

# *The parenting rights of same-sex couples under European law*

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## The Parenting Rights of Same-Sex Couples under European Law

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### 1. Introduction

Few issues incite as much controversy in contemporary law and politics as the recognition and protection of the rights of sexual minorities. The legal recognition of same-sex relationships, in particular, has, in the last couple of decades, become one of the most prominent issues discussed in parliaments, in courts, and in the media around the world, with views on both sides of the debate being overwhelmingly strong and fraught with tension.<sup>1</sup> This is a complicated and sensitive matter which touches on issues relating to human rights, religion, morality, and tradition, as well as on constitutional principles such as equality, autonomy, and human dignity. Most religions and churches reject this move and are often vehemently opposed to it, considering homosexuality a “sin”, this leading, in turn, to negative societal attitudes towards lesbian, gay, and bisexual (LGB) persons, especially in countries that are deeply religious.<sup>2</sup>

A much more controversial issue, nonetheless, is parenting by same-sex couples.<sup>3</sup> It is, of course, well-known that despite impressive advances in medicine and technology, same-sex couples are still incapable of having children who will be

- 1 For literature on the legal recognition of same-sex relationships see, among others, K. BOELE-WOELKI/A. FUCHS (eds.): *Legal Recognition of Same-Sex Relationships in Europe: National, Cross-Border and European Perspectives*, Cambridge: Intersentia, 2012; R. WINTEMUTE/M. ANDENAS (eds.): *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law*, Oxford: Hart, 2001; D. GALLO/L. PALADINI/P. PUSTORINO (eds.): *Same-Sex Couples before National, Supranational and International Jurisdictions*, Heidelberg: Springer, 2014; A. TRYFONIDOU: “EU Free Movement Law and the Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition”, in: *Columbia Journal of European Law* 21 (2015), 195-248; D. KOCHENOV: “On Options of Citizens and Moral Choices of States: Gays and European Federalism”, in: *Fordham International Law Journal* 33 (2009), 156-205; S. TITSHAW: “Same-Sex Spouses Lost in Translation? How to Interpret ‘Spouse’ in the EU Family Migration Directives”, in: *Boston University International Law Journal* 34 (2016), 45-112.
- 2 D.-J. JANSSEN/P. SCHEEPERS: “How Religiosity Shapes Rejection of Homosexuality Across the Globe”, in: *Journal of Homosexuality* 66/14 (2018), 1-28.
- 3 See P. DUNNE: “Who is a Parent and Who is a Child in a Same-Sex Family? – Legislative and Judicial Issues for LGBT Families Post-Separation, Part I: The European Perspective”, in: *Journal of the American Academy of Matrimonial Lawyers* 30 (2017), 27-54, at 31.

genetically related to both members of the couple.<sup>4</sup> Such couples can, however, become *de facto* joint parents in a number of ways, such as through donor insemination (known or anonymous), assisted reproductive technologies, surrogacy, by becoming the joint parents of children from a prior relationship of one of the members of the couple (step-child adoption), or through adoption.<sup>5</sup> This means that in some situations, one of the members of the couple will be biologically connected to the child (e.g. when one of the female partners in a same-sex couple undergoes medically assisted procreation using her own egg or the egg of her partner), whilst in other situations (e.g. adoption or surrogacy used by a male same-sex couple with sperm donated from a third party) the child will be genetically linked to neither member of the couple. Rainbow families (i.e. families comprised of a same-sex couple and their child[ren]), therefore, challenge some of the main assumptions that underpin the nuclear family ideal, namely, that a family is comprised of an opposite-sex couple and that its children are biological descendants of their primary caregivers.<sup>6</sup>

In terms of same-sex parenthood, the important *legal* question is whether, under a specific legal system, same-sex couples can be legally recognised as the *joint* parents of a child (either automatically or after taking specific steps [e.g. adoption]). The aim of this article will be, exactly, to explore this question from the point of view of European law. “European law” is an umbrella term that covers the law produced by two separate – albeit closely interrelated – European organisations, namely, the European Union (EU), on the one hand, and the Council of Europe (with its flagship human rights instrument – the European

- 4 It is true that in the last few years, so-called “three-parent babies” have been created with the use of a technique that mixes DNA from three persons. Nonetheless, so far, such techniques have only been used in situations where a woman has faulty mitochondria and, thus, needs those mitochondria to be exchanged with those of a healthy, unrelated, female egg donor in order to ensure that genetic diseases will not be passed from the mother to the child – see S. REARDON: “Genetic Details of Controversial ‘Three-Parent Baby’ Revealed”, in: *Nature* (2017), available at [www.nature.com/news/genetic-details-of-controversial-three-parent-baby-revealed-1.21761](http://www.nature.com/news/genetic-details-of-controversial-three-parent-baby-revealed-1.21761) (accessed 28.08.2019); “UK Doctors Select First Women to Have ‘Three-Person Babies’”, in: *The Guardian* (1 February 2018), available at [www.theguardian.com/science/2018/feb/01/permission-given-to-create-britains-first-three-person-babies](http://www.theguardian.com/science/2018/feb/01/permission-given-to-create-britains-first-three-person-babies) (accessed 28.08.2019). For an argument that this technique should be extended to allow same-sex couples comprised of two women to have a child that is genetically related to both parents see G. CAVALIERE/C. PALACIOS-GONZÁLEZ: “Lesbian Motherhood and Mitochondrial Replacement Techniques: Reproductive Freedom of Genetic Kinship”, in: *Journal of Medical Ethics* 44 (2018), 835-842. In addition, recent experiments with mice have shown that synthetic sperm and eggs can be created using stem cell technology, which can, potentially, enable same-sex couples to have children who are biologically related to both members of the couple – see, for instance, “Artificial Sperm and Wombs Offer New Means of Reproduction”, in: *Financial Times* (8 December 2017), available at [www.ft.com/content/of9b51d6-c565-11e7-b30e-a7c1c7c13aab](http://www.ft.com/content/of9b51d6-c565-11e7-b30e-a7c1c7c13aab) (accessed 29.08.2019).
- 5 For a clear explanation of these options see T. AMOS/J. RAINER: “Parenthood for Same-Sex Couples in the European Union: Key Challenges”, in: K. BOELE-WOELKI/A. FUCHS (eds.): *Legal Recognition of Same-Sex Relationships in Europe*, 79-122.
- 6 See J.-H. DÉCHAUX: “The Challenges of the New Reproductive Technologies: How Kinship Enters Politics”, in: B. FEUILLET-LIGER/T. CALLUS/K. ORFALI (eds.): *Reproductive Technology and Changing Perceptions of Parenthood around the World*, Brussels: Bruylant, 2014, 311-332.

