The Impact of Right-Wing Populism on the Family Rights of Sexual Minorities in Europe

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1. INTRODUCTION

Europe is increasingly marked by the growth of right-wing populism.[1] In Central and Eastern European countries, in particular, right-wing populists tend to favour traditional forms of authority and patriarchal family structures, and have rather conservative attitudes towards sexual minorities.[2] They conceptualise homosexuality as an unnatural, corrupting, force on society and as a threat to the 'traditional family'. They, therefore, oppose the extension of family rights to sexual minorities.[3]

Family law remains an area of exclusive State power. Thus, in European States where there is a right-wing populist government or where the government is heavily reliant on the support of right-wing populist groups, far-right populist ideology heavily influences national family policies and legislation which regulates family rights. In such States, therefore, sexual minorities often enjoy very little or no family rights under national law and rainbow families (i.e. families comprised of a same-sex couple, with or without children) are cast as illegitimate, non-procreative, entities that are (and should remain) ignored by the law.

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[1] For a psychoanalytically informed interpretation of the rise of right-wing populism in Europe see P. Sandrin, 'The Rise of Right-Wing Populism in Europe: A Psychoanalytical Contribution' in B. de Souza Guilherme, C. Ghymers, S. Griffith-Jones and A. Ribeiro Hoffmann (eds), *Financial Crisis Management and Democracy: Lessons from Europe and Latin America* (Springer, 2020). For an analysis of the psychological reasons for the rise of populism in recent years see the essays in J. P. Forgas, W. D. Crano and K. Fiedler (eds), *The Psychology of Populism: The Tribal Challenge to Liberal Democracy* (Taylor and Francis, 2021).

[2] For a comparison of the far right in East-Central European countries, on the one hand, and Western European countries, on the other see V. Hlousek and L. Kopecek, *Origin, Ideology and Transformation of Political Parties: East-Central and Western Europe Compared* (Routledge, 2010), Chapter 9.

[3] The term 'sexual minorities' generally refers to all persons who have a sexual orientation or gender identity which is different from that of the majority population. This paper will, nonetheless, focus on the position of lesbian, gay and bisexual (LGB) persons (i.e. persons who have a homosexual or bisexual sexual orientation). For the purposes of this paper, therefore, the term 'sexual minority/ties' will be used interchangeably with – and will be taken to be equivalent to – the term 'LGB persons'.

The negative impact of right-wing populism on the family rights of sexual minorities is, nonetheless, also, felt – albeit more indirectly – at a supranational level, since the European supranational Courts (the European Union's (EU) European Court of Justice (ECJ) and the Council of Europe's (CoE) European Court of Human Rights (ECtHR)) do not wish to deliver rulings regarding the family rights of sexual minorities, which will lead to a backlash[4] and/or rollback of sexual minority rights.

The aim of this paper will, therefore, be to examine the role that the rise of right-wing populism in certain European countries may have played in limiting the family rights of sexual minorities in Europe *at the supranational level*. It should be noted that the paper will not test whether there have been specific incidents of a backlash or rollback of sexual minority rights, as a result of the reaction of right-wing populist groups or governments to specific rulings of the European supranational courts. Rather, it will take it as a given that the possibility of a backlash in some European States may be a reason for the more cautious approach exhibited by the ECtHR and the ECJ, with regard to matters in relation to which there is no European consensus and which are central to the right-wing populist agenda in some European countries, as is the case with the family rights of LGB persons.

The paper will begin with a section (Section 2) which will aim to introduce (briefly) populism (and, in particular, right-wing populism) and its approach towards sexual minorities; the focus will be on right-wing populism in a particular geographical context (Central and Eastern Europe) where it comes out as particularly hostile towards sexual minorities. The subsequent section (Section 3) will aim to analyse the approach of the ECtHR in cases involving claims to family rights by LGB persons. Section 4 will, then, examine how the ECJ has responded to questions referred by national courts for a preliminary ruling, which involved the *cross-border* recognition of the familial ties among the members of rainbow families. Section 5 will conclude.

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2. RIGHT-WING POPULISM AND SEXUAL MINORITIES IN EUROPE

In Europe we find some of the most pioneering countries – but we also find some of the least tolerant countries in the occidental world – when it comes to sexual minority rights. This dichotomy is, often, presented as an 'East/West divide', with Western and Northern European countries tending to be among the most liberal in the world as regards the protection of LGB rights, and some Central and Eastern European countries, among the most backward in the 'Western' world, regarding this matter.[5] In the last few years, in particular,

[4] As explained by Voeten, 'A backlash refers to government actions that aim to curb or reverse the authority of an international court' – E. Voeten, 'Populism and Backlashes against International Courts' (2020) 18 Perspectives on Politics 407, 408.

[5] For an analysis of the evolution of LGBT rights within the context of the EU's enlargement policy (which demonstrates this 'East/West divide' noted in the main text) see K. Slootmaeckers and H.Touquet, 'The Co-evolution of EU's Eastern Enlargement and LGBT Politics: An Ever Gayer Union?' in K. Slootmaeckers, H. Touquet, and P. Vermeersch (eds), *The EU Enlargement and Gay Politics: The Impact of Eastern Enlargement on Rights, Activism and Prejudice* (Palgrave Macmillan, 2016). Some have even argued that the EU's enlargement has contributed to the concretisation of the East-West divide in relation to the protection of sexual minorities. See,

in some Central and Eastern European countries, homophobic rhetoric is on the rise, fuelled by right-wing populism, divisive politics and socially conservative and religious groups. Recent examples of this are the Polish officials' public support for so-called 'LGBTI free zones' in 2021, as well as legislation prohibiting 'gay propaganda' in Russia (in 2013) and Hungary (in 2021). Hence, in Central and Eastern European countries like Poland, Hungary and Russia, far-right populist governments and politicians have gained political capital by publicly displaying homophobia and marginalising sexual minorities with calls to 'the defence of the nation'.[6]

Given the paper's focus on right-wing populism, we should begin by providing a brief explanation of populism and, of course, right-wing populism.

It is important, first, to emphasise – as one of the first contemporary[7] scholars writing on populism has stressed – that the term 'populism' is 'exceptionally vague and refers in different contexts to a bewildering variety of phenomena'.[8] This means that it is impossible to define populism in a universal, normative, fashion. As another commentator has put it, 'populism has been used to define movements and parties that belong to different, even oppositional, ideological milieus and positions'.[9] What is more, as will be seen below, populist movements that belong to the same political spectrum but are situated in different geographical contexts, may hold opposing views regarding specific issues, such as the position of persons belonging to sexual minorities.

Having inserted the above caveats, it is still important to begin with a basic explanation of what we understand when we refer to 'populism'.[10] As its name suggests, populism is meant to be a form of politics 'of the people' against 'elites'. Its essential aim is to appeal to 'the pure people' who feel that their concerns and wants are disregarded by 'the corrupt elite'.[11] Populist parties and groups, therefore, claim that they speak in the name of the people. Of course, the term 'people' can be interpreted in different ways and, thus, its meaning is always morphed by the underlying values and specific priorities of the populist party or group that seeks to define it. The same can, also, be said for the term 'elites': who or which groupings constitute part of the 'elite' will depend on who defines the term and for which purpose.

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for instance, the essays in R. Kulpa and J. Mizielinska (eds), *De-centring Western Sexualities: Central and Eastern European Perspectives* (Ashgate, 2011).

