

***The respect for (private and) family life in the case-law of the European Court
of Human Rights: the protection of new forms of family***

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1. Preliminary observations about Article 8

The respect for private and family life is a fundamental right protected in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) under Article 8. This provision aims essentially to prevent any arbitrary interference by the public authorities in the private and family sphere of every individual. This international instrument was adopted in 1950 within the framework of the Council of Europe and nowadays legally binds 47 States,² granting effective human rights protection and, in particular, guaranteeing respect for the family life of almost 800 million people.³

Article 8 ECHR reads as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

¹ The instant paper corresponds to the communication presented, on the 24th of August of 2009, at the 5th World Congress on Family Law & Children's Rights, Halifax, Canada.

² The Council of Europe, based in Strasbourg, was founded on 5 May 1949 by ten countries (Belgium, Denmark, France, Holland, Ireland, Italy, Luxembourg, Norway, Sweden and UK). In August 1949, Greece and Turkey joined this organization. Currently, many other countries are also part of the Council of Europe, namely, by date of accession: Iceland and Germany (1950), Austria (1956), Cyprus (1961), Switzerland (1963), Malta (1965), Portugal (1976), Spain (1977), Liechtenstein (1978), San Marino (1988), Finland (1989), Hungary (1990), Poland (1991), Bulgaria (1992), Slovakia, Slovenia, Estonia, Lithuania, Slovakia and Romania (1993), Andorra (1994), Albania, Latvia, Moldova, Former Yugoslav Republic of Macedonia and Ukraine (1995), Russian Federation and Croatia (1996), Georgia (1999), Armenia and Azerbaijan (2001), Bosnia-Herzegovina (2002), Serbia (2003), Monaco (2004) and Montenegro (2007).

³ In general, on the ECHR, *see, inter alia*, PIETER VAN DIJK ET AL., *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS*, (Kluwer Law International 2006) [hereinafter DIJK, *THEORY AND PRACTICE*]; FRÉDÉRIC SUDRE, *DROIT EUROPÉEN ET INTERNATIONAL DES DROITS DE L'HOMME* (Presses Universitaires de France 2005) [hereinafter SUDRE, *DROIT EUROPÉEN*]; CLARE OVEY & ROBIN WHITE, JACOBS AND WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Oxford University Press 2002) [hereinafter WHITE, JACOBS AND WHITE]; SERGIO BARTOLE ET AL., *COMMENTARIO ALLA CONVENZIONE EUROPEA PER LA TUTELA DEI DIRITTI DELL'UOMO E DELLE LIBERTÀ FONDAMENTALI* (CEDAM 2001); BLACKBURN & POLAKIEWICZ, *FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES, 1995-2000* (Oxford University Press 2001); DAVID J. HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Butterworths 1995).

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

This provision possesses a dual structure common to other substantive provisions of the ECHR: the first paragraph defines the scope of the protected right – the right to respect for private and family life, in this case – and the second paragraph lays down on which grounds Member States may legitimately interfere with the enjoyment of such right.

The first step that the European Court of Human Rights (Eur. Ct. H.R.)⁴ has to take in Article 8 ECHR claims is to analyse whether the relationship described by the applicant can be characterized as “family life”, as only in that case will the situation fall under the scope of this provision. Once a situation of “family life” has been established, the Eur. Ct. H.R. will determine whether there has been an interference with the right to respect for family life or if the Member State had a positive obligation and failed to act. Lastly, if concluding that there was an interference or omission by the Member State in question, the Eur. Ct. H.R. will examine whether it was justified under paragraph 2 of Article 8 and, accordingly, whether it was in accordance to the law, necessary in a democratic society or pursued any of the legitimate aims set out in this paragraph.

The vagueness of the expression “respect for private and family life” has raised considerable interpretive problems in the case-law of the Eur. Ct. H.R., which has been reflected in the way it as dealt with Article 8 claims throughout time. Also, considering

⁴ It should be noticed that until 1998 claims were also decided by the now-defunct European Commission of Human Rights (Eur. Comm’n H.R.).

that the ECHR is “a living instrument which must be interpreted in the light of present day conditions”⁵ and that it is “intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”,⁶ the Eur. Ct. H.R. has clearly opted for a dynamic or evolutive interpretation. Indeed, the case-law of the Eur. Ct. H.R. indicates the wording of this provision has come to assume different meanings in the light of the changing social, moral and cultural patterns of modern European society.⁷

For the sake of the effective protection of the right to private and family life, the Eur. Ct. H.R. has dynamically interpreted the coexisting concepts of “private life” and “family life”. This has allowed a substantial expansion of the scope of Article 8. Therefore, realities once not (meant to be) covered by the protective shield created by the drafters of the Convention, as the adulterous family,⁸ the transsexual’s right to marry,⁹ the environment¹⁰ or the right of minorities to maintain their traditional way of life,¹¹ are now protected. The impact of the adoption of evolutive interpretation of the notions in question is, therefore, very significant.

In addition, the dynamic interpretation of the term “respect” has let the Court to read into Article 8 not only traditional, negative obligations (by which a Member State must abstain from interfering with the enjoyment of this right to private and family life),

⁵ Tyrer v. the United Kingdom, 26 Eur. Ct. H.R. (ser. A) § 31 (1978). *See also, mutatis mutandis*, Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) § 41 (1979); Rees v. the United Kingdom, 106 Eur. Ct. H.R. (ser. A) § 47 (1986); Johnston and Others v. Ireland, 112 Eur. Ct. H.R. (ser. A) § 53 (1986); Christine Goodwin v. the United Kingdom, 2002-VI Eur. Ct. H.R. § 75.

All the Eur. Ct. H.R. decisions and judgments cited above and below are available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>.

⁶ Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A) § 24 (1979).

⁷ For more details about the evolutive interpretation of the Convention given by the Strasbourg organs, *see* Frédéric Sudre, *À propos du dynamisme interprétatif de la Cour européenne des droits de l’homme*, 28 LA SEMAINE JURIDIQUE 1365 (Juillet 2001); François Rigaux, *Interprétation consensuelle et interprétation évolutive*, in *L’INTERPRÉTATION DE LA CONVENTION EUROPÉENNE DES DROITS DE L’HOMME* 41 (Frédéric Sudre ed., Bruylant 1998).

⁸ *See* Johnston and Others v. Ireland, 112 Eur. Ct. H.R. (ser. A).

⁹ *See* Christine Goodwin v. the United Kingdom, 2002-VI Eur. Ct. H.R.

¹⁰ *See* López Ostra v. Spain, 303-C Eur. Ct. H.R. (ser. A) (1994).

¹¹ *See* Chapman v. the United Kingdom, 2001-I Eur. Ct. H.R.

but also positive obligations, namely substantive¹² and procedural¹³ (by which a Contracting State must take action to secure the enjoyment of the right enshrined). The use of a dynamic interpretation has, thus, been essential to carry out an extension of the content of the right to respect for private and family life.¹⁴

Furthermore, in close relation with the emergence of positive obligations and also to ensure the effectiveness of the right safeguarded, the Eur. Ct. H.R. has established that there may as well be obligations to secure an individual's right "even in the sphere of the relations of individuals between themselves".¹⁵ Consequently, the Strasbourg Court recognised the "horizontal effect" or *Drittwirkung* of the Convention, simultaneously expanding the application of Article 8.¹⁶

The above considerations, although quite concise, are sufficient to reveal that the Eur. Ct. H.R. has shown great generosity in granting legal protection to new forms of

¹² For example, to legally recognise the family relationship between an unmarried mother and her child born out of wedlock, as in *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) (1979), or to provide legal recognition of the new gender acquired by transsexuals who undergo gender re-assignment surgery, as in *Christine Goodwin v. the United Kingdom*, 2002-VI Eur. Ct. H.R.

