FAMILY FORMS AND PARENTHOOD

Theory and Practice of Article 8 ECHR in Europe

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THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

The Case Law of the European Court of Human Rights on Parenthood and Family Forms

Andrea BÜCHLER

1. INTRODUCTION

The convergence in the evolution of family law across Europe is in no small part the result of ongoing discourse on the subject of human rights. Following the European Court of Human Rights' (ECtHR) judgment in *Marckx v. Belgium*,[1] in which the Court noted that its judgment should provide an incentive for national

[1] *Marckx v. Belgium* (no. 6833/74), Judgment (Plenary) of 13 June 1979, Series A, Vol. 31.

law to be promulgated in accordance with the European Convention on Human Rights (ECHR), the view has become established that the Convention can also be invoked as a source of impetus for changes in family law at the national level. Article 8 of the ECHR is of decisive significance in this regard. As early as 1979, the ECtHR held that it is the object of Article 8 to protect the individual against arbitrary interference by the public authorities, and that this could also entail "positive obligations inherent in an effective 'respect' for family life".[2] Since the *Marckx v. Belgium* judgment, numerous judgments have been handed down which relate to fundamental issues of family law. For decades, family structures in European countries have been subject to a process of rapid change, which is making them increasingly pluralised. Court decisions provide an indication of which concepts of what constitutes a family are prevalent, of the extent to which specific aspects of societal evolution are apparent in the interpretations placed on the ECHR by the ECtHR, and of how these evolutionary aspects manifest themselves in those interpretations. This chapter focuses particularly on more recent ECtHR judgments, with a view to identifying what "guidance" they provide for family law in European jurisdictions.

2. THE PROTECTIONS AFFORDED TO FAMILY LIFE AND TO PRIVATE LIFE AND THEIR DELINEATION

Article 8 of the ECHR protects both the right to private life and the right to family life. Which of these two specific protections is applicable in a particular instance crucially depends on how the ECtHR interprets the concept of the family and of family life. The protection afforded to private life often serves as a catch-all in cases where the criteria applicable to family life are either not met at all or are met only partially.[3] There are of course many cases in which both protections are applicable.

To date, the ECtHR has avoided a definitive and general definition of how far the concepts of private life and family life are applicable. This has enabled the Court continuously to develop its decisions in the light of the substantial changes which society is undergoing. Indeed, the interpretations which the ECtHR's judgments have placed on Article 8 of the ECHR have exhibited considerable dynamism.

The ECtHR's definition of family life is relatively broad and its respect for family life is based on a functional understanding of what constitutes a family. The notion of family life assumes the existence of a family. In today's judgments,

2 *Ibid.*, §31.

3 Breitenmoser Stephan and Wildhaber Luzius (1992), Article 8 m.n. 1; Roagna Ivana (2012), 28; see also Wyttenbach Judith and Grohsmann Irene (2014), 151, 161.

it is the nature and purpose of relationships, rather than their form, which is paramount. As set out in numerous ECtHR judgments, family life exists where there are actual family ties between the persons concerned.[4] The concept of a family thus encompasses not only the ties between married couples and their children, but also those between couples living together out of wedlock and the children who are either their natural offspring or otherwise in their care, irrespective of the legal status of the parents.[5] Family life within the meaning of Article 8 of the ECHR also includes ties between near relatives such as those between grandparents and grandchildren, since such relatives may play a considerable part in family life.[6] The ties between siblings can also constitute family life.[7] For the purposes of assessing whether a relationship can be said to amount to family life under Article 8 of the ECHR, potentially relevant considerations are whether the couple lives together, how long the relationship between them has been established, whether they demonstrate commitment to each other and support each other, and whether they have children in common.[8]

Relationships between adults and between parents need to be distinguished from those they have with their children. The relationship between parents and their adult children does not fall within the ambit of Article 8 of the ECHR, unless "additional factors of dependence, other than normal emotional ties, are shown to exist".[9] Children born of a family relationship are part of that family by virtue of their birth and this applies from the time of their birth onwards.[10] Furthermore, even in cases where there is no longer any relationship between a child's parents at the time of the child's birth, Article 8 of the ECHR protects the right of both parents to maintain a personal relationship to the child.[11] A genetic relationship

4 *K. and T. v. Finland* (no. 25702/94), Judgment (Grand Chamber) of 12 July 2001, ECHR 2001-VII, §150; see also *Kroon and Others v. the Netherlands* (no. 18535/91), Judgment (Chamber) of 27 October 1994, Series A, Vol. 297-C, §30; *Keegan v. Ireland* (no. 16969/90), Judgment (Chamber) of 26 May 1994, Series A, Vol. 290, §44.

5 *Kroon and Others v. the Netherlands* (*supra* note 4), §30; *Keegan v. Ireland* (*supra* note 4), §44; see also *Johnston and Others v. Ireland* (no. 9697/82), Judgment (Plenary) of 18 December 1986, Series A, Vol. 112, §55 ff. and *Marckx v. Belgium* (*supra* note 1), §31.

6 *Scozzari and Giunta v. Italy* (no. 39221/98 and 41963/98), Judgment (Grand Chamber) of 13 July 2000, ECHR 2000-VIII, §221; *Kruškić v. Croatia* (no. 10140/13), Decision of 25 November 2014, §108; *Manuello and Navi v. Italy* (no. 107/10), Judgment of 20 January 2015, §53.

7 *Mustafa and Armağan Akin v. Turkey* (no. 4694/03), Judgment of 6 April 2010 (not reported), §21.

8 *X., Y. and Z. v. the United Kingdom* (no. 21830/93), Judgment (Grand Chamber) of 22 April 1997, ECHR 1997-II, §36; *Kroon and Others v. the Netherlands* (*supra* note 4), §30; Grabenwarter Christoph (2014), Article 8 m.n. 19; Breitenmoser Stephan and Wildhaber Luzius (1992), Article 8 m.n. 386.

9 *Senchishak v. Finland* (no. 5049/12), Judgment of 18 November 2014 (not reported), §55.

10 *Keegan v. Ireland* (*supra* note 4), §44; *Berrehab v. the Netherlands* (no. 10730/84), Judgment of 21 June 1988, Series A, Vol. 138, §21.

11 *Johansen v. Norway* (no. 17383/90), Judgment of 7 August 1996, ECHR 1996-III, §52; *Berrehab v. the Netherlands* (*supra* note 10), §21.

between parent and child does not, in its own right (i.e. without the existence of any legal or social parenthood), provide a sufficient basis for family ties to be considered to exist. The ECtHR requires "the real existence in practice of close personal ties".[12]

In specific individual cases, a right to family life may be deemed to exist when, although no relationship has in fact yet been established, the father shows a real interest in seeing his child and in establishing future family ties with the child and the reasons for the absence of such ties are not attributable to him.[13] In *Anayo v. Germany* the ECtHR ruled that:

> "where the circumstances warrant it, 'family life' must extend to the potential relationship which may develop between a child born out of wedlock and the natural father. Relevant factors which may determine the real existence in practice of close personal ties in these cases include the nature of the relationship between the natural parents and a demonstrable interest in and commitment by the father to the child both before and after the birth."[14]

Family life as defined by Article 8 of the ECHR exists not only between biological parents and their minor or adult children, but also between adoptive or foster parents and the children entrusted to them.[15] Here however family life is required to exhibit "sufficient constancy".[16] If a child is temporarily taken into state-provided care, the right to family life does not lapse.[17]

The definition of what constitutes private life is also very broad. Legal teaching and to some extent the ECtHR distinguish between physical and moral integrity, privacy and personal autonomy[18] as each requiring protection (though this list is not exhaustive). As far as the relevant questions relating to parenthood and family structure are concerned, the ECtHR's rulings can be said to stipulate that private life with regard to parenthood incorporates the right to have individual decisions on whether to have or not to have a child respected,[19] and

12 Recently *M.P.E.V. and Others v. Switzerland* (no. 3910/13), Judgment of 8 July 2014 (not reported), §31; *K. and T. v. Finland* (*supra* note 4), §150; see also *L. v. the Netherlands* (no. 45582/99), Judgment of 1 June 2004, ECHR 2004-IV, §36.

13 *Schneider v. Germany* (no. 17080/07), Judgment of 15 September 2011 (not reported), §81; *Anayo v. Germany* (no. 20578/07), Judgment of 21 December 2010 (not reported), §57; *Nylund v. Finland* (no. 27110/95), Decision of 29 June 1999, ECHR 1999-VI.

14 *Anayo v. Germany* (*supra* note 13), §57; similarly already *Nylund v. Finland* (*supra* note 13).

15 *Moretti and Benedetti* (no. 16318/07), Judgment of 27 April 2010 (not reported), §49 et seq.

16 *Kroon and Others v. the Netherlands* (*supra* note 4), §30; see also *L. v. the Netherlands* (*supra* note 12), §36; with case law Villiger Mark E. (1999), m.n. 571.

17 *Scozzari and Giunta v. Italy* (no. 39221/98 and 41963/98), Judgment (Grand Chamber) of 13 July 2000, ECHR 2000-VIII, §169; *Eriksson v. Sweden* (no. 11373/85), Judgment (Plenary) of 22 June 1989, Series A, Vol. 156, §58; *Olsson v. Sweden (No. 1)* (no. 10465/83), Judgment (Plenary) of 24 March 1988, Series A, Vol. 130, §59; *W. v. the United Kingdom* (no. 9749/82), Judgment (Plenary) of 8 July 1987, Series A, Vol. 121, §59.

18 Grabenwarter Christoph (2014), Article 8 m.n. 6 f.

19 *Evans v. the United Kingdom* (no. 6339/05), Judgment (Grand Chamber) of 10 April 2007, ECHR 2007-I, §71.

the right to have recourse to *in vitro* fertilisation.[20] In cases where the right to respect for family life cannot be invoked, the right to respect for private life also encompasses the relationship between the biological father and his child.[21] The right to establishing the legal relationship between a man and his biological offspring forms part of the right to private life. Private life as defined in Article 8 of the ECHR includes both a man's right to challenge his presumed paternity[22] and his right to have his paternity established.[23] The child and the mother also have the right to have the paternity relationship between the child and his or her biological father determined.[24] Finally, the ECtHR has also been required to consider whether – irrespective of the possibility of establishing or challenging parenthood – a child has a right to establish its origins. Accordingly, the right to know one's own origins is also encompassed within the right to protection afforded to private life.[25]

The essential object of Article 8 of the ECHR is to protect the individual against arbitrary action by the public authorities. However, Article 8(1) of the ECHR not only requires the state to refrain from certain types of action, it also now affords protection to family life by requiring the state to take positive action. That is to say that the state also has an obligation to take positive steps to ensure that ties between the members of a family can develop.[26] Court decisions sometimes place an obligation on the state to enact legislation to ensure that family life is protected.[27] Should any state interference or any violation of the state's positive obligation to afford protection under Article 8(1) of the ECHR be observed, the limitations set out in Article 8(2) become applicable:

20 *S.H. and Others v. Austria* (no. 57813/00), Judgment (Chamber) of 1 April 2010 (not reported), §82.

21 *Nylund v. Finland* (*supra* note 13); see *Ahrens v. Germany* (no. 45071/09), Judgment of 22 March 2012 (not reported), §58 f.; see also Breitenmoser Stephan and Wildhaber Luzius (1992), Article 8 m.n. 366.

22 *Rasmussen v. Denmark* (no. 8777/79), Judgment (Chamber) of 28 November 1984, Series A, Vol. 87, §33; with regard to the challenge of a paternity declaration *Paulík v. Slovakia* (no. 10699/05), Judgment of 10 October 2006, ECHR 2006-XI, §42.

23 *Kautzor v. Germany* (no. 23338/09), Judgment of 22 March 2012 (not reported), §63 and §73; *Ahrens v. Germany* (no. 45071/09), Judgment of 22 March 2012 (not reported), §60 and §71 f.

24 *Kalacheva v. Russia* (no. 3451/05), Judgment of 7 May 2009 (not reported), §29 regarding the mother's right; *Mikulić v. Croatia* (no. 53176/99), Judgment of 7 February 2002, ECHR 2002-I, §53 regarding the child's right.