Convention on Human Rights [ECHR]), on the other. As will be explained subsequently in this article, the lack of guidance at European level means that the parental rights that same-sex couples enjoy *at the national level* vary considerably throughout Europe. The most recent edition of ILGA Europe’s Rainbow map<sup>7</sup> demonstrates that only a minority of European states provide full parental rights to same-sex couples, reflecting “the idea that in order to thrive a child needs two parents of different sex who are in a committed relationship”.<sup>8</sup> However, are European states allowed – under the ECHR and EU law – to continue to refuse parental rights to same-sex couples? This is the question that this article will aim to answer. For this purpose, a simple structure will be followed, exploring this question, firstly, from the point of view of the ECHR and, secondly, under EU law.

## 2. Parenting Rights for Same-Sex Couples under the ECHR

The Council of Europe is a supranational organisation that was established in 1949, from the ashes of the destruction caused by the Second World War. It is considered the continent’s leading human rights organisation, which, at the moment, includes 47 European countries as its member states. All Council of Europe states have signed and ratified the ECHR, which is a treaty designed to protect human rights, democracy, and the rule of law, whilst the European Court of Human Rights (ECtHR) which is based in Strasbourg, oversees its implementation.<sup>9</sup>

The Council of Europe has a diverse membership and includes states at both ends of the spectrum of LGB egalitarianism. Eastern European countries offer very limited, if any, protection to LGB persons and their families, whilst (the majority) of the Western European countries are pioneers in this field. Eastern European countries, in fact, often view issues concerning sexual minorities as an imposition of “Western values”, which may clash with their norms and values which, allegedly, are more attached to tradition, religion, and the (nuclear) family as the foundation of society.<sup>10</sup> In such Eastern European countries where social

7 See ILGA Europe Rainbow Europe Package: Annual Review and Rainbow Europe Map, available at [www.ilga-europe.org/rainboweurope/2019](http://www.ilga-europe.org/rainboweurope/2019) (accessed on 28.08.2019).

8 N. NIKOLINA: “Evolution of Parenting Rights in Europe – a Comparative Case Study about Questions in Section 3 of the LawsAndFamilies Database”, in: K. WAALDIJK: *More and More Together: Legal Family Formats for Same-Sex and Different-Sex Couples in European Countries: Comparative Analysis of Data in the LawsAndFamilies Database*, Working Paper 75 (2017), available at [openaccess.leidenuniv.nl/bitstream/handle/1887/54628/Waaldijk%20-%20More%20and%20more%20together%20-%20FamiliesAndSocietiesWorkingPaper%2075%282017%29.pdf?sequence=3](http://openaccess.leidenuniv.nl/bitstream/handle/1887/54628/Waaldijk%20-%20More%20and%20more%20together%20-%20FamiliesAndSocietiesWorkingPaper%2075%282017%29.pdf?sequence=3) (accessed 28.08.2019), 102.

9 For an analysis of the ECHR see B. RAINEY/E. WICKS/C. OVEY: *Jacobs, White and Ovey: The European Convention on Human Rights*, Oxford: Oxford University Press, 2017.

10 P. AYOUB/D. PATERNOTTE: “Europe and LGBT Rights: A Conflicted Relationship”, in: M. BOSIA/S.M. MCEVOY/M. RAHMAN (eds.): *The Oxford Handbook of Global LGBT and Sexual Diversity Politics*, Oxford: Oxford University Press, 2019.

change has not yet been achieved and there is, still, widespread homophobia, political leaders have, often, gained political capital by publicly displaying homophobia and marginalising sexual minorities with calls to “the defence of the nation”.<sup>11</sup> In addition, these countries often have high levels of religiosity, and thus the actions and rhetoric of religious institutions act as powerful counter-mobilisers against LGB rights.<sup>12</sup>

This lack of homogeneity in the Council of Europe’s membership affects the organisation’s stance on the protection of the rights of sexual minorities: although the ECHR has, since the 1980s, been interpreted by the ECtHR in a way which recognises that LGB persons – as human beings – enjoy all the rights laid down under this instrument, the protection afforded to them mainly constitutes a compromise position, which ensures that it will not cause the fervent objection of the member states. In particular, although the Strasbourg Court has made it clear, for instance, that all Council of Europe member states must decriminalise same-sex sexual activities between consenting adults,<sup>13</sup> and must provide an equal age of consent for same-sex and opposite-sex couples,<sup>14</sup> it has been more reluctant to impose obligations in the family law field, whereby it leaves a wide margin of appreciation to its signatory states. As noted by the ECtHR in its judgment in *Alekseyev v. Russia*, “there remain issues where no European consensus has been reached, such as granting permission to same-sex couples to adopt a child...and the right to marry, and the Court has confirmed the domestic authorities’ wide margin of appreciation in respect of those issues”.<sup>15</sup>

Within the ECHR, the family is a protected institution. Article 8 ECHR provides that “everyone has the right to respect for his private and family life, his home and his correspondence”, whilst article 12 ECHR provides that “men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right”.

But what constitutes a “family” for the purposes of the ECHR? The nuclear family, consisting of different-sex married spouses and their biologically-linked children, was never the only form of family that existed, though, it is still “the gold standard against which all other family types are assessed”.<sup>16</sup> Nonetheless, “the family” is a flexible and adaptable unit, and recent years have seen an

11 R.C.M. MOLE: “Nationalism and Homophobia in Central and Eastern Europe”, in: K. SLOOTMAECKERS/H. TOUQUET/P. VERMEERSCH (eds.): *The EU Enlargement and Gay Politics: The Impact of Eastern Enlargement on Rights, Activism and Prejudice*, London: Palgrave Macmillan, 2016.

12 A. ADAMCZYK/C. PITT: “Shaping Attitudes about Homosexuality: The Role of Religion and Cultural Context”, in: *Social Science Research* 38/2 (2009), 338-351.

13 App 7525/76, *Dudgeon v. UK*, Judgment of the European Court of Human Rights, 22 October 1981, [1982] 4 EHRR 149; App 10581/83, *Norris v. Ireland*, Judgment of the European Court of Human Rights, 26 October 1988, [1989] 13 EHRR 186; App 15070/89 *Modinos v. Cyprus*, Judgment of the European Court of Human Rights, 22 April 1993, [1993] 16 EHRR 485.

14 App 25186/94, *Sutherland v. UK*, Report of the European Court of Human Rights, 1 July 1997.

15 *Alekseyev v. Russia*, Application nos 4916/07, 25924/08 and 14599/09, 21 October 2010, para. 83.