¹³ For example, to ensure that natural fathers intervene in the adoption's decision-making process of their children, as in *Keegan v. Ireland*, 290 Eur. Ct. H.R. (ser. A) (1994), or to ensure the sufficient involvement of parents in the decision-making process leading to the taking of their children into public care, as in *W. v. the United Kingdom*, 121 Eur. Ct. H.R. (ser. A) (1987).

¹⁴ This principle was set out by the Court in the *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) § 31 (1979), when it stated that Article 8 "does not merely compel the state to abstain from such interferences: in addition to this primary negative undertaking, there may be positive obligations inherent in an 'effective respect' for family life". In this case in particular, the Court read into Article 8 a positive obligation to adopt legal measures to ensure the integration of a child born out of wedlock into the single mother's family from the moment of birth.

On positive obligations under the Convention, *see, e.g.*, SUDRE, DROIT EUROPÉEN, *supra* note 3, at 234-45; Keir Starmer, *Positive obligations under the Convention*, in UNDERSTANDING HUMAN RIGHTS PRINCIPLES 139, 139-59 (J. Jowell QC & J. Cooper ed., Hart Publishing 2001); Dean Spielmann, *Obligations positives et effet horizontal des dispositions de la convention*, in L'INTERPRETATION DE LA CONVENTION EUROPEENNE DES DROITS DE L'HOMME 133, 133-51 (Frédéric Sudre ed., Bruylant 1998) [hereinafter Spielmann, *Obligations positives*]; Frédéric Sudre, *Les obligations positives dans la jurisprudence européenne des droits de l'homme*, 23 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 363-84 (Juill. 1995).

¹⁵ *X. and Y. v. The Netherlands*, 91 Eur. Ct. H.R. (ser. A) § 23 (1985) (condemning the Contracting State because its criminal law did not provide means by which a sexual assault upon a mentally handicapped young woman could be the subject of a criminal prosecution).

¹⁶ *See* SUDRE, DROIT EUROPEEN, *supra* note 3, at 402; Carlo Russo, *Article 8 § 1*, in LA CONVENTION EUROPEENNE DES DROITS DE L'HOMME: COMMENTAIRE ARTICLE PAR ARTICLE 305, 320-21 (Louis-Edmond Pettiti et al. ed., Economica 1999); JACQUES VELU & RUSEN ERGEC, CONVENTION EUROPEENNE DES DROITS DE L'HOMME 533-534 (Bruylant 1990). In general, about the "horizontal effect" of the Convention, *see* Spielmann, *Obligations positives*, *supra* note 14, at 151-74.

“family life” by interpreting extensively paragraph 1 of Article 8 ECHR. Conversely, in relation to paragraph 2, the Strasbourg Court has been particularly deferential to the Contracting States: in the absence of European consensus, the Court has felt forced to allow Member States a wide margin of appreciation in assessing the necessity of an interference with the right guaranteed and, therefore, it has been less assertive in protecting such right.¹⁷ Thus, the dynamic interpretation of paragraph 1 Article 8 has been refrained by the use of the “margin of appreciation” doctrine within the context of paragraph 2.

Finally, it should be added that Article 8 must be read in conjunction with other articles, such as Article 12 on the right to marry and found a family, Article 14 on the right to non-discrimination, Article 5 of the Seventh Protocol on equality between spouses, and Article 1 of the First Protocol on the right to property.

2. The concept of “family life”

As already alluded to above, in assessing an alleged violation of Article 8, the Court begins by investigating if the relationship described by the applicant constitutes

¹⁷ For instance, in the case *X, Y and Z v. the United Kingdom*, 1997-II Eur. Ct. H.R., although the Eur. Ct. H.R. considered that there was family life between a female-to-male transsexual, his female partner and her child born by artificial insemination, it stressed the lack of any common European standard with regard to the granting of parental rights to transsexuals when reasoning about the State’s failure to allow the female-to-male transsexual to be registered as the father of that child and, therefore, decided that there had been no violation of Article 8.

On the margin of appreciation doctrine, *see, inter alia*, Clare Ovey, *The margin of appreciation and article 8 of the Convention*, 19 HUM. RTS. L. J. 10 (1998); Pierre Lambert, *Marge nationale d’appréciation et contrôle de proportionnalité*, in *L’INTERPRETATION DE LA CONVENTION EUROPEENNE DES DROITS DE L’HOMME* 63 (Frédéric Sudre ed., Bruylant 1998); ELIAS KASTANAS, *UNITE ET DIVERSITE: NOTIONS AUTONOMES ET MARGE D’APPRECIATION DES ETATS DANS LA JURISPRUDENCE DE LA COUR EUROPEENNE DES DROITS DE L’HOMME*, (Bruylant 1996); Eva Brems, *The margin of appreciation doctrine in the case-law of the European Court of Human Rights* *Jahr. 56 1-2 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 240 (1996); HOWARD CHARLES YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF THE EUROPEAN HUMAN RIGHTS JURISPRUDENCE*, (Kluwer Law International 1996).

“family life”. Thus, the protection granted by Article 8 requires the existence of a “family”.¹⁸

Since the authors of the Convention did not define the concept of “family” or the concept of “family life”, it is for the Strasbourg Court to determine case-by-case what constitutes a “family” under the Convention. As rightly argued by Frédéric Sudre, this indeterminacy of the concepts of “family” and “privacy”, in conjunction with the evolutive interpretation, led the Eur. Ct. H.R. to a process of expansion and dilution of the concept of “family life”.¹⁹

In this process of construction of the concept of “family life” under Article 8, the Eur. Ct. H.R. begins by pointing out that a lawful and genuine marriage undoubtedly gives rise to family life.²⁰ However, as the Eur. Ct. H.R. often stresses, the notion of family under this provision “may encompass other *de facto* ‘family’ ties where the parties are living together outside of marriage”.²¹ Moreover, for the purposes of Article 8, no distinction should be made between families based on matrimony and those that are not, as a different standpoint would be contrary to Article 14.²² In addition, generally, the relationship between parents and their children constitutes family life starting from the moment of birth and by the very fact of it, regardless of being a child born in or out of wedlock.²³

The Strasbourg Court has made it clear that “the existence or non-existence of ‘family life’ is essentially a question of fact depending upon the real existence in

¹⁸ See, *inter alia*, Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) § 31 (1979).

¹⁹ Frédéric Sudre, *Rapport Introductif – La “construction” par le juge européen du droit au respect de la vie familiale*, in LE DROIT AU RESPECT DE LA VIE FAMILIALE AU SENS DE LA CONVENTION EUROPEENNE DES DROITS DE L’HOMME 11, 11-17 (Frédéric Sudre ed., Bruylant 2002) [hereinafter Sudre, *Raport Introductif*].

²⁰ Abdulaziz, Cabales and Balkandali v. the United Kingdom, 94 Eur. Ct. H.R. (ser. A) § 62 (1985).

²¹ Keegan v. Ireland, 290 Eur. Ct. H.R. (ser. A) § 44 (1994). See, *mutatis mutandis*, Kroon and Others v. the Netherlands, 297-C Eur. Ct. H.R. (ser. A) § 30 (1994); Elsholz v. Germany, 2000-VIII Eur. Ct. H.R. § 43; Lebbink v. the Netherlands, 2004-IV Eur. Ct. H.R. § 34.

²² Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) § 31 (1979).

²³ Keegan v. Ireland, 290 Eur. Ct. H.R. (ser. A) § 44 (1994).

practice of close personal ties”²⁴. Several relevant factors may be considered in order to demonstrate that the relationship invoked by the applicant has sufficient constancy to create “family life”, *e. g.*, whether the couple live together,²⁵ the length of their relationship,²⁶ whether they have demonstrated their commitment to each other by having children together²⁷, whether there are elements of financial and/or psychological dependency involving more than normal emotional ties²⁸, or even whether there is regular visitation by the parent.²⁹

Consistent with this, and according to the Eur. Ct. H.R., “family life” may embrace stable heterosexual relationships, as well as biological ties between a parent and a child, whether they arise from a mono-parental,³⁰ a bi-parental³¹ or an adulterous³² relationship, as long as the ties are sufficiently close and effective.