25 *Godelli v. Italy* (no. 33783/09), Judgment of 25 September 2012 (not reported), §47 f.; *Jäggi v. Switzerland* (no. 58757/00), Judgment of 13 July 2006, ECHR 2006-X, §25 f.; *Odièvre v. France* (no. 42326/98), Judgment (Grand Chamber) of 13 February 2003, ECHR 2003-III, §29; *Gaskin v. the United Kingdom* (no. 10454/83), Judgment (Plenary) of 7 July 1989, Series A, Vol. 160, §36 f. and §49.

26 Grabenwarter Christoph (2014), Article 8 m.n. 72 f.; Frowein Jochen Abraham and Peukert Wolfgang (2009), Article 8 m.n. 23 f.; see also Van Dijk Pieter, van Hoof Fried, van Rijn Arjen and Zwaak Leo (2006), 739.

27 *Sommerfeld v. Germany* (no. 31871/96), Judgment (Grand Chamber) of 8 July 2003, ECHR 2003-VIII, §86; *Marckx v. Belgium* (*supra* note 1), §31.

> "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."

The "protection of the rights and freedoms of others" applies to members of the family concerned.[28] In the case of the child, the limitation with regard to "health or morals"[29] is equally important. Both in the context of a positive obligation of the state to adopt appropriate measures to protect private and family life and with regard to its obligation to refrain from measures which are injurious to such protection, regard must be given to striking a fair balance between the competing interests of the individual and of the community as a whole.[30] While the ECHR Contracting States are accorded substantial latitude in their application of these requirements, this is now becoming increasingly constrained. Particular latitude is granted to Contracting States on matters for which there is no identifiable European standard.[31]

As far as parenthood and family structures are concerned, Article 14 of the ECHR is of particular relevance. It reads as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The birth criterion affords protection to children born out of wedlock.[32] "Other status" covers a number of attributes, including family structure, sexual orientation and marital status.[33] The sex criterion can also be relevant with regard to the protection of both private and family life.[34] Article 14 of the ECHR

28 For the protection afforded in all four areas see Breitenmoser Stephan and Wildhaber Luzius (1992), Article 8 m.n. 652 f.; see also Grabenwarter Christoph (2014), Article 8 m.n. 50.

29 Grabenwarter Christoph (2014), Article 8 m.n. 50; Breitenmoser Stephan and Wildhaber Luzius (1992), Article 8 m.n. 628 f. and 638 f.

30 *Phinikaridou v. Cyprus* (no. 23890/02), Judgment of 20 December 2007 (not reported), §47; *Kroon and Others v. the Netherlands* (*supra* note 4), §31; *Keegan v. Ireland* (*supra* note 4), §49.

31 *Evans v. the United Kingdom* (*supra* note 19), §77; see also *Fretté v. France* (no. 36515/97), Judgment of 26 May 2002, ECHR 2002-I, §41; and *X., Y. and Z. v. the United Kingdom* (*supra* note 8), §44; Meyer-Ladewig Jens (2011), Article 8 m.n. 119; Breitenmoser Stephan and Wildhaber Luzius (1992), Article 8 m.n. 679.

32 See *Marckx v. Belgium* (*supra* note 1), §31.

33 See *X. and Others v. Austria* (no. 19010/07), Judgment (Grand Chamber) of 19 February 2013, ECHR 2013-II, §99; *Sommerfeld v. Germany* (*supra* note 27), §93; *Sahin v. Germany* (no. 30943/96), Judgment (Grand Chamber) of 8 July 2003, ECHR 2003-VIII, §94.

34 As stated in *Konstantin Markin v. Russia* (no. 30078/06), Judgment (Grand Chamber) of 22 March 2012, ECHR 2012-III, in which the Grand Chamber concluded that in light of the government's failure to provide reasonable and objective justifications for the exclusion of

applies only to the rights afforded by the Convention itself.[35] It does however also apply to any additional rights falling within the general scope of the other articles of the Convention that individual states may have decided to provide.[36]

3. PARENTHOOD

3.1. GENERAL CONSIDERATIONS

Parenthood is a social construction which is now being renegotiated in the wake of societal and technological change. When genetic, biological, and social parenthood are not united in one and the same person, it is the law's task to decide which of these particular attributes of parenthood shall be construed as constituting legal parenthood. The law must also determine the position of an individual who has genetic or social ties to the child but does not have the status of his or her legal parent.

Article 8 of the ECHR places a positive obligation on the Contracting States to ensure that the child is legally attributed to his or her family at birth. Where this is necessary, it also allows the child's family affiliation to be determined. The Contracting States also have a positive obligation to ensure that no disadvantage or discrimination arises due to the fact that a child is born out of wedlock or adopted. In a judgment handed down in 1987, the Court already ruled that:

> "Very weighty reasons would accordingly have to be advanced before a difference of treatment on the ground of birth out of wedlock could be regarded as compatible with the Convention."[37]

3.2. FORMATION AND CONTESTATION

A child's biological, social and legal parents may all have an interest, protected under the Convention, both to establish and to contest the child's parenthood.

servicemen from the entitlement to parental leave granted to servicewomen, the applicant had been subjected to discrimination on the grounds of his sex in violation of Article 14 in conjunction with Article 8 of the ECHR. So also with regard to differences in the legal treatment accorded the names of men and women, cf. *Losonci Rose and Rose v. Switzerland* (no. 664/06), Judgment of 9 November 2010 (not reported), §37 f.

35 Grabenwarter Christoph (2014), Article 14 m.n. 4; Meyer-Ladewig Jens (2011), Article 14 m.n. 5 f.; Frowein Jochen Abraham and Peukert Wolfgang (2009), Article 14 m.n. 1; van Dijk Pieter, van Hoof Fried, van Rijn Arjen and Zwaak Leo (2006), 1028 f.

36 Meyer-Ladewig Jens (2011), Article 14 m.n. 8; van Dijk Pieter, van Hoof Fried, van Rijn Arjen and Zwaak Leo (2006), 1031; *P.B. and J.S. v. Austria* (no. 18984/02), Judgment of 22 July 2010 (not reported), §32 f.; *E.B. v. France* (no. 43546/02), Judgment (Grand Chamber) of 22 January 2008 (not reported), §48 f.

37 *Inze v. Austria* (no. 8695/79), Judgment (Chamber) of 28 October 1987, Series A, Vol. 126, §41.

In reaching its judgments, the ECtHR regularly assesses whether – based on a biological, social or legal relationship – there are family ties as defined in Article 8 of the ECHR between a child and his or her (potential) father. In the weighting it ascribes to the interests of the potential fathers involved, and thus in reaching a decision as to whether biological or social paternity should be paramount, the Court considers both the relationship between the child's biological mother and father and the social ties between the child and his or her legal father.

On the one hand, the ECtHR affords protection and indeed gives priority to social ties in preference to purely biological considerations. If the social father has acknowledged the child as his own, the decision as to whether the biological father should be allowed to challenge that paternity falls within the state's margin of appreciation.[38] The Court acknowledges that paternity proceedings are part of the private life of the biological father. However, there is no duty under the Convention to allow the biological father to challenge the legal father's status.

Thus, in its more recent *Ahrens v. Germany*[39] and *Kautzor v. Germany*[40] judgments, the Court has emphasised that there is no violation of Article 8 of the ECHR if a national court, in determining the paternity of a child, accords greater weight to the interests of the child, to the family in which he or she lives and to the presumed father rather than to the interests of the child's biological father. In both these cases, the Court upheld earlier rulings which had prevented biological fathers from challenging the legal paternity of a mother's (new) partner (in *Ahrens v. Germany*) or new husband (in *Kautzor v. Germany*) and from establishing their own paternity of the children concerned. In each case, the Court found that these rulings were not contrary to the Convention. The Court argued that, while the applicants' requests to have their paternity recognised constituted an important part of their right to private life, the family ties between the social fathers of the children concerned were also deserving of protection and that the applicants therefore had no grounds, on the basis of Article 8 of the ECHR, to be allowed to challenge the paternity of another man, as long as that man was also carrying out his obligations as the social father of the child. It is relevant to note that in both these cases, there had never been any close personal ties between the applicants and the children concerned. The Court also drew attention to the latitude accorded to the Contracting States in these cases, which was substantial because there was no consensus among the individual states as to whether to allow a presumed biological father to challenge the legal paternity of a child. While acknowledging that a biological father must

38 *Kautzor v. Germany* (*supra* note 23), §68; *Ahrens v. Germany* (*supra* note 23), §68 f.; Grabenwarter Christoph (2014), Article 8 m.n. 80; see also Wyttenbach Judith and Grohsmann Irene (2014), 161 f.

39 *Ahrens v. Germany* (*supra* note 23).

40 *Kautzor v. Germany* (*supra* note 23).

not be completely excluded from his child's life, the Court also held that this did not necessarily require Contracting States to permit putative biological fathers to challenge the legal paternity of their putative offspring. The protection accorded to the precedence of a child's existing presumed father over his or her biological father was also justified on the grounds that the establishment of biological paternity would have deprived the child of its existing family, causing such damage to the child that this could not be outweighed by the biological father's interest.[41] It is however noteworthy that, contrary to the position it has adopted in decisions relating to parental responsibility and contact rights, the Court did not insist on the interests of the individual child being determined in each case. This jurisprudence has a long history.[42]

On the other hand, as long ago as 1994, the ECtHR had already ruled, in the leading case of *Kroon and Others v. the Netherlands*,[43] that when protected family ties as defined in Article 8 of the ECHR exist between a father and his biological child, and the presumed legal father has disappeared and cannot be found, there must be a possibility of establishing the legal paternity of the child's biological father. In that case, the Court held that the authorities had a positive obligation to permit the formation of "complete family ties" between the applicant and the child.

The biological father's right to have his legal paternity of his child acknowledged thus depends on the nature of the relationship between the child's mother and the child's biological father and on whether or not there are social ties between the child and his or her legal father. How difficult it is to make a determination based on these different relationships, and how closely the ECtHR's arguments depend on the circumstances of each individual case is illustrated by its judgment in the *Różański v. Poland* case.[44] Here, the child was born while the mother and the applicant were living together. The child was left in the sole care of the applicant for some of this time. Subsequently, the child became ill and was taken into hospital. The mother then took the child from the hospital and went into hiding, thus making it impossible for the applicant to have any contact with the child. The mother's new partner acknowledged the child as his own and was acknowledged by the authorities as the child's legal father. In order to assert his paternity, the applicant would have needed the co-operation of the authorities, who had refused to co-operate. The Court found that there had been a violation of Article 8 of the ECHR, because there were no directly accessible procedures by which the applicant could attempt to establish his legal paternity, as any institution of paternity proceedings was at the sole discretion of the authorities. The absence of any guidance as to the authorities'

41 See also *Krisztián Barnabás Tóth v. Hungary* (no. 48494/06), Judgment of 12 February 2013 (not reported), §35.

42 Cf. *M.B. v. the United Kingdom* (no. 22920/93), Decision of 6 April 1994 (not reported); see also *Nylund v. Finland* (*supra* note 13).

43 *Kroon and Others v. the Netherlands* (*supra* note 4).

44 *Różański v. Poland* (no. 55339/00), Judgment of 18 May 2006 (not reported).

exercise of their discretionary powers with regard to paternity was a further concern. The authorities had taken no steps to investigate the circumstances of the case and had based their decision to refuse the applicant's request to have his biological paternity established solely on the fact that another man had been legally recognised as the child's father. Conversely, in a different case – in which it is somewhat difficult to follow the Chamber's reasoning – the ECtHR held that if the biological father of a child would have been able either to adopt the child or claim the child as a "close relative", and thus have the child placed under his parental responsibility, but had not availed himself of these possibilities, then his being denied access to paternity proceedings would not constitute a violation of Article 8 of the ECHR.[45] The applicant had had three children with a woman with whom he cohabited, but who was married to another man. The woman's husband was named the father of the children on their birth certificates. After the applicant and the children's mother had separated, the children lived with the applicant. The presumption of the woman's husband's paternity could not, however, be contested according to Bulgarian law.