[6] R. C. M. Mole, 'Nationalism and Homophobia in Central and Eastern Europe' in K. Slootmaeckers, H. Touquet and P. Vermeersch (eds), *The EU Enlargement and Gay Politics: The Impact of Eastern Enlargement on Rights, Activism and Prejudice* (Palgrave Macmillan, 2016).

[7] Populism is not new, as it has 'been around for centuries, both as an ideology and political movement. The populism we see today is the descendant of a long line of ancestors' – A. Kettis, 'Prologue' (2021) 2 The Interdisciplinary Journal of Populism 4.

[8] M. Canovan, *Populism* (Harcourt Brace Jovanovich, 1981) 3.

[9] C. Marneros, 'Against The Populist Ressentiment' (2021) 2 The Interdisciplinary Journal of Populism 100.

[10] For some of the classic works on 'modern' populism see M. Canovan (n 8); P. Worsley, 'The Concept of Populism' in G. Ionescu and E. Gellner (eds), *Populism: Its Meaning and National Characteristics* (Macmillan, 1969). For a more recent explanation of populism see J-W Müller, *What is Populism?* (University of Pennsylvania Press, 2016).

[11] M. Canovan, 'Trust the People! Populism and the Two Faces of Democracy' (1999) 47 Political Studies 2; C. Mudde, 'The Populist Zeitgeist' (2004) 39 Government and Opposition 542.

Right-wing populists – who are the focus of this paper – combine right-wing politics and populist rhetoric.[12] Hence, they employ anti-elitist sentiments and claim that they speak in the name of the people. However, unlike left-wing populists, who focus mainly on economic issues and attack neoliberalism, right-wing populists are generally concerned with cultural issues and proclaim that their main aim is to protect the national culture and identity of their country, from perceived attacks by 'specific others'.[13] Hence, right-wing populists do not just distinguish the 'pure people' from 'elites': they, also, distinguish 'the pure people from specific others, which can be immigrants, ethnic or racial minorities, criminals, or some other group that is singled out as undeserving in a specific national context'.[14] Which groups are placed in the category of 'specific others' depends, to a large extent, on what is electorally successful in the specific national context at issue. A basic tenet of the attack of right-wing populists against 'elites', is often their claim that it is the aim of 'the corrupted elites' to promote the interests of those specific 'others', at the expense of 'the pure people'. Far-right governments use populism to cement their authoritarianism: attacking 'the other' and turning them into scapegoats[15] – whether these are minority groups or socially liberal activists or politicians – is used not only as a strategy to attract the dissatisfied electorate and ascent to power but, also, as a justification for power grabs that weaken democracy's foundations and the rule of law.[16]

One of the groups that has traditionally been excluded from 'the pure people' and defined as 'the other' by (some) right-wing populist groups in Europe, has been sexual minorities; a group that the European supranational courts – the ECJ and the ECtHR – have protected through their rulings in the last few decades,[17] and with respect to which EU legislation which, inter alia, prohibits discrimination on the grounds of sexual orientation has been made[18] or proposed.[19]

[12] For an analysis of right-wing populism in different EU countries see R. Wodak, M. KhosraviNik and B. Mral (eds), *Right-Wing Populism in Europe: Politics and Discourse* (Bloomsbury, 2013).

[13] For an explanation of the differences between right-wing populism and left-wing populism see S. Gandesha, 'Understanding Right and Left Populism' in J. Morelock (ed.), *Critical Theory and Authoritarian Populism* (University of Westminster Press, 2018).

[14] E. Voeten (n 4).

[15] R. C. M. Mole, 'Hungary's anti-LGBT law: straight from the populist playbook?, published in Populism Europe, available at https://populism-europe.com/hungarys-anti-lgbt-law-straight-from-the-populist-playbook/ (last accessed on 23 March 2022).

[16] Z. Beauchamp, 'How hatred of gay people became a key plank in Hungary's authoritarian turn: Viktor Orbán's war on LGBTQ identities is a war on democracy', published in Vox (28 June 2021), available at https://www.vox.com/22547228/hungary-orban-lgbt-law-pedophilia-authoritarian (last accessed on 22 March 2022).

[17] Without this suggesting that the approach of these two Courts has, always, been specifically favourable towards sexual minorities, especially in their early rulings – see, for instance, Case C-249/96 *Grant v South-West Trains Ltd* ECLI:EU:C:1998:63 (ECJ); *Fretté v France*, app no 36515/97 (ECtHR, 26 February 2002) (ECtHR).

[18] Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

[19] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (SEC(2008) 2180) COM/2008/0426 final.

It is important to emphasise, nonetheless, that right-wing populism does not share the same beliefs and attitudes throughout Europe.[20] As noted above, it is only *some* right-wing populist groups in Europe that view sexual minorities as 'the other' and, thus, object to the grant of family (or other) rights to LGB persons. More specifically, right-wing populists in Central and Eastern European countries respond differently to the claims of sexual minorities from right-wing populists in Northern and Western European countries: it is only the former that view such claims with hostility and vehemently object to the extension of any family rights to same-sex couples.[21] It is for this reason that this paper focuses on the impact that right-wing populism *in Central and Eastern European countries may* have had on the family rights that sexual minorities in Europe claim at the supranational level.

Right-wing populist leaders in Central and Eastern European countries tend to consider calls for the extension of more rights and entitlements to sexual minorities – which traditionally come from international organisations (such as the EU or the CoE) or European (supranational) courts – as an imposition of 'Western values' which clash with their norms and values which are attached to tradition and religion[22] and which consider the 'traditional family' as the foundation of society.[23] They present this 'clash' as a battle between 'corrupt Western liberal elites' and the 'pure (Central and Eastern European) people' and are sceptical of international institutions, which are considered as part of the international elite which desires to promote globalisation and undermine national sovereignty by importing alien values that are antithetical to national values. As explained by Voeten, 'populists object to court judgments that interfere with domestic populist narratives about whose rights deserve to be protected'.[24]

Judgments of European supranational courts or legislation originating at supranational (i.e. EU) level are often viewed by right-wing populist movements as 'colonisation' attempts by a morally corrupt West and can lead to backlash in contexts where such movements are influential. Backlash can consist of non-implementation of (supranational) court judgments, exit threats, or vetoing of (EU) legislation which aims to advance equality and protect the rights of sexual minorities. Voeten explains that right-wing populism (in Central and Eastern

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[20] S. Siegel, 'Friend or Foe? The LGBT Community in the Eyes of Right-Wing Populism', published online in EuropeNow Journal (6 July 2017), available at https://www.europenowjournal.org/2017/07/05/friend-or-foe-the-lgbt-community-in-the-eyes-of-right-wing-populism/ (last accessed on 23 March 2022).

[21] C. M. Lancaster, 'Not So Radical After All: Ideological Diversity Among Radical Right Supporters and Its Implications' (2020) 68 Political Studies 600. The strategy of accepting gay and lesbian citizens as part of 'the people' of a specific country (nation) is called 'homonationalism' – for an analysis of homonationalism (especially in the Dutch context) see N. Spierings, 'Homonationalism and Voting for the Populist Radical Rights: Addressing Unanswered Questions by Zooming in on the Dutch Case' (2021) 33 International Journal of Public Opinion Research 171.