²⁴ Brauer v. Germany, Eur. Ct. H.R. § 30 (2009). *See, mutatis mutandis*, Lebbink v. the Netherlands, 2004-IV Eur. Ct. H.R. § 36; K. and T. v. Finland, Eur. Ct. H.R. § 150 (2001).

²⁵ *See* Johnston and Others v. Ireland, 112 Eur. Ct. H.R. (ser. A) §§ 56, 72 (1986); Keegan v. Ireland, 290 Eur. Ct. H.R. (ser. A) § 45 (1994). It should be noted, however, that the European Court considers that cohabitation is not always necessary. For example, in Berrehab v. the Netherlands, 138 Eur. Ct. H.R. (ser. A) § 21 (1988), the Court held that “family life” existed even if the parents were not living together at the time of the child’s birth. Furthermore, the fact that after the divorce or breakup not all members of the family live together any more does not put an end to their family life nor constitutes an obstacle to its creation. In Elsholz v. Germany, Eur. Ct. H.R. (2000), *e.g.*, although the parents were no longer living together, the father maintained regular contact with his son and, accordingly, the Court considered that there was “family life” between them.

²⁶ *See, e.g.*, Quintana Zapata v. Spain, App. No. 34615/97, 92-A Eur. Comm’n H.R. Dec. & Rep 139 (1998) (holding that a *more uxorio* relationship that lasted 65 years constituted undoubtedly “family life”).

²⁷ *See, e.g.*, Kroon and Others v. the Netherlands, 297-C Eur. Ct. H.R. (ser. A) (1994) (considering that although the couple had never live together, they had a long-standing relationship and had four children and therefore the Court found that they had “family life” within the scope of Article 8).

²⁸ *See, e.g.*, Emonet and Others v. Switzerland, Eur. Ct. H.R. § 37 (2007), (founding “additional factors of dependence other than normal ties of affection”, since the first applicant, due to a serious illness that left her paraplegic, needed to be cared by her biological mother and her adoptive father, respectively second and third applicants).

²⁹ Gül v. Switzerland, 1996-I Eur. Ct. H.R. § 33

³⁰ Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) § 31 (1979).

³¹ McMichael v. the United Kingdom, 307-B Eur. Ct. H.R. (ser. A) (1995).

³² Kroon and Others v. the Netherlands, 297-C Eur. Ct. H.R. (ser. A) (1994).

Relationships between near relatives, as those between siblings,³³ or between grandparents and grandchildren³⁴, or even between uncles/aunts and nephews/nieces,³⁵ may likewise fall within the protective scope of Article 8.³⁶

With regard to recomposed families, the Eur. Ct. H.R. found, *e.g.*, in *K. and T. v. Finland*, that family ties, within the meaning of Article 8, included the relationship between a child and his social father, who was living with the biological mother of that same child.³⁷

The notion of “family life”, in the Strasbourg Court’s view, also comprises the link between adoptive parents and their adoptive children.³⁸ With regard to fostering relationships, the Strasbourg Court seems to find that these relationships constitute “family life” within the meaning of Article 8,³⁹ even though it has not had the opportunity to rule directly on this matter.⁴⁰

³³ *See, e.g.*, *Moustaquim v. Belgium*, 193 Eur. Ct. H.R. (ser. A) (1991), (stating that there was “family life” between the applicant and his siblings).

³⁴ *See, e.g.*, *Vermeire v. Belgium*, 214-C Eur. Ct. H.R. (ser. A) (1991) (concerning the exclusion of a grandchild from the estate of a grandparent solely because of the “illegitimate” nature of the affiliation between them).

³⁵ *See, e.g.*, *Boyle v. the United Kingdom*, 282-B Eur. Ct. H.R. (ser. A) (1994) (where the applicant complained about the denial of access to his nephew, who had been taken into public care, because British law did not envisage this possibility).

³⁶ In this regard, the Court held in the *Marckx* Judgment that “family life”, in the sense of Article 8, “includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in the family”. *See Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) § 45 (1979).

³⁷ *K. and T. v. Finland*, Eur. Ct. H.R. §§149, 150 (2001).

³⁸ *Pini, Bertani and Others v. Romania*, 2004-V Eur. Ct. H.R. §§ 146, 148. In fact, in this case the Court favoured a simple link, arising from a lawful and genuine adoption, over the close *de facto* ties factor, since, although there was no cohabitation nor development of sufficiently *de facto* close ties between adopted children and adoptive parents before or after the adoption orders, the simple “potential relation”, arising from a lawful and genuine adoption, was already worthy of the protection granted by Article 8.

³⁹ *See Rieme v. Sweden*, 226-B Eur. Ct. H.R. (ser. A) § 70 (1992).

⁴⁰ *But see Cecilia and Lisa Eriksson v. Sweden*, App. No. 11373/85, Eur. Comm’n H.R. 64 (1988) (Schermers, dissenting) (holding that “[n]ormally, there will be family life (as of fact) between foster parents and their children” and “[t]he strength of this family life depends on factual circumstances and, in particular, on the duration and the age of the child and on the relationship between duration and age”). *See also Görgülü v. Germany*, Eur. Ct. H.R. § 44 (2004).

Polygamous marriages may also create “family life” and, hence, may be entitled to the protection granted by Article 8,⁴¹ notwithstanding the fact that it does not seem to be an obligation to recognise polygamous unions as formal marriages.⁴²

The Eur. Ct. H.R. has also combined the “sufficiently close interpersonal ties” factor to the “appearance of a family” factor, in order to determine the existence of “family life” between people not bound by blood, marriage or adoption.⁴³

By way of example, in *X, Y and Z v. the United Kingdom*, the Eur. Ct. H.R. stated that *de facto* family ties linked X, a female-to-male transsexual, who had undergone gender reassignment surgery, Y, a woman, with whom X had lived for 18 years to all appearances as her male partner, and Z, Y’s child as a result of artificial insemination by a donor. In fact, the Court noted that in this case there was a clear social appearance of a traditional family, since both X and Y had applied jointly for treatment by artificial insemination, and X had been involved throughout that process and had play the role of Z’s “father” in every respect since his birth.⁴⁴

In sum, according to the well established case-law of the Strasbourg Court, in the case of married couples and children who are born in or out of wedlock, and in the case of other close family relationships, the genuineness of the family ties is presumed, even if subject to proof to the contrary.⁴⁵ Thus, while the mere existence of a biological link may not be sufficient to trigger the protection granted by Article 8, the absence of biological ties does not preclude the existence of family life, as long as either the “sufficiently close interpersonal ties” or the “appearance of a family” criterion is verified.

⁴¹ See, e.g., *E.A. and A.A v. the Netherlands*, App. No. 14501/89, 72 Eur. Comm’n H.R. Dec. & Rep 118 (1992).

⁴² See *Alam and Khan v. the United Kingdom*, App. No. 2991/66, 1968 Y.B. Eur. Conv. H.R. 788 (Eur. Comm’n H.R.).

⁴³ Sudre, *Raport Introductif*, *supra* note 19, at 21.

⁴⁴ *X, Y and Z v. the United Kingdom*, 1997-II Eur. Ct. H.R §§ 35-37.

⁴⁵ DIJK, *THEORY AND PRACTICE*, *supra* note 3, at 694.

And what does not constitute family life under Article 8?

