of Article 7 of the Charter providing for the right to respect for private and family life. From this perspective, the right of same-sex couples to live together in the Member State of which one of them is a national outweighs the Member States' desire to protect their 'public order' or 'national identity'. Based on *Coman*, this right is only recognised with respect to EU citizens who have entered into a same-sex marriage in another Member State. The future will tell whether its scope can be extended to foreigners legally residing in the Union via Directive 2003/86 and to marriages concluded outside the EU.[74]

Quite interestingly, in the context of this contribution, the ECtHR case law provides very significant additions to the protection offered by *Coman*. While Directive 2004/38 only protects same-sex couples who are married or in a registered partnership equivalent to marriage, the ECtHR decided in *Pajic*[75] and *Taddeucci and McCall* that same-sex *de facto* partners without access to marriage should benefit from family reunification under the same conditions as different-sex *de facto* partners and different sex-spouses. In *Pajic*, the Court

[73] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

[74] Tryfonidou, 'An analysis of the ECJ ruling in Case C-673/16 Coman: The right of same-sex spouses under EU law to move freely between EU Member States' (n 23) 14 and 16.

[75] *Pajic v Croatia*, Application no 68453/13.

applied the established *Karner* case law on the requirement that same-sex *de facto* partners be granted the same rights as different-sex *de facto* partners. Accordingly, the Croatian legislation allowing the reunification of heterosexual *de facto* partners only was in breach of articles 8 and 14 of the ECHR. *Taddeucci* goes much further. It departs from the approach taken in *Manenc*[76] and *Mata Estevez*[77] and considers that, as regards marriage-associated benefits, same-sex *de facto* partners who do not have access to marriage *are not* in a situation analogous to that of different-sex *de facto* partners who have the possibility of contracting marriage. However, the Italian legislation treated them in the same way by denying the right to family reunification to all *de facto* partners. Such similar treatment of different situations is in breach of the ECHR unless the defending State adduces 'particularly convincing and weighty reasons'. In the Court's view, the 'margin of appreciation enjoyed by the States in protecting the traditional family' invoked by the government did not meet this standard.[78]

9.2.6 *Recognition of Marriages Celebrated Abroad: Partnerships as a Way of Compromise*

The *Coman* judgment cautiously recalls that 'a person's status, which is relevant to the rules on marriage, is a matter that falls within the competence of the Member States'[79] and only affirms 'an obligation to recognise [same-sex] marriages for the sole purpose of granting a derived right of residence to a third-country national'.[80] It has been suggested, however, that, at some point, the *Coman* dynamic may lead to a more general principle of recognition of same-sex marriage celebrated abroad. Indeed, it remains to be seen to what extent it will or will not be 'sustainable'[81] to confine the recognition of marriage to the sole question of family reunification. It is unclear whether host states, when required to grant residence permits to same-sex spouses, will be able to refuse the latter all the benefits normally deriving from marriage. It is reasonable to think that this first form of 'targeted recognition'[82] will give

[76] *Manenc v France* (n 64).
[77] *Mata Estevez v Spain* (n 65).
[78] *Taddeucci and McCall v Italy* (n 68), paras 92–93.
[79] *Coman and others* (n 21), para 37.
[80] Ibid, para 46.
[81] Bribosia and Rorive (n 23) 347.
[82] Fulchiron, 'Citoyenneté européenne, Liberté de circulation et reconnaissance des situations familiales créées dans un État membre: Un petit pas pour de grandes enjambées?' (n 23) 1678.

rise to others, for example regarding the social and/or fiscal effects of marriage[83] by way of a kind of 'contagion or percolation' effect.[84] *Coman* might thus be auguring a trend towards a larger or even a full recognition of same-sex marriages across EU Member States: if more and more rights arise from marriages celebrated abroad it may become increasingly difficult to justify a refusal of the title of 'spouses'. Considering the current position of the CJEU on the Member States' competence regarding marriage, it is however unlikely that such an obligation of full recognition will be affirmed in the near future.

Recently, the ECtHR arrived at a compromise approach. In *Orlandi v Italy*,[85] the Court found that Italy could not, without violating the Convention, deny any form of recognition to foreign same-sex marriages. The applicants were same-sex couples married in Canada, the United States, and the Netherlands complaining that various local administrations in Italy had refused to officially register their marriages. The Court stated that the recognition of a person's 'real marital status' was a matter of personal and social identity and 'psychological integrity'.[86] The Court also pointed out that since *Schalk and Kopf*, the right to marry was applicable to same-sex couples wishing to marry and that it followed that Article 12 ECHR also applied to same-sex couples already married in another legal order.[87] Nevertheless, states were 'still free' to reserve marriage for heterosexuals[88] and may legitimately aim to prevent their nationals from having recourse abroad to institutions refused in their legal order.[89] Against this background, the Court noted that the lack of recognition had not deprived the applicants either of the rights they had previously enjoyed in Italy or the rights acquired in the country where they had married.[90] Moreover, Italy was allowed a comfortable margin of appreciation since, despite the rapid movement in favour of the recognition of same-sex couples