16 S. GOLOMBOK: *Modern Families: Parents and Children in New Family Forms*, Cambridge: Cambridge University Press, 2015, 4. See, also, A. SINGER: “The Right of the Child to Parents”,

increase in alternative families, many families now consisting of (unmarried) cohabitants and their children, children and their parents and step-parents, children and their single parent, and children and their same-sex parents.<sup>17</sup> The law, therefore, not only needs to recognise such alternative families<sup>18</sup> but also to provide a system that is sensitive and responsive to their own specific needs.<sup>19</sup>

Taking this into account, the ECtHR held, for the first time in 2012, in *Gas and Dubois v. France*, that a same-sex couple and their child(ren) can together enjoy “family life”, within the meaning of article 8 ECHR.<sup>20</sup> This means that the fact that (at least) one of the parents is not biologically linked to the child of the family does not disqualify the parents and the child from constituting a “family”. This follows the general approach of the ECtHR, according to which biological ties are not an overriding factor in establishing family life, and what is important in all cases is whether there is evidence of a real and constant relationship among the members of the family.<sup>21</sup> Accordingly, once a rainbow family qualifies as a “family” for the purposes of the ECHR, it can enjoy the protection offered to all families, subject, of course, to interferences which are in accordance with the law and necessary on a number of grounds.

However, what happens when a same-sex couple wishes to have a child together? Does the ECHR give the right to same-sex couples to “found” a family by requiring all signatory states to allow them *de facto* to have a child and by making provision for *both* members of the couple to be legally recognised as the parents of the child?

The ECtHR is of the view that it is up to the ECHR signatory states to determine whether they will allow single persons and different types of couples to “found a family” and to choose in what ways they can do so (e.g. through adoption or surrogacy). For instance, in *EB v. France*, the ECtHR noted that “the provisions of Article 8 do not guarantee either the right to found a family or the right to adopt... The right to respect for ‘family life’ does not safeguard the mere desire to found a family.”<sup>22</sup> Accordingly, it is not possible for anyone – including a same-sex couple – to rely on article 8 ECHR to require a signatory

in: K. BOELE-WOELKI/A. FUCHS (eds.): *Legal Recognition of Same-Sex Relationships in Europe*, 137-138.

17 S. GOLOMBOK: *Modern Families*, 3.

18 C. MCGLYNN: *Families and the European Union: Law, Politics and Pluralism*, Cambridge: Cambridge University Press, 2006, 39-41 and Chapters 4 and 5; L. GONZALEZ: “With Liberty and Justice for All (Families)’: The Modern American Same-Sex Family”, in: *St. Thomas Law Review* 23 (2011), 293-322.

19 A. BAINHAM: “Family Law in a Pluralistic Society”, in: *Journal of Law and Society* 22 (1995), 234-247.

20 *Gas and Dubois v. France*, no. 25952/07, 2012, para. 37. See, also, *X and Others v. Austria*, no. 19010/07, 2013), paras 95-96; *Boeckel and Gessner-Boeckel v. Germany*, no. 8017/11 (case declared inadmissible), para. 27.

21 *J.R.M. v. the Netherlands*, no. 16944/90, 1993; *Nylund v. Finland*, no. 27110/95, 1999; *K. and T. v. Finland*, no. 25702/94, 2001. See G. VAN BUEREN: *Child Rights in Europe*, Paris: Council of Europe Publishing, 2007, 119.

22 *EB v. France*, no. 43546/02, 2008, para. 41.

state to provide parental rights to persons or couples which it has chosen to exclude from this right.

However, when signatory states decide which persons or couples are entitled to the right to found a family, they must do so without discrimination on any of the grounds prohibited under article 14 ECHR, including on the ground of sexual orientation. Thus, if a signatory state decides to allow single persons to found a family, it must do so in a way which is not discriminatory on any of the article 14 grounds: in *EB v. France*,<sup>23</sup> the ECtHR held that a restriction on the right to adopt by a *single woman based on the fact that she was a lesbian*, amounted to unjustified discriminatory treatment based on sexual orientation which, as such, was contrary to article 14 ECHR read together with article 8 ECHR.<sup>24</sup>

As regards parenting rights by same-sex *couples*, if a signatory state which has not opened marriage to same-sex couples reserves the right to become the joint parents of a child to married couples this – according to the ECtHR – is not contrary to the ECHR, despite the fact that it, in effect, means that same-sex couples are excluded from the right to jointly parent their child as they will not both be *legally* recognised as the parents of the child. *Gas and Dubois v. France*<sup>25</sup> involved two women who had entered into a French PACS and had a child through assisted reproduction. Since France did not – and, still, does not – allow women who are in a same-sex relationship to have a child through assisted reproduction, the child was recognised under French law as only the child of the birth mother. When the other mother sought to be legally recognised as the second parent of the child through a second-parent adoption, this was refused by the French authorities, on the ground that the two women were not married (at the time, same-sex couples in France could only enter into a PACS, as marriage was only open to opposite-sex couples). The ECtHR held that the contested refusal was not discriminatory on the ground of sexual orientation, as the applicants' situation was not comparable to that of married (opposite-sex) couples – who could proceed with a second-parent adoption – whilst it was comparable to that of unmarried opposite-sex couples who were, also, under French law, refused the right to second-parent adoption. In the subsequent case of *X and Others v. Austria*,<sup>26</sup> this approach was confirmed when the court held that a signatory state was not allowed to refuse a second-parent adoption to an unmarried same-sex couple – on the basis that it was unmarried – if its legislation allowed second-parent adoptions by married heterosexual couples *but also by unmarried opposite-sex couples*. This was because this amounted to discrimination on the ground of sexual orientation as regards the enjoyment of the right to private and family life,

<sup>23</sup> Ibid.

<sup>24</sup> See, however, the different result in the earlier judgment in *Fretté v. France*, Application no. 36515/97, ECHR 2002-I, which seems to have been overturned by *EB v. France* (n. 22).

<sup>25</sup> *Gas and Dubois v. France*, no. 25952/07, 2012, para. 37.

<sup>26</sup> Ibid.

because unmarried opposite-sex couples were similarly situated with unmarried same-sex couples; hence, it was contrary to articles 14 and 8 ECHR.<sup>27</sup>

As can be noted from the above rulings, in all instances, it is the familial tie between the child and the non-biological parent that needs to be positively legally established. This is because, since the 1970s, the ECtHR has required signatory states to make provision for the automatic legal recognition of the familial tie between a child and his/her biological parent. In *Marckx v. Belgium*,<sup>28</sup> it was held that article 8 “implies the existence in domestic law of legal safeguards that render possible as from the moment of birth the child’s integration in his [*biological*] family”.<sup>29</sup> Similarly, in *Johnston v. Ireland*,<sup>30</sup> the ECtHR found Ireland to be in breach of the right to family life of a child and her (*biological*) parents, as a result of the fact that the child’s *natural* family ties to her (*biological*) father could not be legally recognised because her parents could not marry on account of the indissolubility – due to the Irish constitutional prohibition on divorce at the time – of the father’s marriage to another woman from whom he had separated.