The protective shield of Article 8 does not encompass the mere desire to found a family, either by marrying, as the Strasbourg Court pointed out in *Abdulaziz, Cabales and Balkandali v. the United Kingdom*,⁴⁶ or having the opportunity to adopt children, as this Court stressed in *Fretté v. France*⁴⁷. Moreover, a relationship between a fiancé and fiancée does not in itself constitute “family life”.⁴⁸

In addition, the European Commission of Human Rights took the view that the sperm donor “that donates sperm only to enable a woman to become pregnant through artificial insemination does not of itself give the donor a right to respect for family life with the child”.⁴⁹

As regards homosexual relationships, considering the different views of the Member States in relation to this issue, they are yet to be protected as “family life”. The Convention institutions have, indeed, reiterated that “despite the modern evolution of attitudes towards homosexuality”, a stable homosexual relationship between two women or two men does not give rise to family life and hence does not fall within the scope of the right to respect for family life, granting them, nevertheless, protection under the concept of “private life”.⁵⁰

The uncertainty and the coexistence of the concepts of “privacy” and “family” in Article 8 has also led the Court to blur the boundary between them, which resulted, on numerous occasions, in the emergency of the nebulous concept of “respect for private and family life”, including the right to establish and develop interpersonal relations. It

⁴⁶ *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 94 Eur. Ct. H.R. (ser. A) § 62 (1985).

⁴⁷ *Fretté v. France*, 2002-I Eur. Ct. H.R. § 32 (recalling, when called to rule on adoption by single homosexuals, that the Convention does not guarantee the right to adopt as such and, in addition, emphasizing that “the right to respect for family life presupposes the existence of a family and does not safeguard the mere desire to found a family”). *See also* *E.B. v. France*, Eur. Ct. H.R. § 41 (2008).

⁴⁸ *Wakefield v. the United Kingdom*, App. No. 11373/85, 66 Eur. Comm’n H.R. Dec. & Rep 225 (1990).

⁴⁹ *J.R.M. v. the Netherlands*, App. No. 16944/90, 74 Eur. Comm’n H.R. Dec. & Rep 120 (1993).

⁵⁰ *See, e.g., Rössli v. Germany*, App. No. 28318/95, 85-A Eur. Comm’n H.R. Dec. & Rep 149, 151 (1996).

is, indeed, within the scope of the concept of “respect for private and family life” that the Strasbourg Court has granted protection under Article 8 to rights such as the right to a safe environment,⁵¹ the right of a minority to maintain a traditional way of life,⁵² the right to identity,⁵³ the right to personal history,⁵⁴ and even the right to return the body of a young child to her parents for bereavement.⁵⁵

This broad interpretation of the right to respect for private and family life has undoubtedly permitted the extension of the protective shield of this provision and, therefore, also ensured its vitality. However, this approach has equally led to a progressive dilution of the specificity and precise boundaries of the concept of “family life”.⁵⁶

⁵¹ See, e.g., *López Ostra v. Spain*, 303-C Eur. Ct. H.R. (ser. A) § 51 (1994) (finding that “severe environmental pollution may affect individuals’ physical well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however seriously endangering their health”). See also *Moreno Gómez v. Spain*, 2004-X Eur. Ct. H.R. § 54; *Guerra and Others v. Italy*, 1998-I Eur. Ct. H.R. § 57; *Powell and Rayner v. the United Kingdom*, 172 Eur. Ct. H.R. (ser. A) § 40 (1990).

⁵² See, e.g., *Chapman v. the United Kingdom*, 2001-I Eur. Ct. H.R. § 73 (holding that measures affecting the stationing of caravans may affect the applicant’s “ability to maintain her identity as Gipsy and to lead her private and family life in accordance with that tradition”).

⁵³ See, e.g., *Burghatz v. Switzerland*, 280-B Eur. Ct. H.R. (ser. A) § 24 (considering that, although the Convention does not include any specific provision on names, a person’s name, which is a mean of personal identification and of linking to a family, concerns his or her private and family life). See also *Stjerna v. Finland*, 299-B Eur. Ct. H.R. (ser. A) § 37 (1994); *Guilot v. France*, 1996-V Eur. Ct. H.R. § 21; *Ünal Tekeli v. Turkey*, 2004-X Eur. Ct. H.R. § 42.

⁵⁴ See, e.g., *Gaskin v. the United Kingdom*, 160 Eur. Ct. H.R. (ser. A) §§ 41, 49 (1989) (stating that the authorities’ failure to grant unimpeded access to the applicants social service case records interfered with his right to respect for his private and family life).

⁵⁵ See *Pannullo and Forte v. France*, 2001-X Eur. Ct. H.R. § 31 (finding that the authorities’ delay – seven months – in returning the body of a young child who had died in hospital to her parents constituted an unjustified interference with their right to private and family life).

⁵⁶ For more details about the evolutionary case-to-case construction of the concept of “family life”, see, *inter alia*, Hans Danelius, *Reflections on some important Judgements of the European Court of Human Rights regarding family life*, in *FAMILY LIFE AND HUMAN RIGHTS* 153 (Peter Lødrup & Eva Modvar ed., Gyldendal 2004) [hereinafter Danelius, *Reflections*]; GILLES DUTERTRE, *KEY CASE – LAW EXTRACTS: EUROPEAN COURT OF HUMAN RIGHTS 268-93* (Council of Europe Publishing 2003); WHITE, JACOBS AND WHITE, *supra* 3, at 217-24; Sudre, *Raport Introductif, supra* 19, at 11-54; DONNA GOMIEN ET AL., *LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND EUROPEAN SOCIAL CHARTER 239-253* (Council of Europe Publishing 1999) [hereinafter GOMIEN, *LAW AND PRACTICE*]; Jane Liddy, *Current topic: the concept of family life under ECHR*, 1 EUR. HUM. RTS. L. REV. 15 (1998); David Feldman, *The developing scope of article 8 of the European Convention on Human Rights*, 3 EUR. HUM. RTS. L. REV. 265 (1997); Vincent Coussirat-Coustère, *La notion de famille dans les jurisprudences de la Commission et de la Cour européennes des droits de l’Homme*, in *INTERNATIONALISATION DES DROITS DE L’HOMME ET EVOLUTION DU DROIT DE LA FAMILLE* 45 (1996).

3. De facto families and the respect for family life

The Court has repeatedly emphasised, as noted above, that “family life” does not only encompass *de jure* family relationships, traditionally based on marriage, but also sufficiently close *de facto* family ties, where the parties are living together outside marriage.⁵⁷ Moreover, the Court has stressed that Article 8, taken in conjunction with Article 14, does not distinguish between legally formalised families and natural families.⁵⁸

In regard to *children born out of wedlock*, despite recognising “that support and encouragement of the traditional family is in itself legitimate or even praiseworthy”,⁵⁹ the Strasbourg Court, considering the socio-cultural developments in this field and the existence of consensus across the Contracting States in favour of eradicating discrimination against “illegitimate” children,⁶⁰ has upheld the principle that no distinction should be made between children born in or out of wedlock. Indeed, the Court has stated that “very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of wedlock can be regarded as compatible with the Convention”.⁶¹ Furthermore, in this regard, the Court has sustained that Member States have a positive obligation to ensure that a child born out of wedlock enjoys the same legal status as the a child born in wedlock.⁶²

In the leading case *Marckx v. Belgium*, in which the applicants – an unmarried mother and her child born out of wedlock – complained about the denial to an

⁵⁷ See *supra* note 21.

⁵⁸ See, e.g., *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) § 31 (1979); *Mazurek v. France*, 2000-II Eur. Ct. H.R. § 30; *Pla and Puncernau v. Andorra*, 2004-VIII Eur. Ct. H.R. § 62.

⁵⁹ *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) § 40 (1979). See, *mutatis mutandis*, *Mazurek v. France*, 2000-II Eur. Ct. H.R. § 50.

⁶⁰ See, e.g., *Mazurek v. France*, 2000-II Eur. Ct. H.R. § 52, § 41; *Inze v. Austria*, 126 Eur. Ct. H.R. (ser. A) § 41 (1987); *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) § 41 (1979).