The possibility of establishing the biological paternity of a child must also be granted to the child's mother. This is illustrated in *Kalacheva v. Russia*,[46] where the ECtHR held that the determination of the paternity of a child affected the private life of the child's mother. For a mother, establishing the biological paternity of her child can be significant not only from a financial and emotional point of view, but also with regard to the way she is perceived by society and to the medical history of her family.

Article 8 of the ECHR is regularly breached in cases where the legal father of a child has no possibility of challenging his own paternity.[47] The dissolution of parent–child family ties is a matter which affects private life. In cases of this kind, the ECtHR ascribes a greater weight to biological paternity than to presumed paternity and the social reality which that represents. However, in *İyilik v. Turkey*[48] the well-established principle under which biological realities prevail over legal presumptions was constrained by the requirement that all the parties involved, including those who would be required to submit to a DNA test, should agree to the test being carried out. In this instance, the Court held that national rules giving precedence to the interests of the child over the applicant's interest in verifying a biological fact were neither arbitrary nor disproportionate.[49] In *Tsvetelin Petkov v.*

45 *Chavdarov v. Bulgaria* (no. 3465/03), Judgment (Chamber) of 21 December 2010 (not reported), §52 f.

46 *Kalacheva v. Russia* (no. 3451/05), Judgment of 7 May 2009 (not reported), §29 f.

47 *Shofman v. Russia* (no. 74826/01), Judgment of 24 November 2005 (not reported), §44 ff.; *Mizzi v. Malta* (no. 26111/02), Judgment (Chamber) of 12 January 2006, ECHR 2006-I.

48 *İyilik v. Turkey* (no. 2899/05), Judgment of 6 December 2011 (not reported); see also *Ostace v. Romania* (no. 12547/06), Judgment of 25 February 2014 (not reported).

49 See, however, *Mikulić v. Croatia* (no. 53176/99), Judgment of 7 February 2002, ECHR 2002-I, §64: the child requested that the putative father should be obliged to submit to a DNA test, in order for the child to be able to establish his parenthood. The Court confirmed that a system that cannot compel the putative father to submit to genetic testing is not *per se* incompatible with the Convention, that however it has to provide alternative means enabling an independent authority to determine the paternity claim.

Bulgaria[50] the applicant complained about his inability to take part in the proceedings in which he had been declared the father of a child; the proceeding for establishing paternity had been carried out in his absence and the Court did not seek any DNA evidence. Furthermore, his request to reopen the proceedings was rejected. The ECtHR held that there had been a violation of Article 8 of the Convention, as the applicant's personal participation in the related proceedings would have been indispensable for the effective exercise of his right to private life.

Where proceedings either to establish or to contest paternity are made subject to certain time limitations, this does not constitute a breach of Article 8 of the ECHR.[51] The time limits so imposed must however be sufficiently flexible to allow the interests of the various parties concerned to be assessed in each individual case. Rigid obstacles to the contestation of paternity, conversely, to which no exceptions are permitted and which are applied regardless of the parties' awareness of the biological reality involved, do violate Article 8 of the ECHR. This is illustrated in *Phinikaridou v. Cyprus*,[52] where the ECtHR held that:

> "Hence, even having regard to the margin of appreciation left to the State, the Court considers that the application of a rigid time-limit for the exercise of paternity proceedings, regardless of the circumstances of an individual case, and in particular, the knowledge of the facts concerning paternity, impairs the very essence of the right to respect for one's private life under Article 8 of the Convention".[53]

3.3. ADOPTION

ECtHR case law regarding adoption reflects the European Convention on the Adoption of Children.[54] Article 11, paragraph 1 of that Convention declares that:

> "Upon adoption a child shall become a full member of the family of the adopter(s) and shall have in regard to the adopter(s) and his, her or their family the same rights and obligations as a child of the adopter(s) whose parentage is legally established."

50 *Tsvetelin Petkov v. Bulgaria* (no. 2641/06), Judgment of 15 July 2014 (not reported), §57.

51 In its older judgment in *Rasmussen v. Denmark* (no. 8777/79), Judgment (Chamber) of 28 November 1984, Series A, Vol. 87, §41, the ECtHR held that placing time limits on the lodging of challenges to the presumed legitimacy of a child was congruent with the legitimate objectives of establishing legal certainty with regard to family ties and was also in the best interests of the child.

52 *Phinikaridou v. Cyprus* (*supra* note 30).

53 *Ibid.*, §65; see also *Röman v. Finland* (no. 13072/05), Judgment of 29 January 2013 (not reported), §60; *Backlund v. Finland* (no. 36498/05), Judgment of 6 July 2010 (not reported), §56; *Mizzi v. Malta* (*supra* note 47).

54 European Convention on the Adoption of Children, Strasbourg, 24 April 1967, in force since 26 April 1968, 634 UNTS 255.

A lawful and genuine adoption establishes family life under Article 8 of the ECHR, even if the parents have not yet lived together and close family ties have yet to be established. It follows from this that adoptive parents must be accorded the right to take the steps required for being reunited with the child they have adopted. Indeed, the Court also noted in this connection that parental leave and similar entitlements also fall within the ambit of Article 8 of the ECHR, and that the administration of these arrangements must therefore be compatible with Article 14 of the ECHR. Any difference in the treatment accorded an adoptive mother from that which a biological mother receives would therefore require an objective and reasonable justification. In *Topčić-Rosenberg v. Croatia*[55] the Court held that that justification did not exist.

When a child is adopted, the child's family ties to his or her natural parents cease to exist. However, in *Emonet and Others v. Switzerland*[56] the ECtHR stated that this clearly cannot apply when the child is adopted by the parent's partner.

In fact, Article 8 of the ECHR does not confer a right to adopt as such. Thus, a prohibition against an unmarried person adopting a child,[57] or a requirement that the difference in age between adoptive parents and the children they adopt[58] does not exceed a given maximum number of years, do not, *per se*, breach Article 8 of the ECHR. In *Emonet and Others v. Switzerland* the ECtHR did however rightly point out that a marriage does not guarantee a more stable home for an adoptive child than that offered by an unmarried couple living together.[59]

Under the ECHR, the adoption of a child does require the consent of the child's legal parents, and, since *Keegan v. Ireland* in 1994,[60] this has also applied to children born out of wedlock. If a child born out of wedlock is adopted without the knowledge or consent of that child's biological father, this constitutes a violation of Article 8 of the ECHR. In cases where adoption serves to consolidate existing family relationships, as would be the case in second-parent adoptions, the ECtHR applies a lower degree of scrutiny. If family ties exist between a child and his or her social father, granting the social father permission to adopt the child without the consent of the child's biological father is an interference in the family life of the biological father but does not violate Article 8 of the ECHR, as long as the biological father was given the right to be heard.[61] Authorisation of a child's adoption by his or her foster parents against the will of the child's biological mother does not constitute a violation of the

55 *Topčić-Rosenberg v. Croatia* (no. 19391/11), Judgment of 14 November 2013 (not reported).
56 *Emonet and Others v. Switzerland* (no. 39051/03), Judgment of 13 December 2007 (not reported), §84.
57 *Di Lazzaro v. Italy* (no. 31924/96), Decision (Plenary) of 10 July 1997, DR 90-B, p. 134, 139; similarly also *Fretté v. France* (*supra* note 31), §28 f.
58 *Schwizgebel v. Switerzland* (no. 25762/07), Judgment of 10 June 2010, ECHR 2010-V.
59 *Emonet and Others v. Switzerland* (*supra* note 56), §81.
60 *Keegan v. Ireland* (*supra* note 4).
61 *Eski v. Austria* (no. 21949/03), Judgment of 25 January 2007 (not reported), §34 f. and §41.

mother's right to family life, if the adoption has an accessible and foreseeable legal basis and is in the best interests of the child.[62] This can be the case when the relationship between a child and his or her foster parents has been established for many years and the child has had only very limited contact to his or her mother. Finally, in *Harroudj v. France*[63] the ECtHR upheld a French court decision which refused a woman the right to adopt an Algerian child who had been entrusted to her care under Islamic-law *kafala* as long as the child did not hold French nationality. Adoption is not permitted under Algerian law. The Court found that the existence of family life was undisputed. It noted that "the notion of 'respect' as understood in Article 8 is not clear cut",[64] particularly as regards positive obligations, that its requirements vary in different situations and from case to case, and that the margin of appreciation accorded to the authorities was therefore wider than in other areas. It held that a fair balance had to be struck between the diverging general and individual interests in the case. Regarding the margin of appreciation, the Court noted that no Contracting State considers *kafala* to be equal to adoption, and that there is no clear consensus regarding whether a prohibition under a child's home state's law should prevent the child from being adopted. It concluded that:

> "by gradually obviating the prohibition of adoption in this manner, the respondent State, which seeks to encourage the integration of children of foreign origin without cutting them off immediately from the rules of their country of origin, has shown respect for cultural pluralism and has struck a fair balance between the public interest and that of the applicant."[65]

In two judgments, the ECtHR had to consider whether prohibition of single-parent adoption by homosexuals constituted a violation of Article 14 of the ECHR in conjunction with Article 8. In 2002 the Court rejected an application for single-parent adoption by a homosexual man, on the grounds that there was no scientific or legal consensus with regard to the parenthood of a homosexual person and the wellbeing of a child, and that therefore a wide margin of appreciation therefore applied.[66] In 2008, however, the Court held that a refusal to allow single-parent adoption by a woman living in a same-sex relationship

62 *Aune v. Norway* (no. 52502/07), Judgment of 28 October 2010 (not reported).
63 *Harroudj v. France* (no. 43631/09), Judgment of 4 October 2012 (not reported); see also *Chbihi Loudoudi and Others v. Belgium* (no. 52265/10), Judgment of 16 December 2014 (not reported): in this case the Belgian authorities refused to approve the adoption by Mr Chbihi Loudoudi and Ms Ben Said of their Moroccan niece, for whom they were caring on the basis of kafala. The kafala is an institution under Islamic law, defined as a voluntary undertaking to provide for a child's welfare, education and protection. The ECtHR found that there had been no violation of Article 8, for the applicants were able to pursue their family life.
64 *Harroudj v. France* (*supra* note 63), §47.
65 *Ibid.*, §51.
66 *Fretté v. France* (*supra* note 31).

was contrary to the provisions of the ECHR.[67] The Court essentially based its judgment in this second case on the view that where national law allows single-parent adoption, this right should be granted without discrimination. The Court held that any differentiation made between persons wishing to adopt a child solely on the basis of their sexual orientation lacked any objective or rational justification and was therefore discriminatory. It also stated that in cases where sexual orientation was taken into consideration by the authorities, only weighty and particularly convincing reasons could justify unequal treatment of applicants.

A similar trend can be seen in ECtHR judgments in cases involving stepchild adoption. Whereas in *Gas and Dubois v. France*[68] the Court decided that Article 8 of the ECHR was not violated in cases where national law denied same-sex couples the right to marry and thus also to adopt stepchildren,[69] a Grand Chamber judgment handed down a short time later, *X. and Others v. Austria*,[70] held that prohibiting the adoption of the biological child of one member of a same-sex couple amounted to discrimination which disadvantaged same-sex couples versus unmarried heterosexual couples. Here again, the ECtHR held that differences in treatment based on sexual orientation, like those based on sex, require particularly serious, convincing and weighty reasons in order to be justified, and that the State had a narrow margin of appreciation in these situations. It held that while the difference in treatment in cases of second-parent adoptions between heterosexual and same-sex couples could be justified on the basis of the need to protect the traditional family, the protection of a child's best interests was also a legitimate aim. The Court examined whether Austria had respected the principle of proportionality and it concluded that there was not sufficient proof that the exclusion of same-sex couples from second-parent adoption was necessary for the protection of traditional families, and that there was considerable doubt with regard to the proportionality of absolute prohibition in such cases. In the light of this, the Court found that there had been a violation of Article 14 in conjunction with Article 8 of ECHR in this case.

Of paramount importance in these cases is what specific sets of circumstances are being compared. It is noteworthy that the Court did not censure national decisions which gave precedence to married couples over unmarried and same-sex couples as far as access to adoption was concerned, whereas it did hold that where second-parent adoption is available to unmarried heterosexual couples, these same rights must apply to unmarried same-sex couples.

67 *E.B. v. France* (*supra* note 36).

68 *Gas and Dubois v. France* (no. 25951/07), Judgment of 15 March 2012, ECHR 2012-II.