[22] For an analysis of the role of religion in the development of the political positions and discourses of right-wing populist parties on LGBT+ rights (in the French and Italian contexts in particular) see L. Ozzano and F. Bolzonar, 'Is Right-Wing Populism a Phenomenon of Religious Dissent? The Cases of the Lega and the Rassemblement National' (2020) 1 International Journal of Religion 45. For an article exploring the role of religion (and cultural context) in shaping attitudes towards non-heterosexual sexual orientations see A Adamczyk and C Pitt, 'Shaping attitudes about homosexuality: The role of religion and cultural context' (2009) 38 *Social Science Research* 338

[23] P. Ayoub and D. Paternotte, 'Europe and LGBT Rights: A Conflicted Relationship' in M. Bosia, S. M. McEvoy and M. Rahman (eds), *The Oxford Handbook of Global LGBT and Sexual Diversity Politics* (OUP, 2019).

[24] E. Voeten (n 4) 412.

European countries) 'also offers an ideology' for why international courts such as the European (supranational) courts 'should not have authority in the first place. International courts, like domestic courts, are countermajoritarian institutions. Moreover, they are located outside the homeland. Strong populist movement or populist presidents make it more likely that governments opt for challenging the authority of courts over alternative strategies such as acceptance, non-compliance, or avoidance'.[25]

This means that in the light of the rise of right-wing populism in Central and Eastern Europe, the European, supranational, institutions can face increasing challenges to their authority which come in the form not only of backlashes which emerge as a result of individual rulings they deliver or decisions that they make but also, and more fundamentally, as broader challenges to their overall authority. The rights of sexual minorities, which is a specifically contested terrain throughout Europe, is clearly an issue where tensions can run high. Hence, as will be seen in the next two sections, it comes as no surprise that the approach of the European institutions shows signs of reticence, especially when it comes to the imposition of positive obligations on States with regard to the grant of family rights to the members of sexual minorities.

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3. THE POSSIBLE IMPACT OF RIGHT-WING POPULISM ON THE ECtHR'S RESPONSE TO CLAIMS FOR FAMILY RIGHTS BY SEXUAL MINORITIES

The CoE was founded in 1949, by ten western European States.[26] Its creation in the aftermath of the Second World War was not coincidental, as it was established, exactly, as a response to the catastrophe brought by that War, aiming to ensure that such a tragedy would never happen again.

The CoE is Europe's leading human rights organisation and counts 46 States in its membership.[27] Its flagship instrument is the European Convention on Human Rights (ECHR), which is a Treaty designed to protect primarily civil and political rights. To ensure the observance of the obligations imposed on the contracting States, the ECHR had created two part-time institutions, the European Commission of Human Rights (EComHR) and the European Court of Human Rights (ECtHR). However, in 1998, with the coming into force of Protocol 11, the Commission was abolished, and the two old institutions were replaced by

[25] Ibid 408.

[26] Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway Sweden, and the United Kingdom.

[27] These span across all the corners and the heartland of Europe and are Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Montenegro, the Netherlands, North Macedonia, Norway, Poland, Portugal, Republic of Moldova, Romania, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United Kingdom. On 16 March 2022, in an extraordinary meeting in the context of the procedure launched under Article 8 of the Statute of the CoE, the Committee of Ministers of the CoE decided to expel the Russian Federation from the CoE after 26 years of membership, due to its ongoing aggression against Ukraine. The resolution (CM/Res(2022)2) can be found here https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a5d7d9.

the ECtHR which, now, became a full-time court. With a steady and growing docket, the ECtHR has become the 'de facto Supreme Court of human rights in Europe'.[28]

The ECHR was drafted in the late 1940s and came into force in 1953. Hence, it comes as no surprise that it does not include any reference to sexual minorities, nor does the prohibition of discrimination laid down in Article 14 ECHR *explicitly* include sexual orientation as a protected ground:[29] the recognition of gay and lesbian rights only began in the 1970s, following the awareness raised by the Stonewall riots in New York in June 1969 and the vocalisation of the concerns of the gay and lesbian community through the activities of early gay rights organisations.[30] Nonetheless, despite the lack of any express references to LGB persons and sexual minorities in the ECHR provisions, from the 1980s onwards, the ECtHR has received many applications through which LGB persons and rainbow families have relied on the provisions of the ECHR to vindicate their human rights.[31]

In this section, the focus will be on the ECtHR case-law through which LGB persons claimed core family rights, namely, the right to marry or, at least, the right to have their relationships legally recognised, as well as the right to parent a child. The aim of the analysis will be to demonstrate how the Court's cautious reasoning in this case-law may have been influenced by the threat of a possible backlash to which a more interventionist judicial approach might lead. In particular – and given that one of the ways that supranational courts, such as the ECtHR, use to mitigate backlash is through judicial restraint[32] – it will be suggested that there is a possible link between the cautious approach of the ECtHR in the cases that will be analysed and right-wing populism mobilisation *in the Central and Eastern European countries*: populist governments or governments that rely strongly on populist support are likely to initiate backlashes in response to ECtHR judgments that directly interfere with national choices regarding the rights of sexual minorities in the family law field.

Before proceeding to analyse the above argument further, we should first examine the ECtHR case-law where the Court ruled on the obligations imposed by the ECHR on its signatory States with regard to the family rights of sexual minorities.

3.1. ECtHR Case-Law Concerning the Family Rights of Sexual Minorities

In this part of the section, we shall focus on the jurisprudence of the ECtHR which examined whether and how the ECHR can be read as requiring signatory States to protect and respect the family rights of sexual minorities. In particular, it will be seen that although the Court has

[28] M. R. Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash' (2016) 79 Law and Contemporary Problems 141, 143.

[29] However, the EComHR clarified in *Sutherland v the United Kingdom*, app no 25186/94, Commission report, 1 July 1997, paras 50-51 that sexual orientation is a protected ground under Article 14 ECHR and this has been consistently followed in its case-law by the ECtHR.

[30] For an excellent account of the history of the gay rights movement in the US, see L. Faderman, *The Gay Revolution: The Story of the Struggle* (New York, Simon & Schuster, 2015).

[31] For an analysis of the Court's case-law involving claims by LGB persons and same-sex couples see P. Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2014).

[32] Ø. Stiansen and E. Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights' (2020) 64 International Studies Quarterly 770, 773.

imposed a positive obligation on States to introduce a legal framework which enables same-sex couples to have their relationship legally recognised, nonetheless, to this day, it has refrained from requiring States to introduce same-sex marriage. Moreover, given that marriage – as repeatedly underlined by the ECtHR – maintains a special position as a unique status which is deeply rooted in the individual tradition and culture of each State, not only are States free to reserve it for opposite-sex couples but, also, they can reserve specific rights and benefits for married couples. The Court's position with regard to the parenting rights of same-sex couples (in particular, their right to be legally recognised as the joint parents of a child) – an issue which is even more controversial[33] – is equally cautious. In the remaining of this part of this section, we shall analyse the Court's approach in the relevant case-law.

To this day, it is still the position of the ECtHR that the ECHR does not require States to open marriage to same-sex couples in their territory.[34] This was first ruled in the *Schalk and Kopf v Austria* judgment in 2010,[35] and has, since then, been confirmed in a number of cases, where the Court has, essentially, repeated the same reasoning.[36]

In *Schalk and Kopf* the applicants complained that being a same-sex couple, they did not have access to marriage in Austria. As noted in the judgment, at the time, only 6 out of 47 CoE Member States had opened marriage to same-sex couples.[37] The Court began by noting that marriage 'is subject to the national laws of the contracting States'.[38] It pointed out that in 'the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex',[39] and it rejected the applicants' argument that Article 12 ECHR, which provides for the right of men and women to marry, 'should, in the light of present-day conditions, be read as granting same-sex couples access to marriage or, in other words, as obliging member States to provide for such access in their national laws'.[40] This was because, although 'the institution of marriage has undergone major social changes since the adoption of the Convention', 'there is no European consensus regarding same-sex marriage'.[41]

[33] 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', (2017) 30 Journal of the American Academy of Matrimonial Lawyers 27, 31 (and the references in footnote 13 of that article). Hodson has noted that although the ECtHR now recognises *de facto* families as valid families that are entitled to the protection of their rights, nonetheless, at present it 'provides too little guidance on matters of family rights and equality for children raised in LGBT families' and 'in short, the ECtHR has failed to grapple adequately with the dynamics of LGBT family life' – L. Hodson, 'Ties That Bind: Towards a Child-Centred Approach to Lesbian, Gay, Bi-Sexual and Transgender Families under the ECHR' (2012) 20 International Journal of Children's Rights 501, 519.