⁶¹ *Pla and Puncernau v. Andorra*, 2004-VIII Eur. Ct. H.R. 61. See, *mutatis mutandis*, *Inze v. Austria*, 126 Eur. Ct. H.R. (ser. A) § 41 (1987); *Mazurek v. France*, 2000-II Eur. Ct. H.R. § 49.

⁶² See *Johnston and Others v. Ireland*, 112 Eur. Ct. H.R. (ser. A) § 74 (1986).

“illegitimate” child of both legal relations with the parents of the mother, and of rights equal to those of “legitimate” children, the Court held that:

[W]hen the State determines in its domestic legal system the regime applicable to certain family ties such as those between an unmarried mother and her child, it must act in a manner calculated to allow those concerned to lead a normal family life.⁶³

The Court also noted that the State has a choice of various means, but, in its actions, it “must avoid any discrimination grounded on birth”.⁶⁴

The existence of these positive obligations was reiterated by the Eur. Ct. H.R. in *Johnston and Others v. Ireland*, which concerned the recognition of the family-law relationship between a child and her parents who could not marry due to the prohibition of divorce in Ireland at the time. In this case, the Court pointed out that, although Article 8 did not oblige a State to implement a right to divorce, it required the State to place a child born out of wedlock, “legally and socially, in a position akin to that of a legitimate child”.⁶⁵

In addition, the Strasbourg Court applied the principle of non-discrimination to matters regarding patrimonial rights as well. According to the Eur. Ct. H.R., the concept of “family life” does not comprise only “social, moral or cultural relations”; it also includes “interests of a material kind”.⁶⁶ Thus, this application of the principle of non-discrimination in relation to patrimonial rights of children born out of wedlock demands that no restrictions be made these children’s capacity to receive property from

⁶³ *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) § 31 (1979).

⁶⁴ *Id.* § 34.

⁶⁵ *Johnston and Others v. Ireland*, 112 Eur. Ct. H.R. (ser. A) § 74 (1986).

⁶⁶ *See Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) § 52 (1979); *Merger and Cros v. France*, Eur. Ct. H.R. § 46 (2004).

their parents, as in *Marckx v. Belgium*,⁶⁷ and that these children be recognized the same inheritance rights on intestacy over estates of their near relatives, as in *Vermeire v. Belgium*.⁶⁸ Furthermore, the principle of non-discrimination also requires that restrictions on adulterine children's inheritance rights should be abolished, as in *Mazurek v. France*,⁶⁹ and that criteria applicable to the choice of the principal heir giving precedence to "legitimate" over "illegitimate" children should be eliminated, as in *Inze v. Austria*.⁷⁰

The case-law of the Strasbourg Court has likewise laid down a set of principles regarding the *establishment of affiliation of children born out of wedlock*, headed primarily by the best interest of the child and reflecting a fair balance between "the biological truth" and "the social parentage". Accordingly, it is in the best interest of the child to create in domestic law the legal safeguards "that render possible as from the moment of birth or as soon as practicable thereafter the child's integration in his family",⁷¹. In relation to the establishment of maternal affiliations in particular, as the Strasbourg Court held in *Marckx v. Belgium*, it is a fundamental right for a mother and her child to have their link of affiliation established from the moment of birth and by the

⁶⁷ See *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) § 55 (1979) (finding that the natural mother's need to have recourse to adoption in order to improve her daughter's situation regarding patrimonial rights constituted a breach of Article 14, taken in conjunction with Article 8).

⁶⁸ See *Vermeire v. Belgium*, 214-C Eur. Ct. H.R. (ser. A) § 28 (1991) (holding that the total lack of inheritance rights on intestacy, based only on the "illegitimate" nature of the affiliation, was discriminatory). See also *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) §§ 56, 59 (1979).

⁶⁹ See *Mazurek v. France*, 2000-II Eur. Ct. H.R. §§ 52, 55.

⁷⁰ See *Inze v. Austria*, 126 Eur. Ct. H.R. (ser. A) § 45 (1987) (considering that giving precedence to "legitimate" over "illegitimate" children in relation to the attribution of a hereditary farm was discriminatory).

On the case-law of Strasbourg relating to the children born out of wedlock see, e.g., Jean-Pierre Marguénaud, *L'égalité des droits patrimoniaux de la famille*, in *LE DROIT AU RESPECT DE LA VIE FAMILIALE AU SENS DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME*, 335, 335-44 (Frédéric Sudre ed., Bruylant 2002); GOMIEN, *LAW AND PRACTICE*, *supra* note 56, at 240-242; SYLVAIN GRATALOUP, *L'ENFANT ET SA FAMILLE DANS LES NORMES EUROPÉENNES* 366-73 (L.G.D.J. 1998); Paola Anna Pillitu, *La tutela della famiglia naturale nella convenzione europea dei diritti dell'uomo*, LXXII *RIVISTA DI DIRITTO INTERNAZIONALE* 793, 800-24 (1989).

⁷¹ *Kroon and Others v. the Netherlands*, 297-C Eur. Ct. H.R. (ser. A) § 32 (1994). See also, e.g., *mutatis mutandis*, *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) § 31 (1979).

very fact of it, with the full juridical recognition of the maxim *mater semper certa est*.⁷² With reference to paternal affiliation, the law should ensure the possibility of establishing paternal affiliation by presumption, by voluntary recognition and by judicial decision. On the matter of presumption of paternal affiliation, the Eur. Ct. H.R. found, in *Kroon and Others v. the Netherlands*, that domestic law should provide a wide range of legal safeguards to allow the challenge of the paternity presumption, namely the *pater is est quem nuptiae demonstrant* presumption, as the respect for family life “requires that biological and social reality prevail over a legal presumption”.⁷³ Nevertheless, in *Nylund v. Finland*, the Strasbourg Court held that it is justifiable “to give greater weight to the interests of the child and the family in which it lives than to the interest of an applicant in obtaining determination of a biological fact” and, therefore, it is acceptable that the applicant – a natural father – is prevented from challenging a legal presumption.⁷⁴ As regards voluntary recognition, the Eur. Ct. H.R., in *Yousef v. the Netherlands*, noted that, considering the best interest of the child, imposing certain conditions to be satisfied by an applicant who wishes to legally recognise the paternity of his daughter does not constitute a breach of his right to respect for his family life.⁷⁵ In addition, as asserted in *Róžański v. Poland*, the respect for family life of a putative biological father demands that he should have direct procedural right to claim the establishment of his legal paternity.⁷⁶ In *Mikulić v.*

⁷² See *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) §§ 31, 41 (1979).

⁷³ *Kroon and Others v. the Netherlands*, 297-C Eur. Ct. H.R. (ser. A) § 40 (1994) (concerning a child whose mother was married to a man who had disappeared before the child’s conception and was at that time in a stable relationship with the applicant; the mother and the biological father claimed, thus, that domestic law did not permit them to challenge the presumption of the husband’s paternity, unless the husband – who had disappeared – participated in the proceedings).

⁷⁴ *Nylund v. Finland*, App. No. 27110/95, 1999-VI Eur. Ct. H.R. 15, 16 (where a child was born to a woman who was married and whose husband was presumed to be the child’s father and where the applicant – the child’s putative biological father – claimed the right to bring proceedings in order to establish his paternity even though the child’s mother and her husband opposed it).

⁷⁵ *Yousef v. the Netherlands*, 2002-VIII Eur. Ct. H.R. §§ 69-75 (in this ruling the Court also bore in mind the infrequent and insufficient contact with the child).

⁷⁶ *Róžański v. Poland*, Eur. Ct. H.R. §§ 73, 79 (2006).