[83] Hammje (n 23) 833.
[84] Fallon (n 23).
[85] *Orlandi and Others v Italy* (n 25). H. Fulchiron, 'La CEDH et la reconnaissance des mariages entre personnes de même sexe célébrés à l'étranger: Avis de tempête ou signal brouillé?' (2018) Recueil Dalloz 446; J. Lievens, 'EHRM opent deur naar Europese erkenning homohuwelijk' (2018) Juristenkrant 1; C. Poppelwell-Scevak, 'Oliari, Orlandi and Homophobic dissenting opinions: The Strasbourg approach to the recognition of same sex marriages' (*Strasbourg Observers*, 2 February 2018) <https://strasbourgobservers.com/2018/02/02/oliari-orlandi-and-homophobic-dissenting-opinions-the-strasbourg-approach-to-the-recognition-of-same-sex-marriages/>.
[86] *Orlandi and Others v Italy* (n 25), para 144.
[87] Ibid, para 145.
[88] Ibid, para 192.
[89] Ibid, para 207.
[90] Ibid, para 208.

in Europe, America, and Australasia,[91] there was no consensus among the states refusing same-sex marriage on the recognition of marriages celebrated abroad.[92] However, the Court held that domestic authorities, without having to recognise the marriages as such, should have taken them into consideration as civil unions. Indeed, the absence of any recognition and the subsequent legal vacuum disregarded the social reality of the applicants' situation without compelling justification.[93]

9.3 RAINBOW FAMILIES

9.3.1 *Same-Sex Parenthood: A Matter of National Identity?*

The ECtHR has dealt with the question of same-sex adoption in two significantly different cases. The first case, *Gas and Dubois*,[94] concerned two women who lived together in a registered partnership in France. They had travelled to Belgium to conceive a child through assisted reproductive technology (ART) and wanted the child to be adopted in France by the birth mother's partner. However, such adoption was impossible as intra-family adoption was reserved to spouses, and marriage to different-sex couples only. In the second case, X. *and others v Austria*,[95] two women living together in a *de facto* relationship and raising the child that one of them had conceived during a previous heterosexual relationship wanted the child to be adopted by the mother's partner. Such adoption was impossible as intra-family adoption was only allowed for different-sex *de facto partners* but not for same-sex *de facto* partners.

Beyond the difference regarding the circumstances of the child conception, the main contrast between *Gas and Dubois* and X. *and others* was that, in the

[91] Ibid, para 204.
[92] Ibid, para 205.
[93] Ibid, para 209.
[94] *Gas and Dubois v France* (n 32).
[95] X *and Others v Austria*, Application no 19010/07, para 137. See N. Rodean, 'Adoption and same-sex couples: New rights in European constitutional space after the ruling X and Others v. Austria' (2014) 29 Direitos Fundamentais & Justiça 30; G. Puppinck, 'X. and Others v. Austria (Part I): Had the woman been a man . . .' (*Strasbourg Observers*, 4 March 2013) <https://strasbourgobservers.com/2013/03/04/x-and-others-v-austria-part-i-had-the-woman-been-a-man/>; S. Smet, 'X. and Others v. Austria (Part II): A narrow ruling on a narrow issue' (*Strasbourg Observers*, 6 March 2013) <https://strasbourgobservers.com/2013/03/06/x-and-others-v-austria-part-ii-a-narrow-ruling-on-a-narrow-issue/>; P. Martens, 'L'égalité dans l'adoption' (2013) Revue de jurisprudence de Liège, Mons et Bruxelles 1404; G. Willems, 'Orientation sexuelle et adoption : L'Autriche condamnée par la Cour européenne des droits de l'homme' (2013) Revue trimestrielle des droits de l'homme 1037.

former, the applicants could not adopt because adoption was reserved for spouses (and marriage was reserved for opposite-sex couples), whereas in the latter, the couple could not adopt because adoption was reserved for opposite-sex couples, either married or not. In the former case, therefore, the difference based on sexual orientation was somehow 'hidden' behind a distinction made on the basis of matrimonial status whereas in the latter, it was 'blatant', as adoption was available to different-sex *de facto* partners but not same-sex *de facto* partners.

In both cases, the Court accepted that there existed a family life between the two women and the child which is protected by Article 8 ECHR. Beyond this, the Court ruled very differently. In *Gas and Dubois*, the Court considered that the applicants were treated by France exactly like opposite-sex registered partners who could not adopt and could not be compared to opposite-sex spouses as 'marriage confers a special status on those who enter into it'.[96] In some sense, the ECtHR refused to see that it was the applicants' sexual orientation that prevented them from marrying which – in turn – prevented them to proceed to the adoption. The Court disregarded the forbidden discrimination based on sexual orientation poorly concealed behind an admissible distinction on the basis of the status of a couple. Things turned out very differently in *X. and others*. Since the distinction was clearly based on the applicants' sexual orientation, the Court referred to *Salgueiro Da Silva Mouta*[97] and *E.B. v France*[98] to recall that 'differences based solely on considerations of sexual orientation are unacceptable under the Convention'.[99] The protection of the traditional family was considered 'a weighty and legitimate reason which might justify a difference in treatment' although it was 'rather abstract' and could be pursued by 'a broad variety of concrete measures'.[100] As the government admitted that 'same-sex couples may be as suited for second-parent adoption as different-sex couples', the Court concluded that Austria did not adduce 'particularly strong and convincing reasons' to justify the disputed distinction and that there had been a breach of Articles 8 and 14 ECHR.[101] *X. and others* undoubtedly constituted a big step forward for lesbian and gay parents but its importance is undermined by the circular reasoning relied on in *Gas and Dubois* by which the right to adoption is only guaranteed where *de facto* partners may adopt.