[34] For an analysis see M. Shahid, 'The Right to Same-Sex Marriage: Assessing the European Court of Human Rights' Consensus-Based Analysis in Recent Judgments Concerning Equal Marriage Rights' (2017) 3 Erasmus Law Review 184.

[35] *Schalk and Kopf v Austria* App. no. 30141/04 (ECtHR, 24 June 2010).

[36] *Hämäläinen v Finland* App. no. 37359/09 (ECtHR, 16 July 2014); *Oliari and others v Italy* App. nos. 18766/11 and 36030/11 (ECtHR, 21 July 2015); *Chapin and Charpentier v France* App. no. 40183/07 (ECtHR, 9 June 2016); and *Orlandi and others v Italy* App. nos. 26431/12, 26742/12, 44057/12 and 60088/12 (ECtHR, 14 December 2017).

[37] These were Belgium, the Netherlands, Norway, Portugal, Spain, and Sweden.

[38] *Schalk and Kopf v Austria* (n 35), para 49.

[39] Ibid, para 55.

[40] *Schalk and Kopf v Austria* (n 35), para 57.

[41] Ibid, para 58.

Accordingly, the Court concluded that 'as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State',[42] pointing out that 'marriage has deep-rooted social and cultural connotations which may differ largely from one society to another', and reiterating that 'it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society'.[43]

The Court, therefore, concluded that Austria was not in violation of Article 12 ECHR due to its refusal to open marriage to same-sex couples. Hence, although, in this case, the Court recognised that 'same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships' and – in that respect – they are 'in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship',[44] it, nonetheless, still considered that it fell on the signatory States to decide whether they wished to extend the availability of marriage to same-sex couples. As regards same-sex couples that married in a country which allows same-sex marriage and apply to have their marriage recognised in a country which has not opened marriage to same-sex couples, in line with its decision to leave for the signatory States the choice as to whether to introduce same-sex marriage in their territory, in *Orlandi and others v Italy* in 2017,[45] the Court held that States have the obligation – under Article 8 ECHR – to provide *some means of recognition* in their territory for same-sex marriages contracted in other jurisdictions, but that they are not obliged to recognise these *as marriages*.

On the other hand, the Court's approach to the legal recognition of same-sex relationships (*albeit not through marriage*) has gradually evolved, along with the views of the ECHR signatory states on the matter. In 2013, the Court ruled in *Vallianatos v Greece* in 2013,[46] that Article 8 ECHR read in conjunction with Article 14 ECHR, requires signatory States that have introduced registered partnerships for opposite-sex couples, to extend these to same-sex couples. In other words, if a signatory State provides for a civil status (other than marriage) for couples, this should be made available to both opposite-sex and same-sex couples. Two years later, in the *Oliari and others v Italy* case,[47] the Court went even further and read Article 8 ECHR as imposing a positive obligation on signatory States to put in place a legal framework for the legal recognition of same-sex relationships. Thus, although, as is obvious from *Schalk and Kopf v Austria* and the cases that followed, marriage maintains a special status as it is deeply rooted in tradition and culture – and from this it follows that States can still choose to exclude same-sex couples from it – the Court recognises that same-sex couples must have the right to have their relationships legally recognised in some way.

When the obligation to put in place a legal framework for the legal recognition of same-sex relationships was firstly imposed in *Oliari*,[48] it was thought that this was strongly influenced

[42] *Schalk and Kopf v Austria* (n 35), para 61.

[43] ibid, para. 62.

[44] *Schalk and Kopf v Austria* (n 35), para 99; see, also, *Oliari* (n 36) para 165.

[45] (n 36).

[46] *Vallianatos v Greece* App. no. 29381/09 and 32684/09 (ECtHR, 7 November 2013).

[47] (n 36).

[48] Ibid.

by the specific social and legal context of the State concerned (Italy) and, thus, might not be an obligation generally imposed on *all* signatory States.[49] Nonetheless, more recently, in the *Fedotova and others v Russia* case,[50] the Third Chamber of the Court appears to have ruled that such an obligation binds all signatory States, even where the majority of a State's population disapproves of same-sex relationships. In relation to the latter point in particular, the Court noted that 'popular sentiment may play a role in the Court's assessment when it comes to the justification on the grounds of social morals. However, there is a significant difference between giving way to popular support in favour of extending the scope of the Convention guarantees and a situation where that support is relied on in order to deny access of a significant part of population to fundamental right to respect for private and family life. It would be incompatible with the underlying values of the Convention, as an instrument of the European public order, if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority'.[51] In ruling that Russia was in violation of Article 8 ECHR by not providing same-sex couples with access to *any* formal legal status for their relationship, the Court acknowledged 'that the respondent Government have a margin of appreciation to choose the most appropriate form of registration of same-sex unions taking into account its specific social and cultural context (for example, civil partnership, civil union, or civil solidarity act). In the present case they have overstepped that margin, because no legal framework capable of protecting the applicants' relationships as same-sex couples has been available under domestic law. Giving the applicants access to formal acknowledgement of their couples' status in a form other than marriage will not be in conflict with the "traditional understanding of marriage" prevailing in Russia, or with the views of the majority to which the Government referred, as those views oppose only same-sex marriages, but they are not against other forms of legal acknowledgement which may exist'.[52]

The Court's Chamber ruling in *Fedotova*, unsurprisingly, was met with the disagreement of Russia, which, in order to comply with the judgment, would need to introduce 'civil partnership, civil union, or civil solidarity act' for same-sex couples. Hence, shortly after the delivery of the judgment, Russia requested that the case be referred to the Grand Chamber and, in November 2021, the Grand Chamber panel of five judges decided to refer the case to the Grand Chamber of the ECtHR. And although Russia's expulsion from the Council of Europe in March 2022, led to the Court's decision to suspend (temporarily) the examination of all applications against Russia,[53] this suspension has now been lifted, following a Resolution adopted by the Court on 22 March 2022, which states that Russia will cease to be a High

[49] H. Fenwick and D. Fenwick, 'Finding "East"/"West" divisions in Council of Europe states on treatment of sexual minorities: the response of the Strasbourg Court and the role of consensus analysis' (2019) European Human Rights Law Review 247, 264; H. Fenwick, 'Same sex unions at the Strasbourg Court in a divided Europe: driving forward reform or protecting the court's authority via consensus analysis?' (2016) European Human Rights Law Review 248, 262.

[50] *Fedotova and others v Russia* App. nos. 40792/10, 30538/14 and 43439/14 (ECtHR, 13 July 2021). For an analysis see D. Bartenev, 'Will Russia yield to the ECtHR?' Verfassungsblog (16 July 2021) available at https://verfassungsblog.de/will-russia-yield-to-the-ecthr/ (last accessed on 28 March 2022).