Croatia, the Court also ruled that, in cases where the Member State has no procedural means to compel the alleged father to comply with a court order for DNA tests to be carried out, it should provide “alternative means enabling an independent authority to determine the paternity claim speedily”.⁷⁷

The Convention case-law regarding the rights of *natural fathers* has evolved considerably over the years, gradually strengthening their legal status.

Initially, regarding the right to care and custody of natural fathers, both the Commission and the Court allowed a difference of treatment between natural fathers and natural mothers, resorting to the notion of “meritorious” fathers. These bodies considered legitimate to assert whether natural fathers were “meritorious” or not, as long as this was done in accordance with the principle of proportionality. Therefore, these bodies upheld that a legal presumption that confers automatically the right to care and custody to the mother protects the interests of the child and the mother. Consequently, it pursues a legitimate aim, as “the nature of the relationships of natural fathers with their children will inevitably vary, from ignorance and indifference”.⁷⁸

More recently, in relation to parental rights of access, the Strasbourg Court ruled that the difference of treatment between the divorced fathers and the natural fathers after family disruption is not consistent with Article 8 ECHR, taken in conjunction with Article 14 ECHR. In doing so, the Court rightly laid down the principle that very weighty reasons need to be put forward before a difference of treatment between a father of a child born out of wedlock and a father of a child born in wedlock can be

⁷⁷ Mikulić v. Croatia, 2002-I Eur. Ct. H.R. § 64.

⁷⁸ McMichael v. the United Kingdom, 307-B Eur. Ct. H.R. (ser. A) § 98 (1995) (concerning a case where the applicant – an unmarried father – claimed that, unlike the mother and the married father, he had no right to care and custody over his child from the child’s birth and, therefore, had no right to participate in the compulsory care proceedings and the adoption proceedings of his child). *See also* B.R. and J. v. Germany, App. No. 9639/82, 36 Eur. Comm’n H.R. Dec. & Rep 130, 140-41 (1984); B.N. v. Denmark, App. No. 13557/88, 63 Eur. Comm’n H.R. Dec. & Rep 167 (1989).

regarded as compatible with the Convention.⁷⁹ In addition, in such cases concerning parental rights of access, the Court has held that there is no breach of Article 8 ECHR if the national authorities sufficiently involve the natural father in the decision-making process to provide him with the possibility of protecting his interests. According to the Court, only sufficient involvement in the decision-making process ensures that the interests of the natural parents are taken into account by the national authorities and, hence, ensures respect for their family life.⁸⁰

In cases where a child born out of wedlock is placed for adoption without the natural father's knowledge or consent, the Eur. Ct. H.R. has given considerable weight to the scope of the natural father's involvement in the decision-making process. Therefore, the Court finds no breach of Article 8 if the natural father's procedural rights are safeguarded by national authorities in the decision-making process.⁸¹

⁷⁹ See *Hoffmann v. Germany*, Eur. Ct. H.R. §§ 53, 60 (2001); *Sahin v. Germany*, Eur. Ct. H.R. §§ 92-95 (2003); *Sommerfeld v. Germany*, 2003-VIII Eur. Ct. H.R. §§ 91-94 (all finding a violation of Articles 8 and 14 ECHR, as the German Law placed a heavier burden on the natural father than the one on divorced fathers, because, unlike the latter, the natural father did not have right of access to his child and the mother's refusal of access could only be overridden by a court when access was "in the interest of the child").

⁸⁰ See, e.g., *Elsholz v. Germany*, 2000-VIII Eur. Ct. H.R. §§ 49, 52, 53 (finding that the refusal to order an independent psychological report and the absence of a hearing did not permit sufficient involvement of the natural father in the decision-making process and, therefore, there was a violation of Article 8 ECHR). *But see* *Sommerfeld v. Germany*, 2003-VIII Eur. Ct. H.R. § 44 (considering that the "German courts' procedural approach was reasonable in the circumstances and provided sufficient material to reach a reasoned decision on the question of access in the particular case" and, therefore, finding no violation of Article 8 ECHR).

⁸¹ See, e.g. *Keegan v. Ireland*, 290 Eur. Ct. H.R. (ser. A) § 55 (1994) (holding that the Irish law, by permitting a child to be placed for adoption without his/her natural father's knowledge or consent, violated Article 8 ECHR). See also *McMichael v. the United Kingdom*, 307-B Eur. Ct. H.R. (ser. A) §§ 90-93 (1995) (finding also a breach of Article 8, on the basis that the natural father was not sufficiently involved in the decision-making process, namely because he did not have access to all reports or relevant documents upon which the decisions had been based). *But see* *Söderbäck v. Sweden*, 1998-VII Eur. Ct. H.R. §§ 32-35 (finding that, although the adoption order was made without the natural father's consent, he was heard in the proceedings, the national authorities made an investigation and obtained an expert opinion and, thus, there was no violation of Article 8).

On the natural father's status in the case-law of the Convention institutions, see, e.g., SUDRE, DROIT EUROPÉEN, *supra* note 3, at 433-39; Danelius, *Reflections*, *supra* note 56, at 158-59; URSULA KILKELLY, THE CHILD AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 246-249, 284-288, 298-314 (Ashgate 2000); GOMIEN, LAW AND PRACTICE, *supra* note 56, at. 240-242; Ian Karsten, *Atypical families and the Human Rights Act: the rights of unmarried fathers, same sex couples and transsexuals*, 4 EUR. HUM. RTS. L. REV. 195, 196-202 (1999); Katherine O'Donnell, *Parent-child relationships within the European Convention*, in FAMILIES ACROSS FRONTIERS 135, 147-148 (Nigel Lowe & Gillian Douglas ed., Martinus Nijhoff Publishers 1996).

With regard to *de facto heterosexual couples* and according to the established case-law of the Convention institutions, the stable relationship of an unmarried couple who cohabit gives rise to “family life”, within the meaning of Article 8 and, thus, falls within the scope of this provision.⁸² Nevertheless, the Court refused in *Johnston and Others v. Ireland* to read into Article 8 a positive obligation compelling Member States to establish for unmarried couples a status analogous to that of married couples.⁸³

The Eur. Ct. H.R. has, however, reviewed its approach regarding this matter. Indeed, in several cases, the Court pointed out that married couples and *de facto* couples may be considered as being in an analogous position for the purposes of Article 14. Accordingly, in order to be regarded as compatible with the Convention, the difference in treatment between spouses and cohabitants must have an objective and reasonable justification. Even so, bearing in mind that this is an area where the margin of appreciation granted to Member States remains very wide, the Court has held that the protection of the traditional family may be identified as a legitimate aim and the means employed to advance that aim may be considered proportionate.⁸⁴

In sum, the commitment to equality between the *de jure* family and the *de facto* family is, regarding this issue, suspended by the Strasbourg case-law, on the grounds of

⁸² See, e.g., *Johnston and Others v. Ireland*, 112 Eur. Ct. H.R. (ser. A) §§ 55-56 (1986); *Keegan v. Ireland*, 290 Eur. Ct. H.R. (ser. A) §§ 44, 45 (1994); *Saucedo Gómez v. Spain*, App. No. 37784/97, Eur. Ct. H.R. 8 (1999).

⁸³ See *Johnston and Others v. Ireland*, 112 Eur. Ct. H.R. (ser. A) § 68 (1986). The same reasoning is found in *Lindsay v. the United Kingdom*, App. No. 11089/84, 49 Eur. Comm’n H.R. Dec. & Rep 181 (1986) (holding that the situation of a married and an unmarried couple could not be considered comparable for the purposes of taxation assessments).