[96] *Gas and Dubois v France* (n 32), para 68.
[97] *Salgueiro Da Silva Mouta v Portugal*, Application no 33290/96.
[98] *EB v France*, Application no 43546/02.
[99] *X and Others v Austria* (n 95), para 99.
[100] Ibid, para 138–139.
[101] Ibid, para 151.

Fortunately, *Taddeucci and McCall* dismissed the *Gas and Dubois* approach and logically considered that the 'specificity of marriage' argument cannot be used against those who cannot marry,[102]. One can thus hope that this updated reasoning will be applied in future same-sex adoption cases and that the ECtHR will accordingly affirm an explicit right to same-sex adoption based on the idea put forward in *X. and others* that 'same-sex couples [are] as suited for ... adoption as different-sex couples'.[103]

While favourable developments may thus be expected as regards adoption,[104] the ECtHR may remain more reluctant to affirm the right to 'direct' (as opposed to 'adoptive') same-sex parenthood established through a legal presumption or acknowledgement of 'co-maternity' or 'co-paternity'. To our knowledge, the ECtHR has delivered only one decision on the matter – *Boeckel and Gessner-Boeckel*.[105] In this case, two German women were living together in a *Lebenspartnerschaft* and one of them gave birth to a son. Two years after the birth, the German court allowed a second parent adoption, by the mother's life partner. The applicants subsequently requested the court to change the child's birth certificate, as, in their view, the presumption automatically designating the mother's husband as the child's legal father should have been applied *mutatis mutandis* in their situation. The ECtHR found, however, that same-sex registered partners and opposite-sex spouses were not in a comparable situation in this respect. According to the Court, the presumption was based on the idea that 'the man who was married to the child's mother at the time of birth was indeed the child's biological father ... [even if] this legal presumption might not always reflect the true descent' whereas, in contrast, 'in case one partner of a same-sex partnership gives birth to a child, it can be ruled out on biological grounds that the child descended from the other partner'.[106]

[102] *Taddeucci and McCall v Italy* (n 68). See Koffeman (n 68).

[103] *X and Others v Austria* (n 32).

[104] See, nevertheless, *C.E. and Others v France*, Application nos 29775/18 and 29693/19 where the Court decided that the impossibility for a woman to adopt her former same-sex partner's child was not in breach of the right to respect for private and family life. The significance of this case may be limited as it focuses on the situation of ex-partners and as the Court took in consideration positive developments arising in French law in the context following the revision of bioethic laws in 2021. See C. Derave and H. Ouhnaoui, 'C.E. & al. v. France: Legal recognition of intended parenthood from previous same-sex relationships (between women)' (*Strasbourg Observers*, 7 October 2022) <http://strasbourgobservers.com/2022/10/07/c-e-al-v-france-legal-recognition-of-intended-parenthood-from-previous-same-sex-relationships-between-women/>.

[105] *Boeckel and Gessner-Boeckel v Germany*, Application no 8017/11.

[106] Ibid, para 30.

In the very recent *V.M.A. v Stolichna obshtina* case,[107] the CJEU similarly emphasised that 'a person's status, which is relevant to the rules on marriage and parentage, is a matter that falls within the competence of the Member States' and that they 'are thus free to decide whether or not to allow marriage and parenthood for persons of the same sex'.[108] In her Opinion, Advocate General Kokott more specifically noted that among the Member States that allow same-sex marriage, 'only some provide for the 'automatic' parenthood of the wife of the biological mother of a child'[109] and that 'the rules on parentage determine the family relationships which are at the heart of family law' and 'represent the essence of the conception which the [State] is seeking to protect as its national identity'.[110]

Currently, another case concerning the issue of same-sex parenthood, *R.F. and others v Germany*,[111] is pending before the ECtHR. Differently from the *Boeckel* case, here one of the women gave birth while the other provided the eggs. Accordingly, both women may claim to be – in some sense – the child's biological mother. In light of the recent confirmation by the CJEU that the recognition of same-sex parenthood is a matter that should be left to the states, it remains to be seen whether this double biological connection with the child will lead the court to take a different approach than the one taken in *Boeckel* and rule in favour of the applicants.