So far, this section has examined the situation of rainbow families where the parent-child relationship needs to be legally established *ab initio*. What happens, however, when the parent-child relationship between the child and both of his/her same-sex parents has been legally established in one country and the family then seeks to have the familial links among its members *to continue to be* legally recognised in another country. Is the refusal of the latter country to recognise the relationship between the child and one or both of the parents – *as this has been established in the first country* – a breach of the ECHR?

Following *Gas and Dubois v. France*,<sup>31</sup> in situations where the child in a rainbow family has established de facto “family ties” with both of his/her parents, it is undisputed that family life exists between the members of the family; and, *a fortiori*, this is the case when those family ties have, already, been legally recognised somewhere. Accordingly, the question is whether the dissolution of the legal links between a child and both or one parent in another country amount to a breach of article 8 ECHR. This question has already been considered by the ECtHR, albeit in cases which did not involve rainbow families.

In *Wagner v. Luxembourg*,<sup>32</sup> at issue was the refusal of the Luxembourg authorities to recognise the Peruvian court decision pronouncing the full adoption by Ms Wagner – a Luxembourg national – of her child, JMWL, of Peruvian nationality. The refusal was the result of the absence in the Luxembourg legislation of provisions allowing an unmarried person to obtain full adoption of a child.

27 For a discussion of these cases see D.A. GONZALEZ-SALZBERG: *Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law*, Oxford: Hart, 2019, 150-154.

28 *Marckx v. Belgium* App no 6833/74 (ECtHR, 13 June 1979).

29 *Ibid.*, para. 31.

30 *Johnston v. Ireland*, no 9697/82, 1986.

31 *Gas and Dubois v. France*, no. 25952/07, 2012, para. 37.

32 *Wagner v. Luxembourg* App no 76240/01 (ECtHR, 28 June 2007).



The ECtHR held that this refusal amounted to an unjustified interference with the right to respect for Ms Wagner's and her child's family life and, thus, amounted to an infringement of article 8 ECHR. The court, in particular, noted that "bearing in mind that the best interests of the child are paramount in such a case...the Court considers that the Luxembourg court could not reasonably disregard the legal status validly created abroad and corresponding to a family life within the meaning of art 8 of the Convention".<sup>33</sup>

The case, therefore, demonstrates that article 8 ECHR requires the contracting states to pursue the cross-border continuity of family ties and, thus, "limping" situations – i.e. situations where a personal status is recognized under the law of State X but not under the law of State Y – should be avoided to the largest possible extent.<sup>34</sup> And as is obvious from the facts of the case, this applies irrespective of whether the child and the parent(s) are genetically linked.

More recently, the ECtHR was called to rule in a case which involved the cross-border recognition of a parent-child relationship lawfully established abroad, albeit in the more controversial context of a surrogacy arrangement (*Mennesson v. France*).<sup>35</sup> The ECtHR, following the principles established in *Wagner v. Luxembourg*, found that the contested refusal of France to recognise a surrogacy agreement entered into in the US, and the resultant refusal to legally recognise the parent-child relationship as legally recognised in that country, amounted to a breach of article 8 ECHR. However, unlike in *Wagner*, in this case, the ECtHR found that there was a breach of article 8 ECHR as regards the children's right to private life only. In particular, the court found that, on the facts of the case, the lack of recognition of the parent-child relationship did not disproportionately affect the applicants' ability to enjoy their family life in a practical sense, and, thus, did not amount to a breach of their right to family life. There was, nonetheless, a breach of the right to private life of the children, since "respect for private life requires that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship";<sup>36</sup> the "legal uncertainty" caused as a result of the non-recognition in the host state is liable to have negative repercussions on the children's definition of their personal identity. More recently, the ECtHR made it clear<sup>37</sup> that in such cases the right to respect for private life requires that domestic law provides a possibility of recognition of a legal parent-child relationship established abroad, not only between the children and the intended parent

33 Ibid., para 133. See, also, *Negrepontis-Giannisis v. Greece* App no 56759/09 (ECtHR, 3 May 2011).

34 P. FRANZINA: "Some Remarks on the Relevance of Article 8 of the ECHR to the Recognition of Family Status Judicially Created Abroad", in: *Diritti umani e diritto internazionale* 5/3 (2011), 609-616, at 611.

35 App no 65192/11 (ECtHR, 26 June 2014). See, also, *Labassee v. France* App no 65941/11 (ECtHR, 26 June 2014) and *Laborie v. France* App no 44024/13 (ECtHR, 19 January 2017).

36 *Mennesson v. France* (n. 35), para 96.

37 ECtHR Advisory Opinion Request No Pt16-2018-001 (10 April 2019).

who is biologically linked to them but, also, with the intended (non-biologically related) mother, designated in the birth certificate legally established abroad as the “legal mother”.

Accordingly, relying on the above authorities, rainbow families can claim that ECHR signatory states interfere with the enjoyment of the right to private and family life of both the parents and the child when they refuse to pursue the cross-border continuity of the family ties, both between the child and the biological parent (in case one of the parents is biologically related to the child) as well as between the child and the non-biological parent.<sup>38</sup>

The right to private and family life is, nonetheless, not an absolute right, and states are allowed to justify their measures which interfere with its exercise, provided that the interference is “in accordance with the law”, furthers a legitimate aim of those mentioned in article 8(2) ECHR,<sup>39</sup> and is necessary in a democratic society.

Given that it is fairly clear and foreseeable that states which do not recognise rainbow families will fail to recognise them also in situations which involve a cross-border element, the interference can be considered to be in accordance with the law. However, can the contested refusal be justified by the “legitimate aims” laid down in article 8 ECHR? States would most likely argue that their refusal to legally recognise the family ties among the members of rainbow families coming from other countries has two aims: the “protection of morals” – with the specific aim of supporting and encouraging the family in the traditional sense which “is, in principle, a weighty and legitimate reason”<sup>40</sup> – as well as “the protection of the rights of others”, in this case, “others” being read as referring to “children”.