[51] Ibid, para 52. For an analysis of the argument that European law should not wait for 'hearts and minds' to change before it imposes more positive obligations on States with regard to the protection of the rights of sexual minorities see A. Tryfonidou, 'Positive State Obligations under European Law: A Tool for Achieving Substantive Equality for Sexual Minorities in Europe' (2020) 13 Erasmus Law Review 98.

[52] *Fedotova and others v Russia* (n 50) para. 56.

[53] See Resolution (CM/Res(2022)2).

Contracting Party to the ECHR on 16 September 2022 but that the Court remains competent to deal with applications directed against Russia in relation to acts or omissions capable of constituting a violation of the ECHR provided that they occurred until 16 September 2022.[54] Accordingly, the fact that Russia will no longer be considered a signatory State to the ECHR from next September, will not affect the possibility of the Grand Chamber delivering a ruling in *Fedotova*.[55] In any event, a number of cases against Poland, which raise the same issue, are currently pending before the ECtHR and, thus, the matter will, also, be clarified through them, given that the social and legal context pertaining in Poland is closer to the one prevailing in Russia than in Italy.[56]

The above case-law demonstrates that the ECtHR accepts that 'traditional marriage' (ie marriage between men and women) maintains a special, privileged, status. What is more, given its privileged status, marriage, according to the ECtHR, can give to those that have contracted it special rights and entitlements. This has been established by the ECtHR in case-law where it has held that if signatory States choose to reserve certain rights or entitlements to couples that have entered into marriage, this is acceptable and does not constitute a breach of the prohibition of discrimination with regard to the enjoyment of the rights laid down in the ECHR, contrary to Article 14 ECHR.[57] By extension, this means that if a signatory State has chosen to allow only opposite-sex couples to marry *and* reserves certain rights and entitlements for married couples, same-sex couples (who are unable to marry) will be completely excluded from such rights and entitlements, through no choice of their own.[58]

The same, cautious, approach, has been adopted by the Court in cases involving claims by same-sex couples to be recognised as the joint legal parents of a child. In this context, the Court has made it clear that there is no right 'to found a family': the ECHR does not impose a positive obligation on States to enable couples (whether opposite-sex or same-sex) to become parents and to be legally recognised as such. However, once procreation rights are recognised, or provision is made for enabling certain categories of persons to become parents and to be legally recognised as such, these rights must be granted without discrimination on any of the prohibited grounds laid down in Article 14 ECHR, including on the grounds of sexual orientation. In *E.B.* v. *France*,[59] the ECtHR made it clear that Article 8 ECHR read in conjunction with Article 14 ECHR requires that if a signatory State grants the right to adopt to single

[54] Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights (available here https://echr.coe.int/Documents/Resolution_ECHR_cessation_membership_Russia_CoE_ENG.pdf) (last accessed on 24 March 2022).

[55] In fact, the Grand Chamber ruling on the case was expected on 27 April 2022, but was cancelled shortly before that date.

[56] *Formela v Poland* App. no. 58828/12 (pending); *Szypula v Poland* App. no. 78030/14 (pending); *Urbanik and Alonson Rodriquez v Poland* App. no. 23669/16 (pending); *Grochulski v Poland* App. no. 131/15 (pending); *Przybyszewska v Poland* App. no. 11454/17 (pending); *Starska v Poland* App. no. 18822/18 (pending); *Meszkes v Poland* App. no. 11560/19 (pending); *Handzlik-Rosul and Rosul v Poland* App. no. 45301/19 (pending).

[57] An exception to this is the case *Taddeucci and McCall v Italy* App. no. 51362/09 (ECtHR, 30 June 2016).

[58] This can be seen, inter alia, in the Court's case-law concerning the parenting rights of same-sex couples and, in particular, in *Gas and Dubois v France*, App no 25951/07 (ECtHR, 15 March 2012).

[59] *E.B. v France* App no 43546/02 (ECtHR, 22 January 2008).

persons, LGB single persons should also enjoy this right and, thus, should not be refused the right to adopt simply on the basis of their sexual orientation. Similarly, in *X and Others* v. *Austria*,[60] the Court held that the same provisions require that the (unmarried) same-sex partner of a woman is granted the right to apply for step-parent adoption of the latter's child, if such a right is granted to the (unmarried) opposite-sex partner of a heterosexual person. Nonetheless, in *Gas and Dubois* v. *France*,[61] it was held that if a signatory state makes available step-parent adoption *only to married couples* (and in that signatory state only opposite-sex couples can marry) then it is not obliged by the ECHR to make step-parent adoption available to any couples who are not married, even if – as is the case with same-sex couples – the fact that they are not married is not a matter of personal choice but, rather, the result of a legal disability which arises from the choice of the relevant State to exclude same-sex couples from the institution of marriage. In pronouncing in this manner, the Court pointed out that 'marriage confers a special status on those who enter into it. The exercise of the right to marry is protected by Article 12 of the Convention and gives rise to social, personal and legal consequences […]. Accordingly, the Court considers that, for the purposes of second-parent adoption, the applicants' legal situation cannot be said to be comparable to that of a married couple'.[62]

Hence, through its case-law, the ECtHR has ruled that same-sex couples cannot require signatory States to open marriage to them, nor can they rely on the ECHR in order to require them to recognise *as a marriage*, their same-sex marriage contracted in another country. States, nonetheless, have the obligation, under the ECHR, to establish a legal framework which allows same-sex couples to have their relationship legally recognised, though the Court allows States a margin of appreciation to choose the most appropriate form of registration of same-sex unions, taking into account their specific social and cultural context. Moreover, with regard to the more controversial issue of parenting by same-sex couples, the Court has held that same-sex couples (as any other couple) do not derive from the ECHR the right to 'found' a family, but rather, have the right to be recognised as the parents of a child without being discriminated against on the basis of their sexual orientation. Nonetheless, according to the ECtHR, States are free to reserve the right to be recognised as the joint parents of a child to married couples – this, however, means that in States which prohibit same-sex marriage, same-sex couples will not be able to rely on the ECtHR in order to require that they can be legally recognised as the joint legal parents of a child.

3.2. The Possible Link Between the Court's Approach in the Above Case-Law and Right-Wing Populism in Eastern European Countries

The family is recognised in national laws and international human rights and other instruments as being a fundamental group in society deserving of protection. It has no official or universal definition – it means different things to different people and meets different needs for different people.[63] Moreover, the concept of 'family' is not common across

[60] *X and Others v Austria* App no. 19010/07 (ECtHR, 19 February 2013).

[61] *Gas and Dubois v France* (n 58).

[62] ibid, para. 68.

[63] A. Diduck, *Law's Families* (CUP, 2003) 1.

geographical spaces and its social and cultural understandings are constantly shifting.[64] Accordingly, it is difficult – if not impossible – to provide a single, universal, definition for the notion of 'family', that encompasses the variety of relationships and forms of contemporary family life.[65]

This is the case even in the European context. Despite the fact that European States share some common values, when it comes to the question of what constitutes a 'family', there appears to be great divergence among them, especially with regard to specific matters such as same-sex relationships, cohabitation, registered partnerships, and parenting in situations which do not involve a 'nuclear family' i.e. a man and a woman who are married and who are both biologically connected to their child(ren).

While some European States have been the first to extend family rights to LGB persons and same-sex couples (such as Netherlands, which was the first country in the world that introduced same-sex marriage, and Denmark which was the first to introduce same-sex registered partnerships), there are a number of European States that still grant very little or no family rights to the members of sexual minorities. In particular, as already explained, in Central and Eastern European countries where right-wing populists are in power or – simply – powerful, patriarchal family structures are deeply imbued in society and reflected in the law, and homosexuality is perceived as a threat to the 'traditional family'. It is, therefore, unsurprising that in such countries, same-sex couples and rainbow families are not recognised as 'families', and LGB persons are excluded from entitlement to some of the most basic family rights and entitlements.