9.3.2 *Assisted Reproductive Technology: The Cross-Border Dimension*

The ECtHR has never had the opportunity to address clearly the question of whether same-sex couples could have an ECHR-guaranteed right to found a family via ART techniques. In *Gas and Dubois*, the applicants had travelled to Belgium for insemination but the Court was not seized of the question of access to ART but only of the subsequent issue of adoption. The Court nevertheless noted that 'while French law provides that … insemination is available only to heterosexual couples it also states that it is to be made available for therapeutic purposes only'. From this therapeutic perspective, the applicants' situation cannot be compared to that of infertile heterosexual couples and they cannot be said to be discriminated against.[112] *Gas and*

[107] Case C-490/20 *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* EU:C:2021:1008.
[108] Ibid, para 52.
[109] Opinion of Advocate General Kokott in Case C-490/20 *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* EU:C:2021:296, para 75.
[110] Ibid, para 105.
[111] *R.F. and Others v Germany*, Application no 46808/16.
[112] *Gas and Dubois v France* (n 32), para 63.

Dubois was followed by another French application – *Charron and Merle-Montet*[113] – to the ECtHR. The application concerned the fact that lesbian couples had no access to insemination in France but was considered inadmissible as the applicant had not exhausted the domestic remedies.[114] In any case, it must be kept in mind that the ECtHR has proven very reluctant to impose any obligation on State Parties as regards medically assisted procreation (MAP) even in situations involving opposite-sex couples.[115] In the foreseeable future, the Court is therefore very unlikely to take serious steps in favour of same-sex partners who want to become parents through ART.

Due to the fact that ART constitutes medical services under EU law these are to be considered 'services' within the meaning of Article 57 TFEU insofar as they are carried out legally and in return for payment, and 'health care' within the meaning of directive 2011/24/EU on patient mobility.[116] EU law thus generally allows individuals to move within the Union to benefit from ART techniques, even when these techniques are prohibited in their State of origin. It seems that a 'considerable flow of patients' crosses borders between European states for reproductive purpose, either because of 'legal restrictions based on prohibition of the technique per se, or because of inaccessibility due to the characteristics of the patients (like age, sexual orientation or civil status)'.[117]

[113] *Charron and Merle-Montet v France*, Application no 22612/15.

[114] See J.-P. Marguénaud, 'Le refus de la procréation médicalement assistée à un couple d'homosexuelles mariées ou la subsidiarité otage de la proportionnalité'. (2018) Revue trimestrielle de droit civil 349.

[115] See A. Lebret, 'The European Court of Human Rights and the framing of reproductive rights' (2020) Droits fondamentaux <www.crdh.fr/revue/n-18–2020/the-european-court-of-human-rights-and-the-framing-of-reproductive-rights/>; G. Willems, 'Droits de l'homme et procréation médicalement assistée: La Cour de Strasbourg face aux évolutions biomédicales et aux mutations de la filiation' in N. Massager (ed), *Procréation médicalement assistée et gestation pour autrui: Regards croisés du droit et de la pratique médicale* (Anthemis 2017); B. Pastre-Belda, 'La Cour européenne des droits de l'homme, entre promotion de la subsidiarité et protection effective des droits' (2013) Revue trimestrielle des droits de l'homme 256.

[116] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare [2011] OJ L88/4. See N. Koffeman, 'Legal responses to cross-border movement in reproductive matters within the European Union' (IACL World Congress – Constitutional Challenges: Global and Local, Oslo, April 2014) <https://scholarlypublications.universiteitleiden.nl/access/item%3A2854771/view>. See also W. Van Hoof and G. Pennings, 'Extraterritorial laws for cross-border reproductive care: The issue of legal diversity' (2012) 19 European Journal of Health Law 187.

[117] F. Shenfield and others, 'Cross border reproductive care in six European countries' (2010) 25 Human Reproduction 1367.

However, the freedom to provide services protected by the TFEU is not absolute and states may try to prevent their nationals from crossing borders to resort to domestically prohibited techniques.[118] Directive 2011/24/EU indeed stipulates that none of its provisions 'should be interpreted in such a way as to undermine the fundamental ethical choices of Member States'.[119] In this respect, it is worth mentioning that in her Opinion in *V.M.A. v Stolichna obshtina*, Advocate General Kokott included human reproduction among 'the fundamental institutions of family law'. In her view, 'national rules governing marriage (or divorce) and parentage (or even reproduction) define the family relationships which are at the heart of this field'.[120]

Similarly, in the *Mennesson* case, the ECtHR decided that a state could legitimately seek 'to deter its nationals from having recourse to methods of assisted reproduction outside the national territory that are prohibited on its own territory'.[121] On a different note, however, it must be kept in mind that in *S.H. and others v Austria*, the Court explicitly noted that restrictions to access to ART were 'more acceptable' if nationals could easily seek the desired treatments abroad.[122] There may be a form of paradox or at least tension here, since, while states may thus seek to discourage 'reproductive tourism', the Court sometimes considers state bans to be less problematic when the denied services can be accessed in another country.