69 Similarly *Boeckel and Gessner-Boeckel v. Germany* (no. 8017/11), Decision of 7 May 2013 (not reported), §28. In this case the applicants were registered partners, one applicant adopted a child and the applicants thereafter applied for a rectification of the child's birth certificate to show that the first applicant was his other parent.

70 *X. and Others v. Austria* (*supra* note 33).

Where a child has attained sufficient maturity to express an opinion, the authorities must take that opinion into account. In *Pini and Others v. Romania*[71] the applicants, four Italian nationals, adopted two Romanian children. The children's home in which the girls had been placed refused to hand them over to the adoptive parents. The ECtHR found the interference with Article 8 of the ECHR to be justified in this case, because the children were almost ten years old and were consciously opposed to the adoption.

3.4. REPRODUCTIVE MEDICINE

New procedures in reproductive medicine represent a challenge to national legal systems and have given rise to various new pieces of legislation in recent decades. However, this is an area where there are substantial differences between the laws of different states. There does not appear to be any international consensus with regard first to the permissibility of specific medical procedures, second to who should have access to reproductive medicine and third to the legal consequences arising from the application of such medical procedures.[72] For these reasons, the ECtHR allows a considerable margin of appreciation to the Contracting States in this area.

It is certainly the case that a person's right to have recourse to medically assisted reproductive techniques falls within the scope of that person's right to private life.[73] The ECHR Contracting States are not however required to make all possible types of reproductive medicine permissible in law. With regard to Austrian reproductive-medicine legislation, the ECtHR has considered whether, and if so to what extent, the prohibition of *in vitro* fertilisation using sperm or eggs provided by third parties constitutes a violation of Article 8 of the ECHR. In its *S.H. and Others v. Austria*[74] judgment, the Chamber held that a general prohibition of embryo transfer following egg-cell donation and a prohibition of *in vitro* fertilisation with sperm donated by a third party both constituted violations of the ECHR, because there was no objective or appropriate justification for either prohibition. The Chamber held that Article 8 of the ECHR conferred the right to have a child and the right to make use of reproductive-medicine procedures as a means of fulfilling the wish to have a child. Austria then appealed to the Grand Chamber, which, in its judgment handed down on

71 *Pini and Others v. Romania* (nos. 78028/01 and 78030/01), Judgment of 22 June 2004, ECHR 2004-V.

72 Cf. in this regard Büchler Andrea and Clausen Sandro (2014), 256 f.; see also Rütsche Bernhard and Wildhaber Isabelle S. (2010), 805.

73 *Costa and Pavan v. Italy* (no. 54270/10), Judgment of 28 August 2012 (not reported), §56 (in French version); *S.H. and Others v. Austria* (*supra* note 20), §82; *Dickson v. the United Kingdom* (no. 44362/04), Judgment (Grand Chamber) of 4 December 2007, ECHR 2007-V, §66; *Evans v. the United Kingdom* (*supra* note 19), §71.

74 *S.H. and Others v. Austria* (*supra* note 20).

3 November 2011,[75] held that the effect of the Austrian decision did not violate the fundamental principles of the ECHR. The Grand Chamber's principal reason for reaching this conclusion was that, given the lack of European consensus regarding the permissibility of individual reproductive-medicine procedures, and in the light of the limitations set out in Article 8(2) ECHR, the restrictions applied by Austrian law in this area did not violate the ECHR.

Furthermore, a woman does not necessarily have the right to request that a fertilised egg be placed in her uterus without the consent of the sperm donor. In *Evans v. the United Kingdom*[76] the former partner of the female applicant requested the destruction of the stored embryos, thus preventing the applicant from ever having biological children. The Grand Chamber noted that it was undisputed that Article 8 ECHR applied to the right to private life and that this included "respect for both the decisions to become and not to become a parent".[77] At issue was the conflict between the rights of two people. The Chamber concluded that:

> "given the lack of European consensus on this point, the fact that the domestic rules were clear and brought to the attention of the applicant and that they struck a fair balance between the competing interests, there has been no violation of Article 8 of the Convention."[78]

In *Costa and Pavan v. Italy,*[79] a rather particular judgment, the ECtHR had to consider whether an absolute prohibition of pre-implantation genetic diagnosis is permissible under Article 8 of the ECHR. The applicants alleged that their being denied the possibility of benefiting from assisted reproduction technology and pre-implantation genetic diagnostics in order to ensure that their child would not suffer from a specific disease they themselves carry constituted a violation of their rights under Article 8 of the ECHR. The Court affirmed interference with the couple's rights under Article 8 of the ECHR. Regarding whether this interference was necessary in a democratic society, the Court held that:

> "[w]hile stressing that the concept of 'child' cannot be put in the same category as that of 'embryo', it fails to see how the protection of the interests referred to by the Government can be reconciled with the possibility available to the applicants of having an abortion on medical grounds if the foetus turns out to be affected by the disease, having regard in particular to the consequences of this both for the foetus, which is clearly far further developed than an embryo, and for the parents, in particular the woman."[80]

75 *S.H. and Others v. Austria* (*supra* note 20).
76 *Evans v. the United Kingdom* (*supra* note 19).
77 *Ibid.*, §71.
78 *Ibid.*, §92.
79 *Costa and Pavan v. Italy* (*supra* note 73).
80 *Ibid.*, §55.

The Court concluded that Italian law lacked consistency and thus constituted a disproportionate interference with the applicants' rights under Article 8 of the ECHR.

Particular questions with regard to the initiation and establishment of parenthood arise where surrogacy is concerned. In the majority of European countries, surrogacy is prohibited.[81] People living in countries in which surrogacy is forbidden do however enter into surrogacy arrangements in countries which do permit the practice. When these intended parents then return to their own country, the question of recognition of the parental relationship between them and the child inevitably arises. In two such cases, *Mennesson v. France*[82] and *Labassee v. France,*[83] the issue at stake was the French authorities' refusal to grant legal recognition in France to parent–child relationships that had been legally established in the United States between children who had been born to a surrogate mother and the intended parents. In fact, French law completely precludes the establishment of a legal relationship between children born as a result of surrogacy treatment abroad and the intended parents – regardless of whether they are the genetic parents of the child – on *ordre public* grounds. Surrogacy is prohibited in France and a surrogacy agreement is therefore null and void under French law. In these two cases, the Court found that a violation of Article 8 of the Convention had occurred with regard to the children's right to respect for their private life, but that there had not been a violation of the applicants' right to family life. It first found that Article 8 ECHR was applicable; family life was clearly a given, since the applicants had lived with and cared for the children. Furthermore, it held that the children's right to identity is an integral part of private life. The Court went on to note that the French authorities' interference with the applicants' right to respect for private and family life was in accordance with the law and pursued such legitimate aims as the "protection of health" and the protection of "the rights and freedoms of others". With regard to the question as to whether this interference was "necessary in a democratic society", the Court acknowledged that a wide margin of appreciation had to be given to the Contracting States, as there was no consensus on issues of surrogacy. However, the Court stated that parentage is a key aspect of the identity of an individual, and observed that a fair balance had to be struck between the different interests involved. The Court also noted that whenever children are involved, their best interests must prevail.[84]

81 Regarding this, see Brunet Laurence, Carruthers Janeen, Davaki Konstantina, King Derek, Marzo Claire and McCandless Julie (2013), 200 f.
82 *Mennesson v. France* (no. 65192/11), Judgment of 26 June 2014 (not yet reported).
83 *Labassee v. France* (no. 65941/11), Judgment of 26 June 2014 (not reported).
84 As already stated in *Wagner and J.M.W.L. v. Luxembourg*, a case relating to the refusal, under international private law, of recognition of an adoption carried out by unmarried parents in another country, *Wagner and J.M.W.L. v. Luxembourg* (no. 76240/01), Judgment of 28 June 2007 (not reported), §118, 128 f.

Since the applicants were allowed to live with their children in France, the Court found that their family life had been sufficiently respected. However, the children themselves were in a state of legal uncertainty not only with regard to their filiation and their inheritance rights but also with regard to their citizenship. The Court considered that an individual's right to establish his or her parentage was an essential aspect of his or her private life. In the cases concerned, the intended fathers were also the genetic fathers. According to the Court, biological filiation is a crucial component of each individual's identity and to deprive the child of legal ties to his or her biological father amounts to an infringement of the right to respect for private life and to a breach of Article 8 of the Convention. According to the ECtHR, the French state had overstepped the permissible margin of appreciation in these cases.

In *Paradiso and Campanelli v. Italy*[85] the authorities had decided to remove a child born from a Russian surrogate from his intended parents and to place him under guardianship on the ground that he had no biological relationship with the applicants and that the applicants had circumvented the prohibition on gestational surrogacy agreements. The ECtHR held that Article 8 of the ECHR was applicable, noting the existence of a *de facto* family relationship between the intended parents and the child. It further found that the Italian authorities had violated the Convention since they had not given sufficient weight to the best interests of the child when balancing them against public order considerations. In particular, the fact that the applicants had attempted to circumvent the prohibition of surrogacy according to Italian law could not take precedence over the best interests of the child, in spite of the absence of a biological relationship between the child and the intended parents. The removal of the child, so the Court argued, is an extreme measure that can only be justified when the child is in immediate danger, a condition that was not fulfilled.

3.5. THE RIGHT TO KNOWLEDGE OF ONE'S OWN ORIGINS

The ECtHR considers the right of a child to a procedure to establish his or her origins to form part of the right to private life under Article 8 of the ECHR. An individual's right to knowledge of his or her own origins is integral to that individual's access to a personal identity and to a shared life history, and is therefore also a very significant factor in the individual's development as a person. In the ECtHR's view:

> "respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality".[86]

The Court's Grand Chamber judgment in *Odièvre v. France*[87] gave rise to some controversy. The case related to a woman who was born anonymously and was subsequently adopted. She later requested access to documents containing information about her biological family. French law provides for the institution of *accouchement sous x*. This grants the mother of a child the right to require that the birth of the child and her own identity as the child's mother be kept secret.[88] The Court found that the institution of *accouchement sous x* did not, *per se*, infringe the ECHR. It held that the issue concerned the conflict of the interests of two adults – the applicant and her biological mother – that are not easily reconciled, and that these interests cannot be seen in isolation from the issue of the protection to be afforded to third parties such as the adoptive parents, the child's biological father and other family members. Furthermore, a general interest was at stake in the form of the health and life of mothers and children. The Court held that the choice of means used to ensure compliance with Article 8 of the ECHR in the relations of individuals between themselves fell within the margin of appreciation of the state. While, in a similar case, *Godelli v. Italy*,[89] heard a few years later, the ECtHR reiterated its view that due consideration must be given to the various interests involved and that Contracting States were free in the choice of methods they applied in so doing, it also emphasised that "particularly rigorous scrutiny is called for when weighing up the competing interests."[90] Here, the Court concluded that because of the absence of an effort to balance the competing interests at stake in Italian law, which resulted in "blind preference" being given to the applicant's biological mother's interest in remaining anonymous, the authorities had not struck an appropriate balance and had thus overstepped their margin of appreciation.[91]

In its other judgments, the ECtHR has regularly ascribed substantial weight to an adult child's interest in knowing his or her origins. While acknowledging that Contracting States remain entitled to weigh up the merits of the various possible courses of action open to them, the Court has held that any limitations placed on an adult child's interest in discovering his or her origins must be subjected to particularly rigorous scrutiny. In *Jäggi v. Switzerland*[92] the applicant requested a DNA test to find out whether a deceased man was his biological

85 *Paradiso and Campanelli v. Italy* (no. 25358/12), Judgment of 27 January 2015 (at the time of writing pending before the Grand Chamber).

86 *Mikulić v. Croatia* (*supra* note 49), §54.

87 *Odièvre v. France* (*supra* note 25).

88 Regarding this, see the French Social Action and Families Code (Code de l'action sociale et des familles), dated 1956, amended version of 23 June 2014, Article L 222-6.

89 *Godelli v. Italy* (*supra* note 25).

90 *Ibid.*, §52.

91 *Ibid.*, §39.