38 In situations where the host member state refuses to recognise the parental ties between a child of a same-sex couple and both of his/her parents, as these have been legally established elsewhere, this is clearly done because the parents of the child are of the same sex. In other words, member states which do not allow a same-sex couple to legally establish a family in their territory, and which do not allow a rainbow family lawfully established elsewhere to be recognised as such, do so for the simple reason that the couple that is founding the family is comprised of two persons of the same sex. If the parents of the child were an opposite-sex couple, in the vast majority of cases they would both be legally recognised as the parents of the child, even if the child was adopted or was conceived via assisted procreation methods. This can clearly amount to discrimination on the grounds of sexual orientation as regards the enjoyment of the right to private and family life and can, thus, amount to a violation of article 14 ECHR read together with article 8 ECHR. Article 14 ECHR prohibits discrimination as regards the enjoyment of the rights and freedoms laid down in the ECHR which is based on a number of grounds. Although “sexual orientation” is not mentioned expressly among the grounds laid down in this provision, the ECtHR made it clear that the term “other status” includes sexual orientation. The same analysis as to why such a breach of the ECHR in this context cannot be justified as provided subsequently in the main text regarding a breach of the right to private and family life can be applied in this context as well.

39 These are national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, the protection of the rights of others.

40 *Karner v. Austria* App no 40016/98 (ECtHR, 24 July 2003), para 40.

The aim of supporting and encouraging the traditional family has been recognised as a valid objective by the ECtHR.<sup>41</sup> However, such a justification would most likely fail, because – to use the reasoning employed in *Marckx v. Belgium* – “in the achievement of this end recourse must not be had to measures whose object or result is...to prejudice the” rainbow family, given that the members of the rainbow family can – as established in *Gas and Dubois v. France* – constitute a “family” and, thus, can enjoy family life. Accordingly, the members of rainbow families who enjoy family life must “enjoy the guarantees of art 8 on an equal footing with the members of the traditional family”.<sup>42</sup>

Moreover, as another commentator has rightly argued,<sup>43</sup> the standard “traditional family” defence would suggest that, by reducing non-heterosexual family rights to the greatest extent possible, national laws disincentivize non-traditional family structures, prioritize heterosexual marriage relationships, and encourage individuals into a socially optimal family model. However, such an argument would be intellectually weak (not to mention wholly removed from social reality). Severing the legal connection between gay, lesbian, and bisexual parents and their non-biological children does not persuade such individuals to enter an opposite-gender heterosexual marriage.

In any event, even if the above aim could, at first glance, seem capable of justifying the interference towards the rights to private and family life in this context, it is unlikely to be found proportionate. The ECtHR has noted that “the fact that an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned” means that the margin of appreciation afforded to states needs to be reduced.<sup>44</sup> And, as the same court has stressed,<sup>45</sup> in cases where the margin of appreciation afforded to states is narrow, “the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people” from a certain entitlement. For the reasons explained above, it cannot be shown that it is necessary, in order to protect the family in the traditional sense, to deprive the children of rainbow families and their parents of the entitlement to have their relationship – as established elsewhere – legally recognised in the member state to which they move.

41 See, for instance, *Vallianatos v. Greece* App nos 29381/09 and 32684/09 (ECtHR, 7 November 2013), para 83.

42 *Marckx v. Belgium* App no 6833/74 (ECtHR, 13 June 1979), para 40.

43 P. DUNNE: “Who is a Parent and Who is a Child in a Same-Sex Family?”, 48-49. See, also, J.M. SCHERPE: “The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights”, in: *The Equal Rights Review* 10 (2013), 83-96, 92; and N. POLIKOFF: “This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non-Traditional Families”, in: *Georgetown Law Journal* 78 (1990), 459-575, 486.

44 See, for instance, *Mennesson v. France* (n. 35) paras 77 and 80; *Orlandi and Others v. Italy* App Nos 26431/12, 26742/12; 44057/12 and 60088/12 (ECtHR, 14 December 2017) para 203.

45 *Karner* (n. 40) para. 41.

For similar reasons, a justification based on the need to protect the rights of others, namely the rights of the children of rainbow families, would also be bound to fail. There has been considerable social, scientific, and psychological research which argues that the successful raising of a child is not dependent upon the sexual orientation of his or her parents.<sup>46</sup> Moreover, the ECtHR has pointed out in its case-law that “there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount” and has made a reference to the importance of the right of the child to maintain a personal relationship and direct contact with both his/her parents.<sup>47</sup> The same court has also noted that “family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations”.<sup>48</sup> Accordingly, the best interests of the child seem to require that the familial ties (s)he has legally established with his/her parents in one country should be maintained when the family finds itself in another country. Same-sex couples should, therefore, continue to be legally recognised as the joint parents of their children in a second state, not *despite* the children’s best interests, but exactly *because* this is required, if the children’s best interests are taken into account.<sup>49</sup>

The preceding analysis demonstrates that the ECtHR has been reluctant to impose an obligation on ECHR signatory states to allow same-sex couples to become and be legally recognised as the joint parents of children. Nonetheless, as has already been made clear in a number of ECtHR rulings involving rainbow families, although the ECHR does not impose an obligation on its signatory states to allow specific types of persons or couples to found a family, nonetheless, when choosing the categories of persons or couples who can have a child and be legally recognised as the parents of that child, they must do so in a way which does not discriminate on the grounds prohibited by article 14 ECHR, which include sexual orientation. Hence, although ECHR signatory states are not obliged to extend parenting rights to same-sex couples, they can refrain from doing so only if they do not extend such rights also to opposite-sex couples who are similarly situated (e.g. if unmarried couples cannot be recognised as the joint legal parents of a child, this must be the case for both opposite-sex and same-sex couples unmarried couples). On the other hand, ECtHR case-law on the cross-border legal recognition of the parent-child relationship can be relied on by rainbow families to require ECHR signatory states to legally recognise the familial ties among the members of such families as these have been legally established

46 See, most fundamentally, S. GOLOMBOK: *Modern Families*, esp. chapters 2 and 7; AMERICAN PSYCHOLOGICAL ASSOCIATION: “Sexual Orientation, Parents, & Children” (2004), available at [www.apa.org/about/policy/parenting.aspx](http://www.apa.org/about/policy/parenting.aspx) (accessed 28.08.2019); N. GARTRELL/H. BOS/A. KOH: “National Longitudinal Lesbian Family Study – Mental Health of Adult Offspring”, in: *The New England Journal of Medicine* 379 (2018), 297-299.

47 *Neulinger and Shuruk v. Switzerland* App no 41615/07 (6 July 2010), para 135.

48 *Ibid.*, para 136.

49 C. MCGLYNN: *Families and the European Union*, 108.

in another country. This can prove particularly helpful for rainbow families as, in many instances, for legal (more permissive legal system) or financial (less costly) reasons, same-sex couples choose or need to have a child in a country where they do not plan to live in the long term and subsequently move back to their country of origin where they need to (continue to) be recognised jointly as the legal parents of that child.