⁸⁴ See *Quintana Zapata v. Spain*, App. No. 34615/97, 92-A Eur. Comm’n H.R. Dec. & Rep 139, 145 (1998) (considering that “differences in treatment with regard to widows’ pensions as between spouses and persons who lived together outside marriage pursue a legitimate aim and are based on an objective and reasonable justification that is, the protection of the traditional family”). See also *Saucedo Gómez v. Spain*, App. No. 37784/97, Eur. Ct. H.R. 8 (1999) (finding that the difference in treatment arose by the domestic law on allocation of the family home and maintenance payments between married and *de facto* couples pursued a legitimate aim: the protection of traditional family); *Shackell v. the United Kingdom*, App. No. 45851/99, Eur. Ct. H.R. (2000) (where the Court followed the same line of analysis, but this time regarding to a difference in treatment in relation to social security legislation and to the benefits afforded to widows). *But see* *P.M. v. the United Kingdom*, Eur. Ct. H.R. §§ 27-29 (2005) (applying the same reasoning, although considering that in this case there was no reason for treating the applicant – a natural father – differently from a married father, after family disruption, as regards the tax deductibility of maintenance payments to his child and, thus, finding a violation of the Convention).

protection of marriage and of the traditional family. Therefore, the Eur. Ct. H.R. sets a clear hierarchy of models of conjugal relationships, offering a privileged status to marriage.⁸⁵

4. Mono-parental and recomposed families and the respect for family life

In accordance with the Strasbourg case-law, the right to found a *mono-parental family* is not protected by the Convention, either under the scope of Article 8 or under Article 12. In the Court's opinion, the best interest of the child still requires the traditional model of bi-parentage. Nevertheless, once a mono-parental family is founded, it should be regarded as a family entitled to the protection granted by Article 8.⁸⁶

In *X. v. Belgium and the Netherlands*, in addressing the issue of adoption by single persons, the European Commission recalled that the Convention does not guarantee the right to adopt as such. Moreover, this body asserted that the right to found a family under Article 12 presupposes the existence of a couple and that this provision should not be interpreted as encompassing the right of a single person to adopt.⁸⁷ A similar reasoning was employed by the Court in *Fretté v. France*, which concerned of the request to adopt by a single homosexual. In this case, the Court reiterated that the right to adopt as such is not enshrined in the Convention. Additionally, the Court

⁸⁵ See, in this sense, Michel Levinet, *La liberté matrimoniale au sens de la Convention européenne des droits de l'homme*, 60 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 890, 889-949 (Octobre 2004); Michel Levinet, *L'embarras du juge européen des droits de l'homme face à homosexualité, in COHABITATION NON MARITALE: EVOLUTION RECENT EN DROIT SUISSE ET ETRANGER: ACTES DU COLLOQUE DE LAUSANNE DU 23 FEVRIER 2000* 61, 104-05 (Florence Guillaume & Raphaël Arn ed., Librairie Droz 2000).

⁸⁶ See, e.g., *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) (1979).

⁸⁷ See *X. v. Belgium and the Netherlands*, App. No. 6482/74, 7 Comm'n H.R. Dec. & Rep 16 (1975). See also, with the same approach, *Di Lazzaro v. Italy*, App. No. 31924/96, 90-A Comm'n H.R. Dec. & Rep 134 (1997).

pointed out that “the right to respect for family life presupposes the existence of a family and does not safeguard the mere desire to found a family”.⁸⁸

Regarding the protection of *recomposed families*, the Eur. Ct. H.R. has found, on one hand, that a relationship between a child and the partner or spouse of a parent may be characterised as “family life”, if the close *de facto* interpersonal ties or appearance of a family criterion is verified. Moreover, the Court has upheld that the best interests of the child, namely the need for stability in the child’s upbringing, may determine that “social parenthood” should prevail over “biological parenthood”. Accordingly, a decision permitting the “social parent” to adopt the child, without the biological father’s consent, having regard to the best interest of the child, may fall within the margin of appreciation granted to the Member States and, hence, may be in accordance with the Convention.

For instance, in *Söderbäck v. Sweden*, the Strasbourg Court found that the child had established stronger *de facto* family ties with the partner and now husband of her mother than with her biological father. In this connection, the Court observed that the child had been living with her mother and her adoptive father since she was eight months old; the adoptive father had taken part in the child’s care and had been regarded by the child as her father. Consequently, in the Court’s view, the adoption had only consolidated and formalised those ties. Thus, having regard to the assessment of the child’s best interests made by the domestic courts, as well as to the limited contact and relationship between the child and her natural father, and as to the natural father’s sufficient involvement in the decision-making process, the Court concluded that the decision of the national authorities fell within the margin of appreciation and was

⁸⁸ *Fretté v. France*, 2002-I Eur. Ct. H.R. § 32. *See also, mutatis mutandis*, *E.B. v. France*, Eur. Ct. H.R. § 41 (2008).

proportionate to the aims pursued.⁸⁹ This same line of reasoning is found, more recently, in *Kuijper v. the Netherlands* and in *Eski v. Austria*.⁹⁰

5. Transsexuals and the respect for (private and) family life

During the first two decades of transsexuals' litigation in Strasbourg, the Eur. Ct. H.R. refused to impose an obligation on Member States to legally recognise transsexuals' gender re-assignment.⁹¹ In *Rees v. the United Kingdom*, *Cossey v. the United Kingdom*, and *Sheffield and Horsham v. the United Kingdom*, the Court's reluctance was based on two basic considerations: the absence of common ground between the Member States, and the wide margin of appreciation afforded to the Contracting Parties in this area.⁹²

In *Christine Goodwin v. the United Kingdom* and *I. v. the United Kingdom* the Strasbourg Court changed its assessment in the light of a grown consensus and responded to the drama of post-operative transsexuals arising from the discordance between their "social appearance" and their "legal status". The Court first noted that this

⁸⁹ See *Söderbäck v. Sweden*, 1998-VII Eur. Ct. H.R. §§ 33, 34. The Court followed, in general, the European Commission's approach revealed in *Garcia v. Sweden*, App. No. 10148/82, 42 Comm'n H.R. Dec. & Rep 113 (1985).

⁹⁰ See *Kuijper v. the Netherlands*, App. No. 64848/01 Eur. Ct. H.R. 14, 15 (2005); *Eski c. Austria*, Eur. Ct. H.R. §§ 39-43 (2007).

⁹¹ See *Van Oosterwijck v. Belgium*, 40 Eur. Ct. H.R. (ser. A) §§ 33, 39, 41 (1980) (concluding that the applicant had not exhausted domestic remedies, even though the Commission had found a breach of Article 8 determined by the refusal of Belgian authorities to change the post-operative transsexual's birth certificate); *Rees v. the United Kingdom*, 106 Eur. Ct. H.R. (ser. A) §§ 44, 46 (1986) (holding that, "[h]aving regard to the wide margin of appreciation to be afforded the State in this area and to the relevance of protecting the interests of others in striking the requisite balance, the positive obligations arising from Article 8 (art. 8) cannot be held to extend that far"); *Cossey v. the United Kingdom*, 184 Eur. Ct. H.R. (ser. A) (1990) (where the facts, outcome and reasoning were essentially the same as in *Rees v. the United Kingdom*); *Sheffield and Horsham v. the United Kingdom*, 1998-V Eur. Ct. H.R., §§ 56, 57 (finding that there had not been "noteworthy scientific developments in the area of transsexualism" nor was there an European consensus regarding the problems created by the recognition in law of post-operative gender status and, therefore, the Court could not apart from its decision in *Rees* and *Cossey*). *But see* *B. v. France*, 232-C Eur. Ct. H.R. (ser. A) § 63 (1992) (finding that, considering the differences between the French and the English systems regarding civil status, change of forenames and the use of official documents, the applicant found herself daily situation which, taken as a whole, was not compatible with the respect due to her private life).