92 *Jäggi v. Switzerland* (*supra* note 25).

father. This request was refused by the Swiss authorities. The Court saw this as a violation of Article 8 of the ECHR. It held that:

> "[although] the applicant, now aged 67, has been able to develop his personality even in the absence of certainty as to the identity of his biological father, it must be admitted that an individual's interest in discovering his parentage does not disappear with age, quite the reverse. Moreover, the applicant has shown a genuine interest in ascertaining his father's identity, since he has tried throughout his life to obtain conclusive information on the subject. Such conduct implies mental and psychological suffering, even if this has not been medically attested".[93]

The Court also noted that the deceased's family had not cited any religious or philosophical grounds for refusing permission for a DNA sample to be taken from the deceased's mortal remains.

4. FORMS OF FAMILY LIFE

4.1. GENERAL CONSIDERATIONS

The pluralisation of family structures presents the ECtHR with major challenges. As far as the relationship between members of a couple is concerned, the Court is regularly called upon to pronounce on what differences in the treatment accorded to different types of relationships are justified and which are not. One such issue is whether same-sex couples should be granted the same access to family law institutions as different-sex couples. With regard to the relationship between parents and their children, the paramount question is whether the authorities can continue to base their positions on status-related attributes – i.e. whether, and if so to what extent, rulings on parental responsibility and care can be based on the marital status of the parents. In its more recent judgments, the ECtHR has generally tended to emphasise that the justification of differences in treatment of children born within marriage and children born out of wedlock requires "very weighty reasons",[94] as does a difference in treatment between married parents and cohabiting parents.[95] With regard to the relevance of a person' sexual orientation, the ECtHR has expressed the view that:

93 *Ibid.*, §40.

94 See *Genovese v. Malta* (no. 53124/09), Judgment of 11 October 2011 (not reported), where the Court found that a law which prevented (only) children born to Maltese fathers out of wedlock from acquiring Maltese citizenship violates Article 14 in conjunction with Article 8 of the ECHR.

95 *Zaunegger v. Germany* (no. 22028/04), Judgment of 3 December 2009 (not reported), §51; *Sommerfeld v. Germany* (*supra* note 27) (extracts), §93; *Sahin v. Germany* (*supra* note 33), §94.

> "when the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of. Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow and in such situations the principle of proportionality does not merely require that the measure chosen is in general suited for realising the aim sought but it must also be shown that it was necessary in the circumstances. Indeed, if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention."[96]

4.2. PARTNERSHIPS

Article 8 of the ECHR not only addresses marriage-based relationships but also covers *de facto* family ties where the persons concerned are living together but are not married. This does not mean, however, that married and unmarried couples should be treated equally in every respect. Even in its more recent judgments, the ECtHR has taken the view that the protection of the traditional family founded on marriage is a legitimate aim of legislation.[97] In cases where a state chooses to provide same-sex couples with an alternative means of recognition, such as registered partnership, it enjoys a certain margin of appreciation as regards the exact status conferred by these arrangements.[98] The Court did however note that Contracting States:

> "must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life."[99]

Despite this open approach to what constitutes a family, the Court had for a long time taken the explicit view that relationships between couples of the same sex did not qualify for protection of family life under Article 8 of the ECHR and that they differed from heterosexual relationships in that respect. It was the Court's established practice to guarantee a same-sex couple's right to private life but not their right to family life. As the number of states granting legal recognition and protection to same-sex partnerships has grown, the ECtHR's interpretation of Article 8 of the ECHR has changed. The first such change in the Court's ECHR

96 *Kozak v. Poland* (no. 13102/02), Judgment of 2 March 2010 (not reported), §92.

97 Cf. *Manenc v. France* (no. 66686/09), Decision of 21 September 2010 (not reported).

98 *Boeckel and Gessner-Boeckel v. Germany* (*supra* note 69), §28; *Gas and Dubois v. France* (*supra* note 68), §66; *Schalk and Kopf v. Austria* (no. 30141/04), Judgment of 24 June 2010, ECHR 2010-IV, §108.

99 *Kozak v. Poland* (*supra* note 96), §98.

pronouncements became apparent in *X., Y. and Z. v. the United Kingdom,*[100] where the ECtHR afforded protection to the family life of a constellation comprising a female to male transsexual, his female partner and their child.

The ECtHR's *Schalk and Kopf v. Austria*[101] judgment marked the end of its previous practice of affording same-sex couples the right only to protection of their private life. This was a case in which a same-sex couple had lodged a complaint with the ECtHR because they had been refused the right to marry. On the one hand, the Court ruled that the authorities' action in this case had not violated the prohibition against discrimination (under Article 14) in conjunction with the right to marry (under Article 12). The Court held that it was acceptable to deny same-sex couples the right to marry, since the ECHR did not in any way grant that right to couples of the same sex. The Court found that there was no European consensus on marriage between two individuals of the same gender. In the light of the "deep-rooted social and cultural connotations" of marriage, which vary greatly between societies, the Court found that it "must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess the needs of society."[102] However, in its judgment in this case, the Court also noted that it had not previously afforded the right to family life protection to same-sex couples, because there had been no evidence of a common approach to homosexuality among the Contracting States and that, for that reason, the margin of appreciation granted to the states had been very substantial. The Court went on to observe, however, that since a growing consensus was now emerging for greater rights to be afforded to same-sex couples, the position it had taken in these matters hitherto would have to be reconsidered. The Court stated that:

> "In view of this evolution, the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would".[103]

A controversial case was presented in *Hämäläinen v. Finland.*[104] Here, the Court's Grand Chamber was called upon to determine whether the Finnish

100 *X., Y. and Z. v. the United Kingdom* (*supra* note 8).
101 *Schalk and Kopf v. Austria* (*supra* note 98).
102 *Ibid.*, §62.
103 *Ibid.*, §94. The Court restated this position in *P.B. and J.S. v. Austria* (*supra* note 36), §30 and the Grand Chamber confirmed it in *X. and Others v. Austria* (*supra* note 33); *Boeckel and Gessner-Boeckel v. Germany* (*supra* note 69).
104 *Hämäläinen v. Finland* (no. 37359/09), Judgment (Grand Chamber) of 16 July 2014 (not reported).

authorities had violated the Convention by denying full recognition of a transsexual person's new gender on the basis of that person's marital status. The applicant had requested that her new gender as a female be registered. The Finnish authorities refused this request on the grounds that under Finnish law, this would either require the applicant not to be married or, if the applicant were married (as was the case in this instance), require the applicant's wife to consent to the transformation of the marriage into a registered partnership, which the wife did not do. The applicant and her wife were deeply religious. The applicant complained under Article 8 of the Convention that her right to private and family life had been violated when the full recognition of her new gender was made conditional on the transformation of her marriage into a registered partnership. The Court's Grand Chamber, however, held that while states are required, in accordance with their positive obligation under Article 8 of the ECHR, to recognise the change of gender undergone by transsexual persons, the Convention cannot be interpreted as imposing an obligation on Contracting States to grant same-sex couples access to marriage. The Court went on to argue that:

> "while it is regrettable that the applicant faces daily situations in which the incorrect identity number creates inconvenience for her [...] the applicant has a genuine possibility of changing that state of affairs: her marriage can be converted at any time, *ex lege*, into a registered partnership with the consent of her spouse. If no such consent is obtained, the possibility of divorce, as in any marriage, is always open to her."[105]

The Court therefore took the view that the Finnish authorities had not acted disproportionately in making it a precondition to the legal recognition of the applicant's newly acquired gender that her marriage be converted into a registered partnership. The judges dissenting to the majority judgment[106] put forward the convincing argument that it is highly problematic to play out the two human rights of recognition of a person's gender identity (as an element of private life) and maintenance of that person's marital status (as an element of family life) against each other and thus to force the applicant to choose between the two.

One case involving the question of access to marriage by same-sex couples is currently pending before the ECtHR: *Chapin and Charpentier v. France.*[107] Whether the Court will be willing to review *Schalk and Kopf v. Austria* in the light of the fact that more and more European countries are opening marriage to

105 *Ibid.*, §87.
106 *Ibid.*, dissenting opinion of the Judges Sajó, Keller and Lemmens, §6.
107 *Chapin and Charpentier v. France* (no. 40183/07), Communicated Case.

same-sex couples[108] is hard to predict.[109] In *Schalk and Kopf v. Austria* the Court did, after all, go so far as to hold that it "would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex".[110] Moreover, if same-sex couples fall within the notion of family life, then it would be consistent and appropriate to expect the Court to draw inferences accordingly and offer such relationships an appropriate framework.[111] In *Vallianatos and Others v. Greece*[112] the Court's Grand Chamber ruled that the Greek Government had not put forward sufficiently weighty reasons to justify the exclusion of same-sex couples from a newly introduced non-marriage-based form of partnership called "civil unions". Finally, in *Oliari and Others v. Italy*[113] the Court found that Italy had failed to fulfil its obligation to ensure that the applicants – three same-sex couples – had access to a specific legal framework providing for the recognition and protection of their relationship.

In a whole range of judgments, based on a number of different applications made to it, the ECtHR has been called upon to rule on differences between the treatment accorded to same-sex couples and that afforded to heterosexual couples. There has been a marked evolution in its pronouncements on these matters. In *Mata Estevez v. Spain* in 2001[114] the applicant, who had cohabited with another man for many years, claimed the social security benefits due to a surviving spouse after the death of his partner, arguing that, as homosexuals, the couple had not been able to sanction their relationship by marrying. At that time, the Court still took the view that the difference in treatment in that case fell within the margin of appreciation accorded to the Contracting States. Similarly, in *Manenc v. France*[115] the Court found that the fact that persons of the same sex cannot be married under French law was not sufficient to place the applicant in a situation comparable to that of a spouse with regard to a survivor's pension. A few months

108 Within the Council of Europe, the Netherlands opened civil marriage to same-sex couples in 2001, which made it the first country in the world to do so. Nine other European States have so far followed suit: Belgium in 2003, Spain in 2005, Norway and Sweden in 2009, Portugal and Iceland in 2010, Denmark in 2012, and France and England and Wales in 2013. Countries that will follow are Finland, Luxembourg and Scotland. There is however also evidence of trends going in the opposite direction, with Croatia having recently introduced a constitutional provision, based on the result of a popular referendum, stating that marriage is a union between a man and a woman, thus preventing same-sex couples from having access to marriage.

109 See the arguments put forward by Bribosia Emmanuelle, Rorive Isabelle and Van den Eynde Laura (2014) 1 f.

110 *Schalk and Kopf v. Austria* (*supra* note 98), §61.

111 *Ibid.*, dissenting opinion of the Judges Rozakis, Spielmann and Jebens, §4.

112 *Vallianatos and Others v. Greece* (nos. 29381/09 and 32684/09), Judgment (Grand Chamber) of 7 November 2013, ECHR 2013-II.

113 *Oliari and Others v. Italy* (nos. 18766/11 and 36030/11) Judgment of 21 July 2015 (at the time of writing not yet final).

114 *Mata Estevez v. Spain* (no. 56501/00), Decision of 10 May 2001, ECHR 2001-VI.

115 *Manenc v. France* (*supra* note 97).

earlier, however, the Court had taken a different stance, when in *P.B. and J.S. v. Austria*[116] it found that the applicants had been victims of a violation of Article 14, read in conjunction with Article 8 of the ECHR, because they were denied the extension of one of the partners' insurance cover to include the other partner on the grounds that they were of the same sex. The only rational explanation for the differing judgments in these cases would appear to be that the key issue in the first two cases was the treatment accorded to same-sex couples and that it was therefore a matter of determining whether it was within the margin of appreciation of the states to decide whether or not to grant same-sex couples access to marriage and thus to all the institutions associated with marriage, while in the third case the key issue was the sexual orientation of one of the partners in the relationship. The ultimate effect of this distinction is however hardly convincing.