With regard to matters in relation to which there is no European consensus, the ECtHR has developed interpretative strategies and doctrines that allow it to proceed with restraint. Most fundamentally, the margin of appreciation enables the ECtHR to allow signatory States leeway in recognition of the cultural and political differences between them. It recognises that with regard to certain matters which are more controversial and 'sensitive' from an ethical and moral point of view, States are better placed to make decisions rather than to have obligations imposed on them 'from above'. As noted in *Oliari and others v Italy*, 'A number of factors must be taken into account when determining the breadth of that margin. In the context of "private life" the Court has considered that where a particularly important facet of an individual's existence or identity is at stake the margin allowed to the State will be restricted […]. Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider […]. There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights'.[66]

The extension of family rights to same-sex couples certainly fits the above description: it is a matter which is controversial and 'sensitive' from an ethical and moral point of view and in relation to which there is a great divergence of views among European States. Hence, as we

[64] E. Leeder, *The Family in Global Perspective: A Gendered Journey* (Sage, 2004), Chapter 1.

[65] A. Diduck and F. Kaganas, *Family Law, Gender and the State* (Hart, 2012), Chapter 1.

[66] *Oliari and others v Italy* (n 36), para 162.

have seen in this section, the ECtHR is granting a great deal of deference to States in deciding which family rights to extend to sexual minorities. Whilst it provides a floor of protection which requires European States to establish a legal framework for the legal recognition of same-sex relationship and to refrain from discriminating against LGB persons and same-sex couples *when it is judged that they are similarly situated with opposite-sex couples*, it considers that the time is not yet ripe for imposing an obligation on States to allow same-sex marriage: extending marriage to same-sex couples constitutes the utmost legitimisation of same-sex relationships, and will, certainly, meet the objection of many European States, especially those which even though they allow same-sex couples to formalise their relationship, they still maintain a constitutional ban on same-sex marriage, such as Croatia, and Hungary.

Such an objection is particularly likely to arise in Central and Eastern European States, where right-wing populist groups are influential. After all, the objection to same-sex marriage has an ideological character: non-compliance with ECtHR rulings that involve family rights claims by the members of sexual minorities will not be because the rulings are costly to implement, as amending legislation in order to afford family rights to the general population or to sexual minorities in particular, has relatively low material implementation costs. Non-compliance is based on ideological grounds which are that the ECtHR should not have authority over family law issues in the first place and that the 'corrupted elites of the West' should not impose their own views which are antithetical to national values and choices. What is more, because in some Central and Eastern European States there is still passionate opposition to same-sex marriage and to the recognition of same-sex couples as the joint parents of a child from a large segment of the population, rushing to impose obligations on States with regard to these matters, is likely, also, to entrench the position of far-right populists, who will now be viewed by the majority of people in their country as the defenders of the nation from – what is bound to be viewed as – unwarranted 'external' interference.

Accordingly, the ECtHR is wisely choosing its battles. When it comes to matters that have deep, ideological, connotations and with regard to which there is no European consensus, the Court is adopting a reticent approach and is treading cautiously. As regards, in particular, the family rights of LGB persons, the Court has secured – at least on paper – some core family rights, namely, the right to have same-sex relationships legally recognised and the right not to be discriminated against with regard to the enjoyment of some family rights. However, the Court has, correctly, judged that it is not yet the time for the 'final battle'– which will extend marriage to same-sex couples – to be fought. The continuing existence of a lack of consensus on the matter among European States and the rise of right-wing populism in Central and Eastern European States in the last few years means that a backlash and even a rollback of sexual minority rights is highly likely to ensue if the Court is viewed as imposing its own views on the matter.

4. THE POSSIBLE IMPACT OF RIGHT-WING POPULISM ON THE EU'S RESPONSE TO CLAIMS FOR FAMILY RIGHTS BY SEXUAL MINORITIES

What is today the EU took, initially, the form of three economically-orientated Communities, which were established in the 1950s.[67] In 1993, the three Communities were subsumed within the – broader – Union, which, now, had wider objectives, but which maintained its economic core, with internal market and free movement continuing to constitute its central policy area.[68]

The founding Treaties of what later became the EU (i.e. the three Community Treaties[69]) did not contain a reference to fundamental human rights, and, of course, there was no reference among their provisions to LGB rights. This does not appear surprising, given that some of the founding states of the EU maintained a criminal provision prohibiting sodomy (that is, male-to-male consensual sex) at the time that the Communities Treaties were conceived. Yet, and despite this, some tentative steps aiming to protect the rights of this segment of the population were taken by the EU already in the 1980s, although, until 1999, all initiatives to this effect were taken in an ad hoc, piecemeal, fashion and consisted of the adoption of soft law measures.[70]

In the EU context, LGB rights have only been tangentially touched upon given the lack of EU competence in, inter alia, the areas of family law, human rights, and immigration, which are areas that are traditionally involved in claims brought by the members of sexual minorities. In particular, questions regarding the legal recognition of same-sex relationships and the consequences attached to them (e.g. entitlement to survivor's benefits and supplementary retirement pensions) initially arose only in the employment context and required the Court to provide an interpretation of the EU's anti-discrimination legislation, Directive 2000/78.[71]

Four years ago, however, in the landmark case of *Coman*,[72] the Court was directly confronted with the issue of the *cross-border* recognition of same-sex marriages in situations involving the exercise of EU free movement rights. In *Coman*, Romania's refusal to recognise for the purpose of granting family reunification rights under EU law, a same-sex marriage contracted in another EU Member State (Belgium) was challenged. In its judgment, the ECJ interpreted

[67] The European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Energy (Euratom) Community.

[68] For an analysis of the history of the EU see L. van Middelaar, *The Passage to Europe: How a Continent became a Union* (Yale University Press, 2014).

[69] The ECSC Treaty, the EEC Treaty, and the Euratom Treaty.

[70] See, for instance, P. M. Ayoub and D. Paternotte, *LGBT Activism and the Making of Europe* (Hampshire, Palgrave Macmillan, 2014).

[71] (n 18). The cases are, inter alia, Case C-267/06, *Maruko* ECLI:EU:C:2008:179; Case C-147/08, *Römer* ECLI:EU:C:2011:286; Case C-267/12, *Hay* ECLI:EU:C:2013:823; Case C-443/15, *Parris v. Trinity College Dublin and Others* ECLI:EU:C:2016:897. For an analysis see 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 and K. Henrard (eds), *EU Anti-Discrimination Law Beyond Gender* (Hart, 2018).