⁹² See *Rees v. the United Kingdom*, 106 Eur. Ct. H.R. (ser. A) §§ 37, 44 (1986); *Cossey v. the United Kingdom*, 184 Eur. Ct. H.R. (ser. A) § 40 (1990); *Sheffield and Horsham v. the United Kingdom*, 1998-V Eur. Ct. H.R. §§ 56, 57.

conflict between social reality and law may place “the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety”, which constitutes “a serious interference” with the transsexual’s private life.⁹³ Furthermore, the Court observed that the National Health Service financed the gender re-assignment of the applicant. Thus, in the Court’s opinion, this administrative practice was not coherent with the State’s refusal to recognise the legal implications of a treatment which it authorises or finances.⁹⁴ In addition, the Court held that the lack of evidence of a European consensus was no longer a decisive factor and, moreover, emphasised the existence of “a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals”.⁹⁵ Lastly, the Strasbourg Court stated that personal autonomy was an important principle underlying the interpretation of Article 8 and that it encompasses the “right to establish details of their identity as individual human beings”.⁹⁶ In this regard, the Court further added that:

In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved.⁹⁷

In the light of the above considerations, the Court found that the Contracting State could no longer claim that the matter falls within the margin of appreciation and,

⁹³ *Christine Goodwin v. the United Kingdom*, 2002-VI Eur. Ct. H.R. § 77; *I. v. the United Kingdom*, Eur. Ct. H.R. §§ 57 (2002).

⁹⁴ *Id.*, respectively, § 78 and § 58.

⁹⁵ *Id.*, respectively, § 85 and § 65.

⁹⁶ *Id.*, respectively, § 90 and § 70.

⁹⁷ *Ibidem.*

accordingly, the Court held that there had been a failure to respect the applicant's private life.⁹⁸

With respect to the right to marry, the Court has reviewed its initial approach. Addressing this issue in the cases *Rees*, *Cossey* and *Sheffield and Horsham*, the Court repeatedly interpreted Article 12 ECHR as referring only to the traditional marriage between persons of opposite biological sex.⁹⁹ However, in *Christine Goodwin* and *I.* cases, the Strasbourg Court overcame this interpretation and upheld that a Member State's refusal to allow a post-operative transsexual to marry a person of the opposite sex, *i.e.* of the transsexual's previous sex, constitutes a breach of Article 12 ECHR. Three arguments were decisive to this *volte-face*: the right to marry and the right to found a family are not connected and the inability of any couple to conceive can not be regarded as, *per se*, depriving a couple of the right to marry;¹⁰⁰ the determination of gender should not be made solely on the basis of biological criteria;¹⁰¹ and Article 9 of the Charter of Fundamental Rights of the European Union, on the right to marry, deliberately leaves out the reference to men and women.¹⁰²

In *X, Y and Z v. the United Kingdom*, which the concerned a female-to-male transsexual who claimed the right to register himself as the father of the child born to his female partner as a result of artificial insemination by a donor, the Court, as noted

⁹⁸ *Id.*, respectively, § 93 and § 73. The same line of reasoning is found in *Grant v. the United Kingdom*, Eur. Ct. H.R. (2006) (which facts are not distinguishable from those in *Christine Goodwin v. the United Kingdom* and *I. v. the United Kingdom*). *See also* *Van Kück v. Germany*, 2003-VII Eur. Ct. H.R. (in which the Court analysed the German court proceedings concerning a claim for reimbursement of the cost of gender reassignment surgery; the Court found that, by considering that the applicant was obliged to prove that the treatment was medically necessary, as well as show the 'genuine nature' of her transsexuality, the domestic courts had overstepped the margin of appreciation and, therefore, had violated Article 8 ECHR).

⁹⁹ *Rees v. the United Kingdom*, 106 Eur. Ct. H.R. (ser. A) §§ 49 (1986); *Cossey v. the United Kingdom*, 184 Eur. Ct. H.R. (ser. A) § 46 (1990); *Sheffield and Horsham v. the United Kingdom*, 1998-V Eur. Ct. H.R. § 66.

¹⁰⁰ *See Christine Goodwin v. the United Kingdom*, 2002-VI Eur. Ct. H.R. § 98; *I. v. the United Kingdom*, Eur. Ct. H.R. §§ 78 (2002).

¹⁰¹ *Id.*, respectively, § 100 and § 80.

¹⁰² *Ibidem.*

above, considered that *de facto* family ties linked the three applicants.¹⁰³ Nevertheless, in relation to the recognition of parenthood, the Court found that there was no common ground amongst the Contracting States as to the recognition of *transsexual's parental rights* and, therefore, the Member State ought to be afforded a wide margin of appreciation.¹⁰⁴ The Court found, thus, that there was no violation of Article 8 ECHR.¹⁰⁵

In short, these complex issues regarding transsexual's parental rights are yet to be ruled by the Strasbourg's case-law.

6. Homosexuals and the respect for (private and) family life

The Strasbourg Court has had an important role in eradicating from domestic law the intolerable criminalisation of homosexual activities, on the basis that this general prohibition of homosexual practices constitutes an interference with the right to respect for private life.¹⁰⁶

In addition, the Court has laid down the principle of non discrimination on the grounds of "sexual orientation", with regard to employment, as in *Lustig-Prean and Beckett v. the United Kingdom*,¹⁰⁷ ages of consent for homosexual acts between adults, as in *L. and V. v. Austria*,¹⁰⁸ parental rights, as in *Salgueiro da Silva Mouta v. Portugal*,¹⁰⁹ and adoption, as in *E.B. v. France*.¹¹⁰

¹⁰³ X, Y and Z v. the United Kingdom, 1997-II Eur. Ct. H.R. §§ 35-37.

¹⁰⁴ *Id.* § 44.

¹⁰⁵ *Id.* § 52.

¹⁰⁶ See *Dudgeon v. the United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981); *Norris v. the United Kingdom*, 142 Eur. Ct. H.R. (ser. A) (1988); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) (1993); *A.D.T. v. the United Kingdom*, 2000-IX Eur. Ct. H.R.

¹⁰⁷ See *See also Smith and Grady v. the United Kingdom*; *Perkins e R. c. Reino Unido*, de 22 de Outubro de 2002

¹⁰⁸ See *L. and V. v. Austria*. See also *S.L. v. Austria*

¹⁰⁹ See *Salgueiro da Silva Mouta v. Portugal*,

¹¹⁰ See *E.B. v. France*, Eur. Ct. H.R. (2008)

According to the case-law of the Convention institutions, and as outlined above, long-term homosexual relationships between same-sex persons do not fall within the scope of the right to respect for family life protected by Article 8 of the Convention.¹¹¹

In regard to the right to marry,

7. Conclusions

The broad interpretation of Article 8 ECHR described above has undoubtedly permitted the extension of the protective shield of this provision and, therefore, also ensured its vitality. However, this approach has equally led to a progressive dilution of the specificity and precise boundaries of the concept of “family life”.

The case-law analysis carried out in this paper allows us to conclude that the main lines of the Strasbourg Court’s decisions in this field are nothing more than a reflection of the coordinates of the existing Family Law in Europe: equality and pedocentrism. The principles drawn out by the Court match with an equalitarian and non-discriminatory vision of the law, focused entirely on the child’s best interests. In some areas, however, the commitment to the principle of equality is suspended by the European Court of Human Rights on the grounds of protection of marriage and the traditional family. The generosity of the Eur. Ct. H.R. in granting legal protection to new forms of “family life”, notwithstanding the permission of the differential treatment of the *de facto* couples and the failure to recognise the stable homosexual relations as “family life”, allows us to say that the Strasbourg case-law is only modestly conservative.

Nevertheless, Article 8 will certainly give rise to new and unforeseen developments with regard to the protection of the new forms of family.

¹¹¹ see X. and Y. v. the United Kingdom, application no. 9369/81, Commission decision of 3 May 1983, Decisions and Reports (DR) 32, p. 220, and S. v. the United Kingdom, application no. 11716/85, Commission decision of 14 May 1986, DR 47, p. 274