In general, the consensus that same-sex couples should be afforded the same protections as different-sex couples has undoubtedly grown stronger. As far as the rights relating to a couple's shared dwelling is concerned, in *Karner v. Austria*[117] the Court held that no convincing and weighty reasons had been put forward to justify the exclusion of homosexual relationships from the Austrian Rent Act and therefore from succession in the tenancy. Accordingly, it found that there had been a violation of Article 14 in conjunction with Article 8 of the ECHR. The ECtHR confirmed its jurisprudence in this regard in *Kozak v. Poland*,[118] where it stated:

> "[s]triking a balance between the protection of the traditional family and the Convention rights of sexual minorities is, by the nature of things, a difficult and delicate exercise, which may require the State to reconcile conflicting views and interests perceived by the parties concerned as being in fundamental opposition. Nevertheless, having regard to the State's narrow margin of appreciation in adopting measures that result in a difference based on sexual orientation [...], a blanket exclusion of persons living in a homosexual relationship from succession to a tenancy cannot be accepted by the Court as necessary for the protection of the family viewed in its traditional sense".[119]

4.3. PARENTAL RESPONSIBILITY, CONTACT AND VISITATION RIGHTS

The ECtHR states that:

> "the mutual enjoyment by a parent and child of each other's company constitutes a fundamental element of family life, even if the relationship between the parents has

116 *P.B. and J.S. v. Austria* (*supra* note 36).

117 *Karner v. Austria* (no. 40016/98), Judgment of 24 July 2003, ECHR 2003-IX.

118 *Kozak v. Poland* (*supra* note 96).

119 *Ibid.*, §99.

broken down, and domestic measures which hinder such enjoyment amount to an interference with the right protected by Article 8".[120]

Parental responsibility[121] falls within the ambit of Article 8 of the ECHR. It encompasses the right to make decisions relating to a child's education, care and place of abode.[122] Nevertheless, Contracting States enjoy a wide margin of appreciation in their decisions on parental responsibility rights and, in some instances, also with regard to contact and visitation rights.[123] Any rulings in this area must however guarantee that the best interests of the child can be evaluated in each individual case.

As early as 1999, in *Salgueiro da Silva Mouta v. Portugal,*[124] the Court held that a distinction in awarding parental responsibility on the basis of sexual orientation was not acceptable under the Convention.

In its *Zaunegger v. Germany*[125] judgment, the ECtHR found that a ruling according to which unmarried fathers could be granted shared parental responsibility only with the consent of the child's mother violated Article 14 in conjunction with Article 8 of the ECHR. In this case, the applicant had lived with and cared for his daughter for the first years of her life. Domestic law did not provide for judicial examination of whether shared parental authority would be in the best interests of the child. The Court noted that there may be valid grounds for attributing parental custody to the mother alone where this protects the child's best interests. However, it found that there was no *prima facie* evidence that awarding shared parental responsibility against the will of the mother would not be in the best interests of the child, and therefore ruled that not granting access to judicial proceedings and to adequate judicial scrutiny to unmarried fathers – in contrast to divorced fathers – constitutes a violation of the Convention. The Court held that:

"although there exists no European consensus as to whether fathers of children born out of wedlock have a right to request joint custody even without the consent of the mother, the common point of departure in the majority of Member States appears to be that decisions regarding the attribution of custody are to be based on the child's best interests and that in the event of a conflict between the parents such attribution should be subject to scrutiny by the national courts."[126]

120 *Zaunegger v. Germany* (*supra* note 95), §38. See also *Qama v. Albania and Italy* (no. 4604/09), Judgment of 8 January 2013 (not reported), §79; in another judgment, the ECtHR even went further, stating that the state also has to take positive measures to enable such enjoyment, *Karrer v. Romania* (no. 16965/10), Judgment of 21 February 2012 (not reported), §38.

121 Parental responsibility is used synonymously with parental authority or parental custody.

122 *Zaunegger v. Germany* (*supra* note 95), §40.

123 Contact and visitation rights is used synonymously with access rights.

124 *Salgueiro da Silva Mouta v. Portugal* (no. 33290/96), Judgment of 21 December 1999, ECHR 1999-IX.

125 *Zaunegger v. Germany* (*supra* note 95).

126 *Ibid.*, §60.

Similarly, not long after *Zaunegger v. Germany*, the ECtHR concluded in *Sporer v. Austria*[127] that unjustified interference with the right to family life had occurred if, contrary to the practice applied in the case of divorced parents, no consideration was given in the case of unmarried parents who subsequently separated as to whether shared parental custody was in the best interests of the child and, if not, whether the child's best interests would be better served by such custody being awarded solely to the child's father or the child's mother. In this particular case, the father had assumed parental responsibility for the child from the time of the child's birth.

However, the Court also found that the authorities' initial attribution, without further examination, of parental responsibility (solely) to the child's mother did not constitute a violation of Article 8 of the ECHR, because such action was appropriate to ensuring that one of the child's parents was immediately granted legal guardianship of the child.[128]

In *Buchs v. Switzerland*[129] the ECtHR was required to consider the related question of whether a ruling that a child's divorced parents could be granted shared parental responsibility for a child only if they made a joint application constituted a violation of the ECHR. The Court held that this ruling did not contravene the Convention, particularly since it applied to unmarried and divorced parents alike. It also noted that neither parent had been privileged over the other in the awarding of parental responsibility after divorce. It concluded that:

"The Court considers that the Government have convincingly established that the reasoning behind the requirement of a joint request for shared parenting was to oblige the parents to show their willingness to cooperate in child-related matters even after divorce. Both parents were thereby treated equally and it was not only the mother but both parents who had the right to oppose shared parental authority. The Court is therefore satisfied that the requirement of a joint request does not draw on any distinction based on the parents' gender, so that no difference of treatment exists either in the law or in the decisions applying it."[130]

Article 8 of the ECHR guarantees the non-custodial parent a right to visit and contact his or her child.[131] Here, too, the ECtHR has emphasised that an unjustified infringement of the Convention would occur in the case of any ruling granting an unmarried father contact rights to his child either only with the mother's consent or based on a special court decision that such contact rights were in the child's best interest, while at the same time requiring that in the case of

127 *Sporer v. Austria* (no. 35637/03), Judgment of 3 February 2011 (not reported).

128 *Ibid.*, §85; *Zaunegger v. Germany* (*supra* note 95), §55.

129 *Buchs v. Switzerland* (no. 9929/12), Judgment of 27 May 2014 (not reported).

130 *Ibid.*, §72.

131 *Hoffmann v. Germany* (no. 34045/96), Judgment of 11 October 2001 (not reported), §34 f.

married parents the father's contact rights could be restricted only on the basis of the child's best interests. In *Sahin v. Germany*[132] the applicant, an unmarried father, had been denied contact rights to his child. According to the legislation in force in Germany at that time, the child's mother, to whom custody over the child had been awarded, was entitled to determine whether or not the child's father should be granted contact rights to his child. The only circumstances under which the guardianship authority could award contact rights to the child's father were if it deemed this to be in the child's best interests, whereas divorced fathers were legally entitled to contact rights to their children. The ECtHR held that whether a child was born to married or unmarried parents did not constitute reasonable grounds for inequality of treatment. Similarly, in *Sommerfeld v. Germany*[133] and *Hoffmann v. Germany*[134] the Court took the view that the fundamental differences in the treatment accorded to the two different groups of fathers with regard to their contact rights to their children amounted to discrimination under Article 14 in conjunction with Article 8 of the ECHR. Contact may however be denied to fathers in individual cases based on an evaluation of the best interests of the child.

While, in its *Görgülü v. Germany*[135] judgment, the ECtHR did not uphold an application for parental custody made by a man who did not learn of his paternity of a child until after the child's mother had given the child up for adoption – based on the argument that the authorities enjoy a wide margin of appreciation when deciding on custody – it did however rule that:

> "a stricter scrutiny is called for as regards any further limitations, such as restrictions placed by those authorities on parental rights of access, and as regards any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between a young child and one or both parents would be effectively curtailed".[136]

The Court therefore found that a prohibition of contact between father and child would constitute a violation of Article 8 of the ECHR.

In *Gluhaković v. Croatia,*[137] the ECtHR saw a violation of Article 8 of the Convention in the state's failure to take the personal circumstances of the applicant into account when arranging contact with his daughter. In the light of the particular circumstances of the case and the urgent need to put an end to the violation of the applicant's right to respect for his family life, the Court made its first-ever ruling that the respondent state had to ensure effective contact between the applicant and

132 *Sahin v. Germany* (*supra* note 33).
133 *Sommerfeld v. Germany* (*supra* note 27).
134 *Hoffmann v. Germany* (*supra* note 131).
135 *Görgülü v. Germany* (no. 74969/01), Judgment of 26 February 2004 (not reported).
136 *Ibid.*, §42.
137 *Gluhaković v. Croatia* (no. 21188/09), Judgment of 12 April 2011 (not reported).

his daughter at a time compatible with his work schedule and on suitable premises. In *Kuppinger v. Germany,*[138] the ECtHR held that the lack of effective remedy for lengthy proceedings on contact rights constituted a violation of the Convention.

Furthermore, Article 8 of the ECHR may also require that a man who is the biological father of a child, but not the child's legal father, be granted contact rights to the child if this is in the best interests of the child. In *Anayo v. Germany*[139] a relationship between a married woman and Mr Anayo led to the birth of twins. The couple's relationship ended before the children were born and the woman returned to live with her husband. Based on the legal attributes of the situation, the woman and her husband denied Mr Anayo any contact with the children. The Court took into consideration the margin of appreciation applicable to the German authorities, but found that the balancing of the various interests involved had not been fair in the light of the authorities' failure to evaluate whether contact with the applicant would have been in the best interests of the twins. *Schneider v. Germany*[140] was a case allegedly involving a child born out of wedlock. Here, the husband of the child's mother and the mother herself both elected not to have the paternity of the child verified. The child's alleged biological father applied for contact and information rights in respect of the child, but the authorities declined to consider his application. The ECtHR ruled that the German authorities' failure to evaluate whether contact with the applicant was in the best interests of the child and their failure to weigh up the interests of the various parties involved constituted violations of Article 8 of the ECHR. The Court also noted that the child's alleged biological father would not have had any possibility of establishing any family ties with the child through personal contact with the child. The Court concluded that:

> "Having regard to the realities of family life in the 21st century, revealed, *inter alia*, in the context of its own comparative law research [...], the Court is not convinced that the best interest of children living with their legal father but having a different biological father can be truly determined by a general legal assumption. Consideration of what lies in the best interest of the child concerned is, however, of paramount importance in every case of this kind [...]. Having regard to the great variety of family situations possibly concerned, the Court therefore considers that a fair balancing of the rights of all persons involved necessitates an examination of the particular circumstances of the case."[141]

Finally, even if a person is neither the child's legal father nor the biological father, Article 8 ECHR requires the Contracting States to examine on a case-by-case

138 *Kuppinger v. Germany* (no. 62198/11), Judgment of 15 January 2015 (not selected for publication) §144, §145.
139 *Anayo v. Germany* (*supra* note 13).
140 *Schneider v. Germany* (*supra* note 13).
141 *Ibid.*, §100.

basis whether it is in the child's best interests to maintain contact with him. In *Nazarenko v. Russia*[142] a man had brought up a child as his own for several years. Later it was revealed that he was not the biological father and his paternity was then terminated. In the consequence, he was automatically and completely excluded from the child's life. The Court held that denying him the right to maintain contact with the child without taking the child's best interests into consideration constituted a violation of the Convention.

4.4. STEP PARENTHOOD AND FOSTER PARENTHOOD

In *Kopf and Liberda v. Austria*[143] the applicants were foster parents of a child who lived in their care for several years before the biological mother sought and obtained custody of the child. They requested the right to visit the child, a request that was rejected because the authorities considered that the child might suffer from conflicting loyalties between the mother and the applicants. The ECtHR reiterated that Article 8 of the ECHR encompasses *de facto* family ties and that although "as a rule, cohabitation may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create *de facto* family ties".[144] In this case the Court acknowledged that the length of time that the child had spent in the care of the applicants, their concern for the child's wellbeing and the emotional ties between them and the child meant that family life for the purposes of Article 8 ECHR did indeed exist. The question at issue was whether the balance struck between the interests of the child, his foster parents and his biological mother was fair. While reiterating that it cannot replace the domestic authorities, the ECtHR nevertheless found that the length of the proceedings, which had lasted over three-and-a-half years and during which the applicants had had no contact with the child, was excessive and that there therefore had been a violation of Article 8 of the ECHR.