### 3. Parenting Rights for Same-Sex Couples Under EU Law

What is today the EU was originally founded in the 1950s, in the form of three economically-oriented Communities: the European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Energy Community (Euratom).<sup>50</sup> The first of these Communities (the ECSC) was founded in 1952, i.e. just three years after the foundation of the Council of Europe and – like the latter – was a(nother) response to the destruction brought by the Second World War. The long-term objective behind the foundation of the three Communities in the 1950s, was, thus, the desire for peace in Europe: the rationale was that the proposed cooperation in economic matters would make the participating states economically interdependent but would, also, bring them closer together, in this way averting another war in the continent. Accordingly, back in the 1950s, when the three Communities were established, their main aim was to build an internal market where goods and people could move freely between the participating countries. In 1993, the three Communities were subsumed into the newly-founded Union – the European Union – and the aims of the organisation expanded beyond the economic sphere.<sup>51</sup> This led – by the end of the 1990s – to a union which had added the protection of fundamental human rights to its core values,<sup>52</sup> whilst a single treaty provision included in the founding treaties which merely required that men and women should be paid equally for work of equal value,<sup>53</sup> had fully blossomed into a successful EU antidiscrimination policy, seeking to eradicate discrimination on a wider range of grounds, including discrimination on the grounds of sexual orientation. However, what has the position of LGB persons been under EU law?

In the EU, the first, tentative, steps towards the formation of an organised lesbian and gay liberation political movement were taken in the 1970s, following the Stonewall Riots in New York in 1969.<sup>54</sup> Nonetheless, it took this political movement almost three decades before its efforts had begun to come to fruition.

<sup>50</sup> For more on the history of the EU see L. VAN MIDDELAAR: *The Passage to Europe: How a Continent Became a Union*, New Haven, CT-London: Yale University Press, 2014.

<sup>51</sup> M. HOLLAND: *European Integration from Community to Union*, London: Pinter, 1993.

<sup>52</sup> Now found in article 2 TEU.

<sup>53</sup> This is the current article 157 TFEU.

<sup>54</sup> For an account of the Stonewall Riots see D. CARTER: *Stonewall: The Riots that Sparked the Gay Revolution*, New York: St Martin's Press, 2004. For an excellent account of the history of

At first, EU law came empty-handed for persons with non-heterosexual sexualities as, until 1999, there was no *binding* EU legal instrument which either explicitly or implicitly protected their rights.<sup>55</sup> Moreover, the EU's top court – the European Court of Justice (ECJ) – appeared reticent (to put it mildly) in the first two cases where claims were brought by LGB persons claiming that they suffered discrimination by their employer because of their sexual orientation: it held that EU law did not, at the time, prohibit discrimination based on sexual orientation, whilst same-sex relationships were not considered equivalent to opposite-sex marriages or relationships outside marriage and, thus, the entitlements granted to persons who were in an opposite-sex marriage or relationship did not have to be extended to persons who were in a same-sex relationship.<sup>56</sup>

Nonetheless, the gradual transformation of EU anti-discrimination law from initially a tool in the process of creating an internal market to a human rights instrument had, clearly, contributed to the protection of sexual minorities from discrimination under EU law.<sup>57</sup> The foundations for this were laid in 1999, with the coming into force of the Treaty of Amsterdam, which introduced a new legal basis – what is now article 19 TFEU – which gave competence to the EU to make legislation prohibiting discrimination based on sex, racial, or ethnic origin, religion or belief, disability, age, or sexual orientation.<sup>58</sup> This provision – which made the EC treaty the first international agreement to explicitly make reference to discrimination based on sexual orientation – is what formed the legal basis for Directive 2000/78, which is still in force today and prohibits discrimination on a number of grounds, including sexual orientation, albeit only in the employment field.<sup>59</sup> Since 2009, discrimination on the grounds of sexual orientation *outside the employment field* is also prohibited by EU law, under article 21 of the EU Charter of Fundamental Rights. The 2000 Directive and article 21 EUCFR have been interpreted by the ECJ in rulings which give mixed signals regarding the EU judiciary's commitment to the protection of the rights of LGB persons.<sup>60</sup>

the gay rights movement in the US see L. FADERMAN: *The Gay Revolution: The Story of the Struggle*, New York: Simon & Schuster, 2015.

- 55 A. TRYFONIDOU: "The Impact of the Framework Equality Directive on the Protection of LGB Persons and Same-Sex Couples from Discrimination under EU Law", in: U. BELAVUSAU/K. HENRARD (eds.): *EU Anti-Discrimination Law Beyond Gender*, Oxford: Hart, 2018, 231-232.
- 56 Case C-249/96 *Grant* EU:C:1998:63; Joined Cases C-122 and 125/99 *P D and Sweden v. Council* EU:C:2001:304.
- 57 A. TRYFONIDOU: "Discrimination on the Grounds of Sexual Orientation and Gender Identity", in: S. VOGENAUER/S. WEATHERILL (eds.): *General Principles of Law: European and Comparative Perspectives*, Oxford: Hart, 2017, 365-394.
- 58 For an analysis on the steps that led to the introduction of this provision see M. BELL/L. WADDINGTON: "The 1996 Intergovernmental Conference and the Prospects of a Non-Discrimination Treaty Article", in: *Industrial Law Journal* 25 (1996), 320-336.
- 59 Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 180/22.
- 60 See, for instance, Case C-81/12 *Asociația Accept* EU:C:2013:275; Case C-528/13 *Léger* ECLI:EU:C:2015:288; Case C-443/15, *Parris* EU:C:2016:897; Case C-673/16, *Coman* EU:C:2018:385.

The aim of this section of the article, nonetheless, is not to consider the extent to which EU law protects LGB rights; rather, the article has a more specific aim, namely, to consider what has been the EU's stance on parenting by same-sex couples.

It should be noted that, in the EU context, there has been no case to date before the ECJ (or a national court<sup>61</sup>) whereby a rainbow family sought to rely on EU law to challenge the choices of an EU member state with regards to this matter. Accordingly, the analysis that will follow will aim to demonstrate what should be held should such a challenge emerge in the future.

Like in the ECHR context, the starting point here should be that family law is considered to be an area that EU member states maintain their exclusive competence, and thus the EU does not have competence to act. Hence, although the EU includes among its member states some of the pioneering countries in terms of LGB egalitarianism, it cannot *require* all its 28 members to open marriage or any other legally recognised relationship status to same-sex couples, and it cannot require them to allow same-sex couples to found a family and to be legally recognised (*ab initio*) as the joint parents of a child.<sup>62</sup>

Nonetheless, it is a well-established principle of EU law that even though the EU cannot interfere in areas that fall within the exclusive competence of its member states – such as in the area of family law – when the member states act in those areas, they have to comply with their obligations under EU law.<sup>63</sup> Put simply, this means that when they make choices and they legislate in the family law field, member states must ensure that they do not violate EU law.