9.3.3 *Shared Parental Responsibility and Contacts: A Favourable, Yet Timid, Evolution*

Currently, the EU has no competence to regulate adoption and parenthood, and the ECtHR is not (yet) ready to explicitly affirm the right to same-sex adoption or *a fortiori* a hypothetical right to same-sex parenthood. In this situation, European judges may try to put forward the right for same-sex parents and their children to enjoy at least some 'core' rights allowing the flourishing of the adult–child relationship. To our knowledge, only the

[118] Koffeman (n 116), para 5.
[119] Directive 2011/24/EU (n 116).
[120] Opinion of Advocate General Kokott in *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* (n 109), para 75.
[121] *Mennesson v France*, Application no 65192/11, para 62. See also *Paradiso and Campanelli v Italy*, Application no 25358/12, para 180.
[122] *S.H. and Others v Austria*, Application no 57813/00, para 114: 'the Court also observes that there is no prohibition under Austrian law on going abroad to seek treatment of infertility that uses artificial procreation techniques not allowed in Austria and that in the event of a successful treatment the Civil Code contains clear rules on paternity and maternity that respect the wishes of the parents'.

ECtHR has been asked to rule on the critical issues of parental responsibility and contacts in the specific context of rainbow families. Unfortunately, its decisions on the matter did not further much the cause of legal recognition and protection of the links established in such families.

In 2018, in *Bonnaud and Lecoq*,[123] the ECtHR decided that the impossibility for a couple of women to share parental responsibility over the two children that they were raising together was not contrary to the ECHR. Each of them had become mother of one of the children through ART in Belgium and they wished to exercise joint parental authority over both of them using a mutual 'delegation of parental authority' which under French law is a general possibility for (a) parent(s) to share parental responsibility with a third party. However, the domestic courts found that, as both women were already perceived as the children's mothers by family and friends and as they did not report any particular difficulties, the necessity of a delegation had not been demonstrated. The ECtHR endorsed this explanation observing that the refusal to grant the delegation was based on the factual circumstances of the case[124] and that the assessment by the French courts did not reveal any difference in treatment based on sexual orientation.[125]

In 2020, in *Honner*,[126] the Court similarly considered that the denial of a right to contact the mother's ex-partner who had assumed the role of a second mother for years was not in breach of the Convention. Here, again, the couple had travelled to a Belgian fertility centre, and the woman who had given birth had appointed her partner as the child's testamentary guardian and had also largely entrusted her with the child's daily upbringing. The two women had entered into a civil partnership in 2009 but separated in 2012, and the child's mother had subsequently refused contacts between the child and her ex-partner who had then applied for contact as a person having established lasting emotional ties with the child. The national judge, however, refused to order such right to contact as, due to the very sharp deterioration in the relationship between the two women, contacts did not appear to be in the child's best interest. The ECtHR ruled in favour of the defending State by considering that French courts had delivered a 'carefully reasoned' decision, taking into consideration all the relevant facts and prioritising the prevailing interest of the child who was in a traumatic and guilt-inducing situation.

[123] *Bonnaud and Lecoq v France*, Application no 6190/11.
[124] Ibid, para 44.
[125] Ibid, para 45.
[126] *Honner v France*, Application no 19511/16.

One may consider that *Bonnaud and Lecoq* as well as *Honner* did not give due consideration to the fact that the applicants were not ordinary 'third parties' but the child's co-mothers. There had been no possibility of officialising the relationship between the children and their mother's partner despite the joint parental project, as, at the time, they could not have recourse to intra-family adoption and no alternative parenting status had been designed to accommodate the specific needs of rainbow families. However, by applying the general provisions of the Civil Code to the applicants as if they were any 'third party' in relation to their children and eluding the fact that they were actually the children's second parents, the French decisions may certainly be considered as treating obviously different situations in a similar manner which, arguably, the Court should have considered contrary to Article 14 ECHR.[127]

Most recently, the ECtHR dealt with another French case, *Callamand*,[128] which concerned the refusal of post-separation contacts between a child and her mother's ex-wife. The Court decided that in that particular situation, the French courts had not given sufficient consideration to the co-mother's right to respect for her family life and had accordingly violated Article 8 ECHR. Specifically, the Court noted that 'the applicant sought only the opportunity to continue to see, from time to time, a child in respect of whom she had acted as a co-parent for more than two years since her birth'.[129] Unlike in *Honner*, the Court considered that 'it [was] not sufficiently clear from the reasoning of the domestic courts how they proceeded to investigate whether a fair balance was maintained between potentially conflicting interests'[130] and that 'the Court of Appeal did not show that the fact that [the child] was having difficulties was in consequence of his meetings with [the applicant]'.[131] Thus, while not formally departing from the *Honner* approach, *Callamand* may be considered a timid evolution towards an increased ECHR protection provided to social and affective ties established in the context of rainbow families.