5. CONCLUSION

ECtHR case law on Article 8 of the ECHR is abundant, notably with regard to issues relating to parenthood and family structures. The Court regularly assesses the extent to which a consensus on the various questions involved has developed among the European states. Where no common European standard has established itself, the Contracting States are granted a wide margin of appreciation. In its more recent judgments, however, the ECtHR has shown itself

142 *Nazarenko v. Russia* (no. 39438/13), Judgment of 16 July 2015 (not yet reported), §§66 f.
143 *Kopf and Liberda v. Austria* (no. 1598/06), Judgment of 17 January 2012 (not reported).
144 *Ibid.*, §35.

somewhat less reticent on many issues, and it has both curtailed the margin of appreciation granted to Contracting States and further enhanced individual rights to private and family life. As far as the consideration given to the marital status of a child's parents in matters relating to the legal position of the child is concerned, the margin of appreciation granted to Contracting States is very narrow indeed, and the same also applies to the consideration given to an individual's sexual orientation when his or her entitlement to various rights and benefits is being evaluated (though it is debatable whether any margin of appreciation is justified with regard to discrimination of any kind on the basis of sexual orientation). Any unequal treatment in these areas requires very convincing reasons. However, in matters relating to the legal recognition of same-sex partnerships or to the establishment or contestation of parenthood, the Court continues to accord the Contracting States a wide margin of appreciation. There are also many areas – such as adoption, the application of time limits to the contestation of paternity and the attribution of parental custody – where the ECtHR accords the individual states a certain margin of appreciation, but also requires them to evaluate the competing interests applicable in each individual case. There has so far been little clarification of the more recent questions raised by reproductive medicine. On the one hand, the Court has ruled that restrictions placed on access to such established procedures as third-party sperm or egg-cell donation are justified. On the other hand, it has admonished inconsistencies in the application of prohibitions relating to pre-implantation genetic diagnosis.

While the ECtHR's jurisprudence in many areas is difficult to predict, there can be no doubt that ECtHR jurisprudence with regard to Article 8 of the ECHR has evolved considerably, even if it is sometimes characterised by gaps and inconsistencies and appears to be in search of a just mean, while the periphery is constantly shifting. As Bribosia, Rorive and Van der Eynde see it, the Court appears to be pursuing a variety of strategies:

> "Particularly in non-discrimination law, one can observe that the Court tends to give concrete form to its advances in case law by moving smoothly. Sometimes, it gives an alarm signal by speaking of an emerging European consensus although it dismisses the claimant in casu, sometimes it paves the way for a coming evolution while it will activate its potential in a future case."[145]

What future course the "doctrine of the Convention as a living instrument and the principle of dynamic and evolutive interpretation"[146] will now take is however anything other than certain.

145 Bribosia Emmanuelle, Rorive Isabelle and Van den Eynde Laura (2014), 4 f.
146 Steering Committee for Human Rights and Committee of Experts on the Reform of the Court (29 August 2012).

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PART II
NATIONAL REPORTS

SYNTHESIS

Andrea Büchler and Helen Keller

1. AIM, METHOD AND INHERENT LIMITS OF THE COMPARATIVE ANALYSIS

The aim of this comparative research project was twofold, given that a systematic analysis of the Court's Article 8 case law in matters of parenthood and forms of family life should offer a basis for determining, first, whether a core concept of Article 8 has developed on the European level and, secondly, whether the Court's case law was welcomed in the states examined in the sense that the core concept of Article 8 is reflected at the national level. The analysis of the country reports is both telling and disillusioning. For one, an examination of the Court's case law clearly shows that family law matters are still considered, to a very significant extent, as falling under national law, and the relevant domestic regulations therefore diverge considerably according to the choices made by national legislators. Moreover, experiences with the Court's case law under Article 8 in the countries examined have proven heterogeneous.

Nonetheless, this chapter endeavours to compare the country reports and to draw some general conclusions both for the national and for the European level. It goes without saying that the explanations offered below are speculative and represent an attempt to explore the legal developments on the national level as influenced by the Court, and *vice versa*. We do not claim to conduct a statistical or empirical analysis in this chapter. Instead, we have critically read the country reports from a certain distance and in a comparative way. What we offer is a possible explanation for why some material family law matters differ among a number of Council of Europe Member States despite the fact that national lawmakers act under the same umbrella, namely the Court's jurisprudence on Article 8 ECHR. Our findings as detailed below show that the contrast in attitudes and reasoning between the judiciary and legislative branches is striking. Nonetheless the country reports also reveal some trends towards convergence in family law matters.

The present chapter is divided into five sections. After this short introduction, a second section deals with the traditional questions concerning the position of the Convention in the national legal systems and whether there are indications that the national courts are willing to apply Convention standards even in cases in which these standards conflict with national law. The third section draws some conclusions about compliance mechanisms on the national level. For that purpose, the notion of "implementation" is used in a broad sense, also encompassing compliance with judgments that the Court has handed down vis-à-vis third countries. The fourth section tries to answer some basic questions inherent in any comparative legal research, including whether the analysis confirms some preliminary assumptions such as the idea that the "North" is more liberal and progressive than the "South" or the "Centre" of Europe in family law-related matters. The fifth section elaborates on the Court's role in

family law matters. This issue is intrinsically linked to the question of what the Court can and should achieve in a multi-layered human rights system. However, we focused more closely on the question of whether there were any particularities in the Court's role and self-perception in family law matters. The sixth section contains a substantive analysis of the comparative research, in particular with regard to unmarried and same sex-couples and their access to family law institutions, unmarried fathers and their position vis-à-vis their biological children, access to reproductive medicine and – last but not least – the notion of the best interests of the child. Finally, the last section casts a look at the possible future of matters related to the Court's case law concerning Article 8.

2. THE CONVENTION AND THE COURT'S CASE LAW IN THE NATIONAL LEGAL CONTEXT

The hierarchical position of the ECHR in the domestic legal system varies between the states surveyed. In some Member States, the ECHR enjoys quasi-constitutional status and supersedes domestic statutory law. This is the case, for example, in Greece, Sweden and Croatia.[1] In Austria, the Convention forms an integral part of constitutional law.[2] In other countries, the position of the ECHR is, in certain aspects, even stronger than the domestic constitution. In Spain, for example, despite the fact that the Constitution enjoys supreme status, constitutional provisions on fundamental rights and freedoms must be interpreted in conformity with international treaties, including the ECHR.[3]

The question of the Convention's direct applicability in the domestic legal systems of the Member States depends on whether those systems are monistic or dualistic, with monist systems being more capable of implementing stable mechanisms for harmonising the Convention with domestic law.[4] Before being transposed into the domestic law of dualist states, the ECHR cannot be applied directly and has only interpretive value. In England and Wales, this was the case until the ECHR was transposed into the domestic legal order by means of the Human Rights Act 1998 (HRA 1998). After transposition, the Convention's norms now bind public authorities and require national courts to interpret domestic legislation in a compatible manner, giving it quasi-constitutional status despite the absence of a domestic constitution.[5] In Sweden, the ECHR – which was incorporated into domestic law in 1995 – was explicitly given quasi-

1 Koutsouradis Achilleas and Papadopoulou Lina, Report on Greece, section 1.1; Korać Graovac Aleksandra, Report on Croatia, section 1; Singer Anna, Report on Sweden, section 1.2.
2 Grabenwarter Christoph and Störck Marie-Therese, Report on Austria, section 1.
3 Martín-Casals Miquel and Ribot Jordi, Report on Spain, section 1.1.
4 Stone Sweet Alec and Keller Helen (2008), 20.
5 Scherpe Jens, Fenton-Glynn Claire and Hughes Kirsty, Report on England and Wales, section 1.1.

constitutional status by means of an amendment to the Instrument of Government holding that no legislation contrary to the Convention may be adopted in future.[6] In Germany, where the ECHR has also been incorporated into the domestic system, the Convention is hierarchically equivalent to domestic statutory law and thus does not have the same rank as the constitution, though it serves as an important tool of interpretation.[7] Incorporated international law – including the ECHR – enjoys a stronger position in Hungary, where it is accorded a status between domestic statutory law and the Basic Law.[8]

The monist–dualist dichotomy does not predetermine the Convention's application by the domestic judiciary in law or in practice after transposition or incorporation; this depends on other factors.[9] While the domestic judiciary of monist Croatia is legally required to take the Convention into consideration, for example, there is a dearth of case law that applies the ECHR. Aleksandra Korać Graovac argues that this is due to a lack of knowledge about Convention standards, at least in the lower instances.[10] In dualist Sweden, where courts also rarely exercise their right to perform judicial review of the compatibility of legislation with the ECHR, Anna Singer explains this hesitation as a form of deference to the legislature.[11] Deference to the legislature is reflected both in the approaches used in dualist England and Wales, where a declaration of incompatibility issued by the higher courts does not affect the validity or application of domestic provisions, but may lead to a fast track amendment process,[12] and in Greece, where any court can disapply but no court – with the exception of the Supreme Court under very strict requirements – can abolish domestic legislation in the event of a conflict with the ECHR.[13] In some Member States, by contrast, the Convention empowers the judiciary and enriches its jurisprudence. In Hungary, for example, it is rare for the Constitutional Court's judgments on family law to fail to cite the Court's jurisprudence.[14] In other states, the Convention permits the courts to review acts of the legislature that they could not otherwise scrutinise. This is the case in Switzerland and the Netherlands, where courts cannot review the constitutionality of statutory law, but may directly review it for compliance with the rights and freedoms enshrined in the Convention.[15] All Dutch courts of any level are obliged

6 Singer Anna, Report on Sweden, sections 1.1 and 1.2.
7 Coester-Waltjen Dagmar, Report on Germany, section 1.2.1.
8 Szeibert Orsolya, Report on Hungary, section 1.
9 See, in addition to the Country Reports in this volume, Keller Helen and Stone Sweet Alec (2008), 685.
10 Korać Graovac Aleksandra, Report on Croatia, section 1.1.
11 Singer Anna, Report on Sweden, section 1.3.
12 Scherpe Jens, Fenton-Glynn Claire and Hughes Kirsty, Report on England and Wales, section 1.3.1.
13 Koutsouradis Achilleas and Papadopoulou Lina, Report on Greece, section 1.3.
14 Szeibert Orsolya, Report on Hungary, section 1.
15 Forder Caroline, Report on the Netherlands, sections 1.1 and 1.2, with reference to Articles 93 and 94 of the Dutch Constitution; Cottier Michelle and Wyttenbach Judith, Report on Switzerland, section 1.2.

to end violations of international obligations. The judiciary has a range of tools for dealing with such cases, the most drastic being a declaration that the offending domestic provision is void.[16] In Switzerland, the judiciary can suspend the application of federal statutory law and cantonal law on any hierarchical level if it cannot be interpreted in a manner that conforms to the ECHR.[17]

In addition, the country reports in this volume permit comparison of the domestic approaches to the reopening of domestic proceedings after the Court has found a violation of the Convention. While the Committee of Ministers has urged Member States to permit the reopening of domestic proceedings in this event, states' approaches on this matter continue to vary.[18] In Croatia, for example, applicants who have been successful in Strasbourg may file a motion for an amendment of the relevant first instance decision; the domestic court is then obliged to comply with the legal assessment of the ECtHR.[19] Under Swiss law, it is also possible to apply for a reopening of final domestic cases, both in civil and criminal matters, where *restitutio in integrum* is otherwise not possible.[20] Until 2006, the reopening of domestic proceedings in Germany was only possible in criminal matters; the law was then amended to permit the reopening of civil cases as well.[21] Under Spanish law, on the other hand, there is little specific guidance concerning the implementation of violation judgments of the ECtHR; as a rule, domestic proceedings cannot be reopened.[22]

The above shows that the nature of the domestic approach to international treaties – be it monist or dualist – does not predetermine the hierarchical position or judicial application of the ECHR in the domestic law after the Convention has, in dualist systems, been transposed or incorporated into domestic law.[23] In most of the Member States under consideration, the ECHR holds a privileged position in domestic law: while it may not be hierarchically superior to the domestic constitution, it holds – due to the institutional safeguard that the Court represents – a strong position vis-à-vis conflicting statutory law.