Hence, when EU member states decide whether they will legally recognise the parent-child relationship in situations involving rainbow families, they must ensure that their decision does not violate EU law. The determination of an EU member state as to whether or not it will allow same-sex couples to legally *establish* a family in their territory by being legally recognised as the joint parents of a child (*ab initio*), does not seem to have any connection with the aims or policies of the EU; accordingly, EU law does not require EU member states to allow same-sex couples in their territory to become the *de facto* joint parents of a child, nor does it require them to enable the parents of a child to be recognised legally (*ab initio*) as the parents of the child. This is why the parental rights that same-sex couples enjoy at the national level vary considerably throughout the EU (as is the case, more broadly, in Europe at large, as was seen in the previous section).

61 In most instances, EU law is enforced through private enforcement actions by individuals before national courts which is made possible by the doctrine of direct effect, established judicially in 1963 – for an explanation of direct effect see R. SCHÜTZTE: *European Union Law*, Cambridge: Cambridge University Press, 2018.

62 For cases where the ECJ has made it clear that EU law cannot require EU member states to provide legal recognition to same-sex relationships see, inter alia, Case C-267/06 *Maruko* ECLI:EU:C:2008:179, para 59; *Parris* (n. 60) para 59.

63 See, for instance, *Parris* (n. 60) para 58.

Nonetheless, a clear possibility of a clash between EU law and an EU member state's stance on the matter can emerge in situations where the latter refuses to legally recognise the parent-child relationship between a child and both of his/her (same-sex) parents, *as this has been established in another country*. The legal basis for challenging this refusal is twofold (the EU free movement provisions and EU fundamental human rights protection). The article will, therefore, now explore each of these two legal bases and the arguments that can be made by rainbow families in this context.

### 3.1 EU Free Movement Law

EU member state nationals derive from the free movement of persons provisions which are found in the Treaty on the Functioning of the European Union (TFEU), the right to move freely between EU member states and to reside in the member state of their choice.<sup>64</sup> They also derive a number of secondary rights, the grant of which has been considered necessary for enabling them to exercise the above, primary, right.<sup>65</sup> One such secondary right is the so-called right to family reunification which enables member state nationals who exercise free movement rights to be accompanied or joined by their close family members in the EU member state to which they move.<sup>66</sup> This right has been laid down in secondary EU legislation since the 1960s, and is currently found in Directive 2004/38.<sup>67</sup> In order for family reunification rights to be meaningful, they are supplemented by a number of additional rights which have as their aim to ensure that the family can become integrated into the society of the host member state, after it is admitted to its territory. Examples of such rights are the right of the family members to work in the host member state,<sup>68</sup> and the right of the “sponsor” member state national and the family members to enjoy equal treatment with the nationals of the host member state in situations which fall within the scope of EU law.<sup>69</sup> The rationale behind the grant of family reunification (and related) rights has, simply, been to ensure that Union citizens will not be deterred from exercising their EU free movement rights: if the host member state was allowed to refuse to accept

64 The free movement of persons provisions are, currently, art 45 TFEU (workers), art 49 TFEU (the self-employed), art 56 TFEU (service providers/recipients), and art 21 TFEU, which is the catch-all, *lex generalis*, provision which applies to all Union citizens. According to article 20 TFEU, every EU member state national is, automatically, a Union citizen.

65 For an explanation of the distinction between primary and secondary rights in EU free movement law see A. TRYFONIDOU: *The Impact of Union Citizenship on the EU's Market Freedoms*, Oxford: Hart, 2016, 21-22.

66 For an analysis of the family reunification rights that member state nationals derive from EU law see C. BERNERI: *Family Reunification in the EU: The Movement and Residence of Third Country National Family Members of EU Citizens*, Oxford: Hart, 2017.

67 Council and Parliament Directive 2004/38 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 L 158/77.

68 *Ibid.*, article 23.

69 Article 24 of Directive 2004/38 (n. 67).



their close family members, and to facilitate the integration of the family, in its territory then the member state national might decide not to move at all and in this way the exercise of EU free movement rights would be restricted.

If this rationale is transposed into the rainbow families context, where a child is a member state national and (s)he is not allowed to be accompanied or joined by both of her parents in the host state – because the legal links between the members of the family, as legally established elsewhere, are not recognised in the host state – the child’s right to move and reside in the territory of another EU member state will be breached.<sup>70</sup> Similarly, in situations where, for the same reason, a member state national cannot be accompanied or joined by his/her children in the host EU member state, (s)he will be deterred from exercising free movement rights.<sup>71</sup> Now, assuming that a rainbow family *is* actually admitted to the host member state, this is not the end of the story. If that state does not legally recognise the family ties between the members of the family for other legal purposes (e.g. tax law, property law, inheritance law, nationality law, pensions, hospital and school visits, and so on) this will cause great inconvenience to the members of the family which, in its turn, will impede the exercise of their free movement rights.<sup>72</sup>

Accordingly, the refusal of the host EU member state to legally recognise the familial ties already enjoyed by the members of a rainbow family moving to its territory from another member state can amount to a breach of the EU free movement of persons. This is the case when the above failure leads to the refusal of family reunification rights or of other entitlements which the family seeks to claim once it has been admitted into the territory of the host member state.<sup>73</sup>

### 3.2 *EU Fundamental Human Rights Protection*

Under EU law, fundamental human rights have been protected as part of the general principles of EU law since the late 1960s.<sup>74</sup> With the coming into force of the Treaty of Lisbon in 2009, the Treaty on European Union (TEU) has been amended, and its article 6 now provides that the EU Charter of Fundamental Rights (EUCFR) has the same legal value as the treaties. Hence, in the EU, there are currently two parallel sources of fundamental human rights protection: the EUCFR and the general principles of EU law.<sup>75</sup>

<sup>70</sup> See, for instance, Case C-200/02 *Zhu and Chen* ECLI:EU:C:2004:639.

<sup>71</sup> See, for instance, Case C-413/99 *Baumbast and R* ECLI:EU:C:2002:493.

<sup>72</sup> Here, the argument made by the ECJ in a different context (the cross-border recognition of surnames) is employed: Case C-148/02 *Garcia Avello* ECLI:EU:C:2003:539.

<sup>73</sup> Such an obstacle to free movement is unlikely to be justified (on the grounds of public policy or the need to preserve their national identity, which are laid down in articles 45[3] TFEU and 52 TFEU) as the measure is not based on the *personal conduct* of the individual(s) concerned, as required by art 27(2) of Directive 2004/38 (n. 67).

<sup>74</sup> Case 29/69 *Stauder* ECLI:EU:C:1969:57.

<sup>75</sup> For an analysis of the development of the EU human rights policy see R. SCHÜTZE: *European Union Law*, Chapter 12.