[72] Case C-673/16, *Coman* ECLI:EU:C:2018:385.

the term 'spouse' for the purposes of Directive 2004/38[73] – which requires the grant of family reunification rights to a migrant Union citizen and his/her 'spouse' – as including a *same-sex* spouse. In its judgment, the ECJ noted that 'a number of Governments that have submitted observations to the Court have referred in that regard to the fundamental nature of the institution of marriage and the intention of a number of Member States to maintain a conception of that institution as a union between a man and a woman, which is protected in some Member States by laws having constitutional status. The Latvian Government stated at the hearing that, even on the assumption that a refusal, in circumstances such as those of the main proceedings, to recognise marriages between persons of the same sex concluded in another Member State constitutes a restriction of Article 21 TFEU, such a restriction is justified on grounds of public policy and national identity, as referred to in Article 4(2) TEU'.[74] The ECJ however quickly dismissed this argument: 'the obligation for a Member State to recognise a marriage between persons of the same sex concluded in another Member State in accordance with the law of that state, for the sole purpose of granting a derived right of residence to a third-country national, does not undermine the institution of marriage in the first Member State, which is defined by national law and, as indicated in paragraph 37 above, falls within the competence of the Member States. Such recognition does not require that Member State to provide, in its national law, for the institution of marriage between persons of the same sex. It is confined to the obligation to recognise such marriages, concluded in another Member State in accordance with the law of that state, for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law.'[75] The Court further noted that 'an obligation to recognise such marriages for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity or pose a threat to the public policy of the Member State concerned'.[76]

This demonstrates that although the ECJ is very well aware of the limits on the EU's competence regarding family law matters – and is conscious of the backlash that a more ambitious ruling in this case might bring – it nonetheless does not shy away from declaring expressly that for the purposes of EU law, *and where a situation falls within the scope of EU free movement law*, same-sex marriages and opposite-sex marriages validly contracted in an EU Member State should be equally recognised. EU law is supreme – and continues to be supreme – even over national constitutional provisions and even in relation to matters that form part of a Member State's national identity.[77] Yet, as argued elsewhere, the ECJ in this case has left quite a few questions unanswered, the most important one being whether

[73] 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.

[74] *Coman* (n 72), para. 42.

[75] Ibid, para. 45

[76] *Coman* (n 72), para. 46. The Advocate General (ECLI:EU:C:2018:2) shared similar views: 'if it were to be considered that the concept of marriage relates to national identity in certain Member States (which has not been expressly maintained by any of the Member States having lodged written observations, but only by the Latvian Government at the hearing on 21 November 2017), the obligation to respect that identity, which is set out in Article 4(2) TEU, cannot be construed independently of the obligation of sincere cooperation set out in Article 4(3) TEU. In accordance with that obligation, the Member States are required to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union' – para. 40.

[77] G. van der Schyff, 'The constitutional relationship between the European Union and its Member States: the role of national identity in article 4(2) TEU' (2012) 37 European Law Review 563, 582-583.

marriages contracted in other Member States will need to be recognised by an EU Member State *for purposes other than the grant of family reunification rights* in situations where there is an exercise of EU free movement rights.[78] Hence, once a married, same-sex, couple has been admitted into the territory of the host Member State, should the latter recognise them as married for purposes such as taxation, pensions, inheritance, and other entitlements which are reserved for married couples? It is clear that the ECJ wished to avoid to answer this question, as a positive response to this might be perceived as the imposition of same-sex marriage on EU Member States through the back door.

More recently, the Court was called to rule, for the first time, in a situation involving the cross-border recognition of the parent-child relationship, in a case, referred by a Bulgarian court, where the parents of the child were a female same-sex couple.[79] In the *V.M.A.* case,[80] the ECJ held that EU Member States are required to recognise – for the purposes of EU free movement law – the familial ties established in another EU Member State between a child and her parents who are a same-sex couple. The Advocate General in the case – Advocate General Kokott[81] – noted in her Opinion that what was at issue in this case 'is a very sensitive matter, given the exclusive competence of the Member States in the area of nationality and family law and the considerable differences that exist, to date, within the European Union in respect of the legal status of and the rights conferred on same-sex couples'. [82]

The ruling is important, in that it has made it clear that the principle of mutual recognition applies to birth certificates issued by EU Member States, including when they identify two persons of the same sex as the parents of a child. This is especially important for rainbow families, given that a large number of Member States refuse to allow two persons of the same sex to become the joint legal parents of a child in their territory and also refuse to recognise the familial ties that the members of rainbow families have legally established in other countries.[83] With this ruling, the Court has ensured that minors who are Union citizens can be accompanied by *both* of their same-sex parents in whichever EU Member State they decide to move. In addition, LGB Union citizens who are married with a person of the same sex can be accompanied or joined in the territory of another EU Member State, not only by their spouse (as was already established in *Coman*) but also by their children (confirmed in *V.M.A*).

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[78] A. Tryfonidou, 'The ECJ Recognises the Right of Same-Sex Spouses to Move Freely Between EU Member States: The *Coman* ruling' (2019) 44 European Law Review 663.

[79] For a detailed analysis of the difficulties faced by rainbow families when they exercise their free movement rights see A. Tryfonidou, 'EU Free Movement Law and the Children of Rainbow Families: Children of a Lesser God?' (2019) 38 Yearbook of European Law 220.

[80] Case C-490/20 *V.M.A.* ECLI:EU:C:2021:1008. For an analysis see A. Tryfonidou, 'The Cross-Border Recognition of the Parent-Child Relationship in Rainbow Families under EU Law: A Critical View of the CJEU's V.M.A. Ruling', European Law Blog, 21 December 2021, available at 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/ (last accessed on 28 March 2022).

[81] ECLI:EU:C:2021:296.

[82] Ibid, para. 4.

[83] See A. Tryfonidou and R. Wintemute, 'Obstacles to the Free Movement of Rainbow Families in the EU', Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, PE 671.505, March 2021 (available at https://www.europarl.europa.eu/RegData/etudes/STUD/2021/671505/IPOL_STU(2021)671505_EN.pdf) (last accessed on 25 March 2022).

This sends out a strong message to all EU Member States that under no circumstances can rainbow families be separated when they cross an EU border. The ruling is also important in symbolic terms because it demonstrates that for the purposes of EU law, rainbow families are 'families'.

Yet, and despite the fact that the ruling secures the right of the members of rainbow families to move together to the EU Member State of their choice, nonetheless, the ECJ in this ruling, as in *Coman*, refrained from engaging with the thorny question of whether the cross-border recognition of the familial ties between the child and both of her parents is required not only when family reunification rights are claimed in the host Member State but, also, *for all other legal purposes*. Delivering a ruling which explicitly requires this would, almost certainly, raise the fervent objection of EU Member States who vehemently object to the idea of recognising two persons of the same sex as the joint parents of a child,[84] and would, as has been the case with the ruling in *Coman*, lead to backlash in the form of non-implementation of the ruling at the national level.[85]

Accordingly, the two rulings in which the ECJ was called to directly consider the claims of the members of sexual minorities for the cross-border recognition of their family rights demonstrate that 'the ECJ makes strategic calculations in its decision making, avoiding decisions that could create a political backlash'.[86] This appears to be an apt response in the current political climate, whereby the various crises that have battered Europe in the last decade or so, have provided fertile ground to right-wing populists throughout Europe to use the EU as a scapegoat and to fuel an increasing anti-EU sentiment. In the UK, this has led to Brexit.[87] In Member States where right-wing populist governments are in power – such as in Hungary and Poland – unpopular (for the government) EU actions often lead to backlash which takes the form of non-compliance with ECJ rulings or the vetoing of Commission legislative proposals which require unanimity in the Council.

It is true that the ECJ – like its Strasbourg counterpart, the ECtHR – has been particularly cautious when ruling in cases involving the family rights of sexual minorities which lead to the imposition of *positive* obligations on European States. The same reticence has been demonstrated by the Commission: although it has been made aware of the fact that Romania

[84] It should be noted that in its first ever LGBTIQ Equality Strategy (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'), the Commission resolved to introduce a legislative proposal seeking to ensure that in cross-border situations, the parent-child relationship established in one country will be recognised in all EU Member States; this will be applicable to all families (i.e. rainbow families and families built by opposite-sex couples).