[127] See P. Cannoot, 'Inadmissibility decision in Bonnaud and Lecoq v. France: Should the Court have recognized the specificity of a same-sex relationship?' (*Strasbourg Observers*, 11 April 2018) <https://strasbourgobservers.com/2018/04/11/inadmissibility-decision-in-bonnaud-and-lecoq-v-france-should-the-court-have-recognized-the-specificity-of-a-same-sex-relationship/>; A. Margaria, 'Honner v France: Damage prevention and/or damage control?' (*Strasbourg Observers*, 12 January 2021) <https://strasbourgobservers.com/2021/01/12/honner-v-france-damage-prevention-and-or-damage-control/>.

[128] *Callamand v France*, Application no 2338/20.

[129] Ibid, para 41 (free translation).

[130] Ibid, para 39 (free translation).

[131] Ibid, para 43 (free translation).

9.3.4 *Social Benefits: The Work–Life Balance of Same-Sex Parents*

As regards parenting-associated social benefits, so far, the ECtHR does not appear very inclined to require states to treat same-sex parents similarly to different sex-parents, which may seem consistent with the approach taken in *Bonnaud* and *Honner* but which may change in the post-*Callamand* context.

Indeed, in *Hallier and others*,[132] the Court considered that refusing a co-mother the benefit of a paternity leave was not in breach of the Convention. The Court did consider that a lesbian co-mother 'is in a situation comparable to that of a biological father in a heterosexual couple'; however, it noted that legislation on paternity leave 'was intended to strengthen fathers' responsibility for their children's upbringing . . . and to bring about a change in the sharing of domestic tasks between men and women'.[133] According to the Court, granting fathers eleven days of paid leave was proportionate to such a legitimate aim. Moreover, the Court said that the differentiated treatment was not based on sex or sexual orientation but on the existence or absence of a biological link with the child. Finally, the Strasbourg judges considered that 'making the benefit of this leave dependent on a parenthood link with the child could, at the time in question, fall within the margin of appreciation granted to the State in this area'.[134]

The Court's reasoning may be considered unsatisfying. First, the aim of strengthening fathers' responsibility would not be undermined in any way by providing the parental leave also to co-mothers. Then, the justification based on biological links may be considered weak as some legal fathers are not their child's biological fathers. Conversely, there are situations where a co-mother is biologically related to her partner's child, such as in the circumstances of *R.F. and others*. Finally, as concerns the distinction based on legal parenthood as such, the reasoning may be considered flawed as it neglects the fact that, at the time, it was impossible for the applicants to have such tie legally established because of their sexual orientation. Once again, this amounts to denying a specific benefit to same-sex couples blaming them for not having established a legal relationship that had been impossible for them to establish.

This decision of the ECtHR seems to be based on broadly the same premises as the EU directive 2019/1158 on work–life balance for parents

[132] *Hallier and Others v France*, Application no 46386/10.
[133] Ibid, para 31 (free translation).
[134] Ibid, para 32 (free translation).

and carers.[135] Indeed, whereas the directive officially 'acknowledges the existence of non-traditional family types',[136] it does not include any provision referring directly to same-sex parents or prohibiting discrimination based on sexual orientation. There might thus be a 'heteronormative bias' here, in the way in which families are perceived and described.[137] As a consequence, directive 2019/1158 may be considered as not paying sufficient attention to the need of families that do not reflect traditional gender norms, such as rainbow families.[138] It shall be seen whether the CJEU might be able to increase inclusiveness in EU parental leave law through interpretation, notably in the light of the Charter provisions.

9.3.5 *Family Reunification: The Landmark* V.M.A. v Stolichna Obshtina *Case*

One important step in favour of rainbow families was taken by the CJEU in the *V.M.A. v Stolichna obshtina* case.[139] The applicant in the main proceedings was a Bulgarian woman married to a British woman. They had resided together in Spain since 2015 and had a daughter in 2019. The Spanish birth

[135] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU PE/20/2019/REV/1 [2019] OJ L188/79.

[136] European Commission, Directorate-General for Employment, Social Affairs and Inclusion, N. Picken and B. Janta, *Leave Policies and Practice for Non-traditional Families* (Publications Office 2020) <http://data.europa.eu/doi/10.2767/276102>.

[137] E. Chieregato, 'A work-life balance for all? Assessing the inclusiveness of EU Directive 2019/1158' (2020) 36 International Journal of Comparative Labour Law and Industrial Relations 59.

[138] Ibid. See also Chapter 2 by Alina Tryfonidou.