Although the ECHR is *not* an EU instrument, it has, nonetheless, always had a significant impact on the development of EU fundamental human rights protection, being recognised as a source of “guidelines” for the ECJ when determining which fundamental human rights form part of the general principles of EU law and how these must be interpreted.<sup>76</sup> In addition, it plays a crucial role in the interpretation of the EUCFR, as article 52(3) of the latter provides that “in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

Given that there have been no ECJ rulings dealing with the parental rights of same-sex couples, and since the ECHR plays a crucial role in the development of EU fundamental human rights protection and – in fact – constitutes a “floor” of the protection offered at EU level, it is obvious that the arguments made in the previous section, where the parenting rights of same-sex couples were explored in the ECHR context, can be transposed here.

As noted earlier, the ECtHR held in *Gas and Dubois v. France* that a same-sex couple and their child(ren) can together enjoy “family life”, within the meaning of article 8 ECHR.<sup>77</sup> Taking into account article 52(3) EUCFR seen above, the same interpretation must be followed for the purposes of article 7 EUCFR, which provides the right to private and family life in the EU context, and for the right to private and family life as a general principle of EU law. Hence, for the purposes of EU law, in situations where the child in a rainbow family has established de facto “family ties” with both of his/her parents, it is undisputed that family life exists between the members of the family, and, *a fortiori*, this is the case when those family ties have, already, been legally recognised somewhere.

EU law cannot apply in purely internal situations, i.e. situations which are confined to one EU member state and which have no connection with EU policies.<sup>78</sup> Accordingly, “static” same-sex couples who have not exercised their EU free movement rights cannot rely on EU fundamental human rights protection to require their own EU member state to legally recognise them as the joint parents of their children, and this is so even when that member state discriminates against them on the ground of their sexual orientation (though, since all EU member states are signatories to the ECHR, they will – as seen in the previous section – be able to rely on the ECHR to challenge this).

On the other hand, if a same-sex couple who moves between EU member states is faced in the host member state with a refusal to legally recognise a parent-child relationship established elsewhere, the situation clearly falls within the scope of EU law since there is an exercise of and a restriction on (as explained in the

76 Case 4/73 *Nold* ECLI:EU:C:1974:51.

77 *Gas and Dubois* (n. 20) para 37.

78 A. TRYFONIDOU: *Reverse Discrimination in EC Law*, Alpen aan den Rijn: Kluwer, Law International, 2009, chapters 1 and 2.

previous sub-section) EU free movement rights. If the principles established in *Wagner v. Luxembourg* and *Mennesson v. France* cases are transposed in this context, rainbow families can claim that the host EU member state is in breach of their right to private and family life (as is protected under article 7 EUCFR and as a general principle of EU law) as a result of refusing to pursue the cross-border continuity of the family ties among the members of the family, as these have been legally established elsewhere. What is more, such a reading of the right to family life seems to be in line with ECJ pronouncements where the court emphasised the importance of ensuring that member state nationals who move between EU member states can *continue* to lead a normal family life in the host member state.<sup>79</sup>

#### 4. Conclusion

This article had as its aim to explore the stance of European law – namely, EU law and the law stemming from the Council of Europe’s ECHR – on the parenting rights of same-sex couples. It has been explained that both organisations (the EU and the Council of Europe) lack competence in the area of family law and, for this reason, their member states are free to decide issues that fall within this field. Accordingly, each member state is free to decide whether it will open marriage or any other relationship status to same-sex couples and – most importantly for our purposes – whether it will allow same-sex couples to become *de facto* parents who are legally recognised as the joint parents of their children. In the ECHR context this, nonetheless, comes with the proviso that although member states are free to determine which categories of persons/couples can “found a family” by having a child, nonetheless, when they do so they must not discriminate on any of the grounds included in the article 14 ECHR list, which include sexual orientation.

On the other hand, in cross-border situations which involve a same-sex couple asking a member state to legally recognise the familial links between the child and both parents, *as these have already been established in another country*, both the ECHR and EU law can assist. Although no case-law involving rainbow families where this issue emerged has been heard, to date, by either the ECtHR or the ECJ, it is clear that under both legal systems the refusal of a member state to allow the cross-border continuity, in law, of the parent-child relationship can amount to a breach of a number of provisions. As a human rights instrument, the ECHR is breached as a result of such a refusal since a violation of the right to private and family life of the parents and the children ensues in such a scenario; this can be relied on alone or together with the prohibition of discrimination on the ground of sexual orientation in the enjoyment of this right. Similarly, in the EU context, the same human rights-based argument can be made, but an additional – functional – argument can be put forward as well, to the effect that

79 See, inter alia, Case C-127/09 *Metock and Others* ECLI:EU:C:2008:449, para 62; *Coman* (n. 60) para 32; Case C-165/16 *Lounes* ECLI:EU:C:2017:862, para 52.

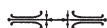
the contested refusal can restrict the exercise of the free movement rights that member state nationals derive from EU law.

Accordingly, despite the limited competence that the EU and the Council of Europe have in the family law field, EU law and the ECHR can be relied on by same-sex couples to eradicate discrimination on the ground of sexual orientation as regards the enjoyment of the right to found a family (ECHR) and to require member states to ensure the cross-border continuity of the legal ties between a child and both of his/her same-sex parents, as these have been established elsewhere (ECHR and EU law).

#### SUMMARY

##### The Parenting Rights of Same-Sex Couples under European Law

Few issues incite as much controversy in contemporary law and politics as the recognition and protection of the rights of sexual minorities. The legal recognition of same-sex relationships, in particular, has, in the last couple of decades, become one of the most prominent issues discussed in parliaments, in courts, and in the media around the world. A much more controversial issue, nonetheless, is parenting by same-sex couples, with the important *legal* question being whether, under a specific legal system, same-sex couples can be legally recognised as the *joint* parents of a child. The article explores this question from the point of view of European law in two sections, the first considering the Council of Europe's European Convention on Human Rights and the second European Union law. In both instances, the European directives do not claim competence over family law in the European member states. In the first, states are free to establish laws regulating families, with the important proviso that all people must be treated equally, with no discrimination, including discrimination based on sexual orientation. Countries are not obliged to recognize same-sex unions nor same-sex parenting rights, so long as these are in line with practices for heterosexual couples. A similar situation exists in European Union law. However, both regulating bodies can and do enforce the recognition of the home country's decisions by host countries of Europeans who move to a different country. In EU law, this comes under the freedom of movement provision. All of this means that lack of guidance at the European level allows that the parental rights that same-sex couples enjoy *at national level* vary considerably throughout Europe. However, the article shows that the cross-national provisions establish a legal principle that pushes towards an equalization of family law in regard to same-sex couples, motivated by those who establish residence in one country, already having their rights legally recognized in another.



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