[85] To this day, and almost four years after the judgment was delivered, the spouse of Mr Coman (Mr Hamilton) has not been issued with a residence permit, something which has pushed – according to ILGA Europe – Mr Coman to submit an application to the ECtHR – see https://www.ilga-europe.org/resources/news/latest-news/european-court-will-consider-lack-implementation-eu-law-enable-freedom (last accessed on 24 March 2022). See *Relu Adrian Coman and others v Romania* (2663/21) (lodged on 23 December 2020, communicated on 9 February 2021).

[86] K. J. Alter, 'The European Union's Legal System and Domestic Policy: Spillover or Backlash?' (2000) 54 International Organization 489, 495.

[87] C. Thorleifsson, *Nationalist Responses to the Crises in Europe: Old and New Hatreds* (Routledge, 2018), Chapter 1.

has, almost four years after the ruling in *Coman*, still not taken steps to implement the judgment,[88] it has not taken any concrete steps in order to require that Member State to comply with it – it could, for instance, go back to the ECJ asking for the imposition of a penalty payment under Article 260 TFEU, but it has not done so. Instead, adopting a seemingly more 'conciliatory approach', in its LGBTIQ Equality Strategy, the Commission promised 'to continue to ensure the correct application of free movement law, including to address specific difficulties preventing LGBTIQ people and their families from enjoying their rights' as well as 'dialogues with Member States in relation to the implementation of the *Coman* judgment'.[89]

On the other hand, recent Commission actions demonstrate that there are limits to the reticence of the EU institutions with regard to the leeway left to the Member States in relation to sexual minority rights. In the summer of 2021, the Commission announced that it initiated enforcement actions against Poland and Hungary.[90] The action against Poland is based on the failure of the Polish authorities 'to fully and appropriately respond to its [i.e. the Commission's] inquiry regarding the nature and impact of the so-called "LGBT-ideology free zones" resolutions adopted by several Polish regions and municipalities'. The action against Hungary, on the other hand, targets the recently adopted Hungarian law which 'prohibits or limits access to content that promotes or portrays the so-called "divergence from self-identity corresponding to sex at birth, sex change or homosexuality" for individuals under 18; and a disclaimer imposed on a children's book with LGBTIQ content'. It is still early days and, thus, it will be interesting to see how these actions will proceed, not least as it is the first time that such actions are initiated against Member States on the ground that they are violating the rights of sexual minorities. However, the message that is sent is that the danger of a backlash in EU Member States that are ruled by right-wing populist governments can have a different impact on the approach of EU institutions, depending on the nature of the right that is at stake. More specifically, EU institutions (including the EU judiciary) appear more reticent to impose *positive* obligations on EU Member States such as the requirement to grant specific family rights to the members of sexual minorities, whilst they seem willing to disregard a potential backlash in situations where what they are confronted with are violations of sexual minority rights which directly attack the dignity of LGB persons, such as the Polish LGBTI-free zones policies.

5. CONCLUSION

This paper had as its aim to examine the role that the rise of right-wing populism in Central and Eastern European countries may have played in limiting the family rights of sexual minorities in Europe *at the supranational level*. It should be noted, nonetheless, that this paper is not, merely, bound to contribute to the scholarly discussion regarding the advancement of the rights of sexual minorities in Europe at a supranational level and of the

[88] See n 85.

[89] LGBTIQ Equality Strategy (n 84) 14-15.

[90] 'EU founding values: Commission starts legal action against Hungary and Poland for violations of fundamental rights of LGBTIQ people' (15/7/2021) – available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668 (last accessed on 26 March 2022).

impact of far-right populism on this. Rather, the use of the rights of sexual minorities as a case-study in this context, can offer valuable lessons for understanding, more broadly, the response of supranational, European, institutions, to matters that concern delicate issues with regard to which a European consensus is lacking and which, often, take centre-stage in the manifestos of rights-wing populist movements. Hence, the conclusions drawn in this paper can be transplanted into other, similar, contexts, which touch on issues relating to human rights, religion, morality, and tradition, such as sexual and reproductive health questions and the rights of ethnic and religious minorities.

The paper has shown that both of the European (supranational) Courts (the ECtHR and the ECJ) have been particularly cautious in their rulings in cases involving the family rights of the members of sexual minorities.

The paper has concluded that the ECtHR – as Europe's 'supreme' human rights court' – has secured, at least on paper, some core family rights for the members of sexual minorities, namely, the right to have same-sex relationships legally recognised and the right not to be discriminated against with regard to the enjoyment of some (other) family rights. However, that Court has judged that it is not yet the time for the 'final battle'– which will extend marriage to same-sex couples – to be fought. The continuing existence of a lack of consensus on the matter among European States and the rise of right-wing populism in Central and Eastern European States in the last few years means that a backlash and even a rollback of sexual minority rights is highly likely to ensue if the Court is viewed as imposing its own views on the matter, whilst ignoring the views of the government and (even) people in some States.

As regards the EU's response, we have seen that through its recent rulings in the cases of *Coman* and *V.M.A.*, the ECJ ruled that EU law requires *the cross-border* recognition of (existing) same-sex marriages and of the parent-child relationship between a child and both of her same-sex parents (as already established in a Member State), *at least* for the purpose of the grant of family reunification rights deriving from EU free movement law. The paper has concluded that these rulings demonstrate the ECJ's preference for a step-by-step approach in deciding which family rights EU law should require Member States to grant to the members of sexual minorities, as part of the Court's 'strategic calculations' which aim to avoid decisions that may lead to a political backlash. It has been explained that this appears to be an apt response in the current political climate, whereby the various crises that have battered Europe in the last decade or so, have provided fertile ground to right-wing populists throughout Europe to use the EU as a scapegoat and to fuel an increasing anti-EU sentiment. At the same time, the recent Commission actions against Hungary and Poland demonstrate that there are limits to the reticence of the EU institutions with regard to the leeway left to the Member States in relation to sexual minority rights. The danger of a backlash (as a result of pro-LGB rulings and actions) in EU Member States that are ruled by right-wing populist governments, can have a different impact on the approach of EU institutions, depending on the nature of the right that is at stake: EU institutions appear more reticent to impose *positive* obligations on EU Member States with regard to the family rights of sexual minorities, whilst they seem willing to disregard a potential backlash in situations where what they are confronted with are violations of sexual minority rights which directly attack the dignity of LGB persons.

Recent election results demonstrate that right-wing populist parties continue to gain ground in all parts of Europe: the (fourth!) landslide victory of Viktor Orban's right-wing populist Fidesz party in Hungary's national election in early April 2022, and Marine Le Pen's progression to the second round of the 2022 French presidential election in the same month, constitute important victories for the far right in Europe, which (further) reflect increasing popular dissatisfaction with the way that the various crises have been handled by the EU and through neo-liberal policies. Moreover, the ongoing Russia-Ukraine War and the resultant surging cost of living (and other crises that it is bound to bring) can only mean that the position of right-wing populist parties is likely to become further entrenched in the European political landscape. It is impossible to predict how – if at all – all these will affect the approach of the European, supranational, institutions towards the rights of sexual minorities. Nonetheless, the recent actions taken by the European Commission against the two most hard-core far-right populist governments in the EU, may not just constitute an exception to its traditionally reticent approach in situations involving sexual minority rights, but may, rather, signal that the EU is now determined to take a stricter approach where the values on which it is founded (and which are laid down in Article 2 TEU) are threatened by the actions of right-wing populist governments. Only time will tell, however, whether this is actually the case.