[139] *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* (n 107). See C. De Capitani, 'Rainbow families and the right to freedom of movement – the V.M.A. v Stolichna Obshtina, Rayon 'Pancharevo' Case' (*EU Law Analysis*, 11 January 2022) <http://eulawanalysis.blogspot.com/2022/01/rainbow-families-and-right-to-freedom.html>; H. Hardy, 'Court of Justice of the European Union's landmark decision on the cross-border recognition of the relationship of same-sex parents and their children' (*Global Human Rights Defence*) <https://ghrd.org/article-detail.php?id=82>; J. Meeusen, 'Functional recognition of same-sex parenthood for the benefit of mobile Union citizens – Brief comments on the CJEU's Pancharevo judgment – GEDIP' (*GEDIP-EGPIL*, 2022) <https://eapil.org/2022/02/03/functional-recognition-of-same-sex-parenthood-for-the-benefit-of-mobile-union-citizens-brief-comments-on-the-cjeus-pancharevo-judgment/>; D. Thienpont and G. Willems, 'Le droit à la libre circulation des familles homoparentales consacré par la Cour de justice de l'Union européenne' (2022) 132 Revue trimestrielle des droits de l'homme 925; A. Tryfonidou, 'The cross-border recognition of the parent–child relationship in rainbow families under EU law: A critical view of the ECJ's V.M.A. ruling' (*European Law Blog*, 21 December 2021) <https://europeanlawblog.eu/2021/12/21/the-cross-border-recognition-of-the-parent-child-relationship-in-rainbow-families-under-eu-law-a-critical-view-of-the-ecjs-v-m-a-ruling/>. See also Chapter 7 by Michael Bogdan.

certificate mentioned the applicant's wife as 'mother' and the applicant as 'mother A'. In 2020, the couple asked the Bulgarian administration to issue a Bulgarian birth certificate to the child but their request was rejected based on the fact that Bulgarian birth certificates only have one box for 'mother' and one for 'father'. Only one name may be entered in each box.

The Court noted that despite not recognising the applicant's parenthood, national courts had found that the child was to be considered a Bulgarian national. While this position could seem inconsistent, it implied that as an EU citizen, the child was entitled to identity documents recognising her parents as established in another member state which allowed her to be accompanied by them when exercising her freedom of movement.[140] As the national position allowing nationality while refusing parenthood felt somewhat unconvincing (the latter normally flowing from the former), the CJEU also considered the alternate hypothesis where the child would not be granted Bulgarian nationality based on its *Coman* reasoning. Just as the term 'spouse' in Directive 2004/38 must be interpreted as to include same-sex spouses legally married in a Member State, the term 'descendant' in the same Directive must be read as applying to children whose relationship with their same-sex parents has been validly established somewhere in the EU.[141] The CJEU specifically added, exactly as in *Coman*, that 'the obligation … to recognise the parent-child relationship between [a child] and [their same-sex parents] in the context of the child's exercise of her rights under Article 21 TFEU and secondary legislation relating thereto, does not undermine the national identity or pose a threat to the public policy of that Member State'.[142]

While such consecration of the right to free movement of rainbow families is undeniably a very significant achievement, the scope of *V.M.A. v Stolichna obshtina* is limited.[143] On the one hand, it only covers birth certificates issued by a Member State and does not apply to same-sex legal parenthood established in a third country.[144] On the other hand, the obligation of recognition

[140] *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* (n 107), paras 40–50.
[141] Ibid, paras 67–68.
[142] Ibid, para 56.
[143] Tryfonidou (n 139).
[144] In this respect, see *S.-H. v Poland*, Application nos 56846/15 and 56849/15; S. Ganty, 'Surrogacy as citizenship deprivation in S.-H. v. Poland' (*Strasbourg Observers*, 14 March 2022) <strasbourgobservers.com/2022/03/14/surrogacy-deprives-from-citizenship-in-s-h-v-poland%EF%BF%BC/#:~:text = –%20H.,of%20the%20Polish%20legal%20system>. In this decision relating to two men who became parents through surrogacy in California and live in Israel with the children, the Court accepts the government's position that directive 2004/38 confers them a right to family reunification based on one of the co-fathers' Polish

is limited to the exercise of the right to free movement and does not involve the other legal effects of legal parenthood.

9.3.6 *Recognition of Parenthood Established Abroad: Towards an EU Regulation?*

V.M.A. *v Stolichna obshtina* has set up a very important milestone but family reunification as such is not sufficient to guarantee the real freedom of movement of mobile rainbow families. Unless the ties of legal parenthood are fully or entirely recognised, the latter will still be confronted with awkward and complicated situations where, while being allowed to settle together, rainbow families will not be considered as legal families for most aspects of parent–child relationships such as parental responsibility, social benefits, tax law, inheritance, and so on. Also, it is not certain whether and how states that are obliged to welcome same-sex parents' families in their legal order may progressively be inclined or constrained – through the operation of a 'contagion or percolation' dynamic – to grant them the full range of rights and duties normally arising from legal parenthood.

Notably, in her 2020 State of the Union address,[145] the president of the Commission Ursula von der Leyen expressly declared that 'to make sure that we support the whole community, the Commission will soon put forward a strategy to strengthen LGBTQI rights' and that, as a part of this, she would 'push for mutual recognition of family relations in the EU' because 'if you are parent in one country, you are parent in every country'. In its subsequent 'Union of Equality: LGBTIQ Equality Strategy 2020–2025' (LGBTIQ Equality Strategy), the Commission effectively committed to '[proposing] a horizontal legislative initiative on the mutual recognition of parenthood between Member States'.[146] After an impact assessment,[147] a formal proposal

citizenship despite the lack of recognition of parenthood itself and despite the fact that parenthood was established in a third country.

[145] European Commission, 'State of the Union Address by President von der Leyen at the European Parliament Plenary' Press release (16 September 2020) <https://ec.europa.eu/commission/presscorner/detail/ov/SPEECH_20_1655>.

[146] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Union of Equality: LGBTIQ Equality Strategy 2020–2025, COM(2020) 698 final.

[147] European Commission, 'Cross-border family situations – Recognition of parenthood: Inception impact assessment' Ares(2021)2519673 <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12878-Cross-border-family-situations-recognition-of-parenthood_en>.

for a Council regulation on the cross-border recognition of parenthood was published in December 2022.[148]

As regards the issue of the recognition of family ties established abroad, some important developments recently occurred in the case law of the ECtHR related to the specific context of international surrogacy. In *D.B. and others v Switzerland*,[149] the Court decided that two men who became parents through surrogacy in California, one of them providing his sperm for the conception, should be able to have their legal parenthood established in the United States recognised in Switzerland. The Court thus expanded its *Mennesson* approach to same-sex parents, explicitly considering that the fact that the applicants are a same-sex couple does not justify departing from the principles identified in the French case. Another, currently pending ECtHR case *A.D.-K. v Poland*[150] also relates to the recognition of same-sex parenthood. The applicants are two women who became parents together in the UK and were registered there as the child's 'mother' and 'parent' on the British birth certificate. They complain that the Polish authorities refused to recognise their daughter's legal parenthood as established in the UK, insisting that the decision had an impact not only on the child's citizenship (as one of her co-mothers is Polish) but also on her inheritance rights and, more generally, on 'their right to be considered parents'. The facts are thus very similar to those at issue in *V.M.A.* and, in the light of the decision in *D.B. and others*, it seems likely that the court will require that parentage be recognised, except if the difference between the Swiss and the Polish contexts is considered sufficient to justify a different approach. If this is confirmed, the ECtHR will deserve to be credited for a really significant contribution to strengthening the position of international rainbow families.

9.4 CONCLUSION

The above developments show a fairly strong convergence of the two European legal orders as regards the rights of same-sex couples and rainbow families.

In the first place, the European (supranational) Courts currently refrain from forcing states to abandon their traditional conception of the fundamental institutions of family law – marriage and parentage. There is a clear link

[148] European Commission, Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM(2022) 695 final.

[149] *D.B. and Others v Switzerland*, Application nos 58817/15 and 58252/15.

[150] *A.D.-K. and Others v Poland*, Application no 30806/15.

between the 'deep-rooted social and cultural connotations' of *Schalk and Kopf*, and the idea expressed by the Advocate General in *V.M.A.* that the rules on parentage represent 'the essence of the conception which the State is seeking to protect as its national identity'. The common underlying idea is that marriage and parentage are so deeply connected to the States' social and cultural identity that it is not (yet) possible to impose a distinct, uniform, and inclusive European approach that would guarantee the right to marry and to become a parent irrespective of sexual orientation.

It can be considered that, as a compensation for not affirming the right to same-sex marriage or same-sex parenthood, the ECtHR tends to require that family relationships be recognised and protected in alternative ways. The *Fedotova* Grand Chamber decision puts it very clearly as regards couple relationships by requiring States to provide at least the option of registered partnership. Things are less clear as regards parent–child relationships, but *Callamand* may be cautiously considered as a step towards a similar requirement to offer minimal recognition and protection to parenting relationships in rainbow families through parental responsibility and contact rights. For its part, the CJEU contributes to the advancement of equality by requiring a non-discriminatory allocation of family-related social benefits. By affirming that registered same-sex partners should enjoy the same social benefits as heterosexual spouses, the *Hay* decision provides a significant addition to the right to a partnership affirmed by the ECtHR. Hopefully, the Court will adopt a similar approach when applying directive 2019/1158 on work–life balance and make sure that same-sex parents are not discriminated against in the allocation of parenting-related benefits.

Arguably, the most significant developments in recent years have occurred in relation to mobile families. In this respect, the *Coman* and *V.M.A.* decisions clearly affirm an obligation of European States to guarantee the right to family reunification in a way that affirms the right to be together as the core of the right to family life. Yet the recent decisions of the ECtHR go even further as, on the one hand, *Orlandi* requires States to recognise same-sex marriages celebrated abroad as at least a registered partnership and, on the other hand, *D.B. v Switzerland* requires the recognition of same-sex parenthood established abroad at least when one of the co-parents is biologically linked to the child.

Thus, while being careful not to directly confront the most conservative states by forcing the recognition of same-sex couples and rainbow families through marriage and parentage, the ECtHR and the CJEU use, in a complementary way, different strategies to strengthen their legal position. Taken together, developments regarding registered partnerships, parental responsibility

and contacts, social benefits, family reunification, and cross-border recognition lead to the conclusion that the current European recognition and protection of same-sex families is admittedly incomplete or imperfect, but quite significant, especially considering the still fragmented European context. At some point in the future, new families' increased visibility and legitimacy should lead to the ultimate step of imposing a European and inclusive understanding of marriage and parenthood.