3. EXPERIENCES IN IMPLEMENTATION AND COMPLIANCE

The influence of the Court's jurisprudence is most visible in the implementation of its case law in the Contracting States. According to Article 46 ECHR, the

16 Forder Caroline, Report on the Netherlands, section 1.3.1, with references.
17 Cottier Michelle and Wyttenbach Judith, Report on Switzerland, section 1.2.
18 Compare Committee of Ministers Res R (2000) 2 (19 January 2000).
19 Korać Graovac Aleksandra, Report on Croatia, section 1.3.
20 Cottier Michelle and Wyttenbach Judith, Report on Switzerland, section 1.3.
21 Coester-Waltjen Dagmar, Report on Germany, section 1.3.4.
22 Martín-Casals Miquel and Ribot Jordi, Report on Spain, section 1.1.
23 Keller Helen and Stone Sweet Alec (2008), 685 f.

judgments rendered by the Court are binding for the state concerned. The concrete reaction to the result of a particular ruling by the Court is supervised by the Committee of Ministers; the Court is involved in this process only indirectly.[24] Beyond the binding force of its rulings between the parties concerned, there is wide support for a *de facto erga omnes* effect of the Court's case law.

The broad effect of the Court's case law is mirrored in the variety of possible implementation situations. For one, the state concerned may face some particular difficulties in implementing a judgment. In addition, state authorities may realise that a judgment handed down vis-à-vis another state might necessitate an amendment of the domestic law in the same subject area (cross-country implementation) or in a different but related area (cross-matter implementation); cross-country and cross-matter implementation can happen simultaneously. And, finally, states may want to implement the Court's jurisprudence "preventively".

3.1. IMPLEMENTATION OF "OWN JUDGMENTS"

De facto non-implementation of the Court's jurisprudence may result from the fact that the national legislator is not willing to amend the national law in the light of a Strasbourg ruling. A telling example is the Swiss delay in implementing the judgments in *Burghartz v. Switzerland* and *Losonci Rose and Rose v. Switzerland*.[25] Political disagreement between Berne and Strasbourg was decisive for the delay.[26] However, not only may the legislative branch be delayed in implementing a Strasbourg ruling: the same holds true for the judiciary, which is sometimes hesitant to change its jurisprudence.[27] This is often due to the fact that no cases concerning the relevant subject matter make it to the supreme courts, or in other words that there is no occasion for the highest judicial instances to implement the Court's case law.

Another example is the non-implementation of *Vallianatos v. Greece* by the respondent state.[28] Here, too, a certain political disagreement was (and still is)

24 See Keller Helen and Marti Cedric (2015).

25 *Burghartz v. Switzerland* (no. 16213/90), Judgment (Chamber) of 22 February 1994, Series A, Vol. 280-B; *Losonci Rose and Rose v. Switzerland* (no. 664/06), Judgment of 9 November 2010 (not reported); the respective national law was only amended in 2011.

26 Cottier Michelle and Wyttenbach Judith, Report on Switzerland, section 3.2, note 141.

27 For an example, see the decision of the Swiss Supreme Court of 25 August 2000, which does not extend the notion of family life to the relationships of homosexual couples following *Schalk and Kopf v. Austria* (*Schalk and Kopf v. Austria* (no. 30141/04), Judgment of 24 June 2010, ECHR 2010-IV), Cottier Michelle and Wyttenbach Judith, Report on Switzerland, section 3.2.2.

28 *Vallianatos and Others v. Greece* (nos. 29381/09 and 32684/09), Judgment (Grand Chamber) of 7 November 2013, ECHR 2013-II. On 6 May 2014 Greek authorities announced that they are considering a revision of the domestic family law. At the time of writing, the Committee of Ministers of the Council of Europe has not yet analysed these considerations.

the cause for the delay. Economic difficulties make matters even worse and are too often used as an excuse for non-compliance.[29]

A new Strasbourg ruling may prove challenging to the national legislator and the judicial branch during the implementation process, in particular with regard to the temporal effects of the ruling. While the Court limited the temporal effects of the *Marckx v. Belgium* judgment to cases *ex tunc*, it has since taken such an approach only rarely. Therefore it is up to the national legislator to define the temporal effects of new jurisprudence in the context of the implementation process. By way of example, reference can be made to the Austrian highest courts' reaction to *X. and Others v. Austria* and to the temporal rules rendered by the German Constitutional Court following the *Zaunegger* judgment.[30] In the latter instance, the German Constitutional Court concretised the temporal effects of an amendment of legislation necessary for the sake of legal certainty.

3.2. IMPLEMENTATION OF "OTHER JUDGMENTS"

National courts may use the Court's case law rendered vis-à-vis another state as the basis for changes in the domestic legal system. In many ways, cross-country implementation is different from compliance with a judgment rendered by the Court in respect of the state concerned. The question whether it is necessary to amend domestic law or practice can be difficult insofar as it might not be clear whether the domestic situation is equivalent to the one examined by the Court. It is always possible to distinguish the national law by qualifying it as different from the situation examined in Strasbourg and therefore as compatible with the Court's case law. The report on Switzerland describes a telling example. Whereas some cantonal courts applied the Court's jurisprudence in *Zaunegger v. Germany* and *Sporer v. Austria* in a far-reaching way, the Federal Supreme Court narrowed the scope of this jurisprudence down in order to differentiate the Swiss law from the German and Austrian situations.[31] This is a striking difference to the attitude of the Austrian Constitutional Court, which repeats and thereby "translates" the Strasbourg jurisprudence into the Austrian legal context, thus facilitating the implementation of judgments against both Austria and other states.[32]

29 Koutsouradis Achilleas and Papadopoulou Lina, Report on Greece, section 1.4, referring to "the ongoing economic crisis, which allegedly keeps the government busy with the 'important' issues of tackling the crisis and poverty instead of 'wasting' legitimate capital on non-urgent issues, like the protection of homosexual persons."

30 Grabenwarter Christoph and Störck Marie-Therese, Report on Austria, section 2.3.2.3, note 172; Coester-Waltjen Dagmar, Report on Germany, section 1.3.2, note 19.

31 Cottier Michelle and Wyttenbach Judith, Report on Switzerland, section 3.3.1, note 156 ff.

32 Grabenwarter Christoph and Störck Marie-Therese, Report on Austria, section 1.

However, distinguishing the national approach from one examined by the Strasbourg Court may be complicated by the fact that, in some situations, the Court's ruling may be exceptionally clear. A good example is provided by the case of *Costa and Pavan v. Italy*, in which the Court held that the absolute ban on prenatal diagnostics for couples wherein both partners are carriers of a genetic disease is incompatible with Article 8 ECHR. Apart from the respondent state, Switzerland is the only other country among the 47 Member States of the Council of Europe that has enacted the same ban. As of January 2015, however, an amendment of the respective Swiss law was under consideration.[33]

An illustrative example of the implementation of judgments against one state by another state is the reference to *Rasmussen v. Denmark* by the Dutch Supreme Court in 1993 when considering the question of time limits for an action brought by a potential biological father.[34] The House of Lords' reasoning in the case of *Ghaidan v. Godin-Mendoza*[35] also shows the cross-country influence of the Court's case law.[36] Furthermore, the landmark judgment in *Marckx v. Belgium* had a remarkable influence on both national judiciaries and national legislatures all over Europe in questions concerning the status of children born out of wedlock.[37]

Indubitably, cross-country implementation should not be used in order to lower the national human rights standard.[38] According to its Article 53, the Convention defines only a minimal standard of human rights protection. The Contracting States are free to go beyond the Court's case law. Illustrative here is the German Constitutional Court's approach concerning the question of whether same-sex partners should be permitted to adopt a child; here, the German Constitutional Court went beyond the standard set by the Court in *Gas and Dubois v. France* by allowing successive adoption by a same-sex partner.[39] Another example is the decision of the German Federal Supreme Court holding that the domestic authorities are obliged to acknowledge a homosexual couple's parenthood of a child carried by a surrogate mother and conceived with the biological material of one of the partners.[40] This approach certainly goes a step further than what was decided by the ECtHR in *Mennesson v. France* and *Labassee v. France*, both of which concerned married heterosexual couples.[41]

33 Cottier Michelle and Wyttenbach Judith, Report on Switzerland, section 2.4, note 107.
34 Forder Caroline, Report on the Netherlands, section 2.2.2.1, note 92.
35 *Ghaidan (Appellant) v. Godin-Mendoza (FC) (Respondent)* [2004] UKHL 30.
36 Scherpe Jens, Fenton-Glynn Claire and Hughes Kirsty, Report on England and Wales, section 3.2.1, note 118 ff.
37 For the case's influence in England, see Scherpe Jens, Fenton-Glynn Claire and Hughes Kirsty, Report on England and Wales, section 2.3, note 46 ff.
38 For an example from the Polish context, see below, section 3.5.
39 Coester-Waltjen Dagmar, Report on Germany, section 2.1.4.1, note 91.
40 Decision of the German Federal Supreme Court of 10 December 2014, XII ZB 463/13.
41 *Mennesson v. France* (no. 65192/11), Judgment of 26 June 2014 (not yet reported); *Labassee v. France* (no. 65941/11), Judgment of 26 June 2014 (not reported).

3.3. "PREVENTIVE" IMPLEMENTATION

National authorities are often confronted with legal questions concerning which the ECtHR has never handed down a ruling. In seeking a legal solution, states might refer to the Convention in order to lend legitimacy to their own judgments. By "preventive" implementation, we mean such a situation in which a state makes broad reference to either the Convention or the Court's case law despite the fact that this is, from a strictly legal point of view, not necessary. Such cases show that the Convention and the Court's case law have an impact on national legal systems that goes far beyond what Article 46 and the *de facto erga omnes* effect of the Court's judgments require.

Striking examples of preventive implementation are made in the country report on the Netherlands, which points out several instances in which either the Dutch legislator or the judiciary have referred to Article 8 or specific case law in order to resolve newly-arisen legal questions. This was true for the question whether a putative father should have the right to establish his paternity in certain circumstances without being subject to the veto right of the mother,[42] the reference to *Różański v. Poland* for determining whether a sperm donor should be in a position to establish a legal filiation link with his child after having established family life in the concrete case,[43] and the right of unmarried parents to joint custody as developed by the Dutch Supreme Court with reference to *Marckx v. Belgium*.[44]

The Austrian Constitutional Court's approach in the aftermath of *S.H. and Others v. Austria* goes in the same direction. The Constitutional Court was confronted with the question of whether the exclusion of homosexual women from accessing donor sperm is constitutional. Although the ECtHR did not hand down an explicit answer to this question in *S.H. and Others v. Austria*, the Constitutional Court took some of the ECtHR's reasoning into account, coming to the conclusion that this exclusion violates Article 14 in conjunction with Article 8 ECHR.[45] Subsequently the legislator amended the Austrian Artificial Procreation Act and legalised not only sperm donation for homosexual women but also oocyte donation and *in vitro* fertilisation with donated semen for homosexual and heterosexual couples as well as pre-implantation diagnostics under very strict conditions.[46]

3.4. IMPLEMENTATION DEPENDING ON THE STATUS OF FAMILY LAW DEVELOPMENT

One has to bear in mind that the guidance that the Convention can give to states depends – not exclusively, but to a large extent – on the stage of development of

42 Forder Caroline, Report on the Netherlands, section 2.2.2.1, note 86 f.
43 *Ibid.*, section 2.2.2.1, note 100 ff.
44 *Ibid.*, section 3.3.1.1, around note 293 f.
45 Grabenwarter Christoph and Störck Marie-Therese, Report on Austria, section 2.3.3.2.
46 *Ibid.*, section 2.3.3.3.

the national law vis-à-vis, on the one hand, the minimal standard guaranteed by the Court's case law and, on the other hand, the general trend towards a European consensus. This is best illustrated in the country reports on Spain,[47] Sweden,[48] England and Wales,[49] Germany[50] and the Netherlands.[51] The authors of these reports describe the domestic legal development as essentially autonomous and as going beyond what the European minimal standard requires in many areas.

Astonishingly enough, Switzerland does not belong to this group of countries.[52] In many areas, Swiss family law was and still is based on "preference for the marital family".[53] This is about to change, and the country report on Switzerland illustrates the significant role that the Convention and the Court play in this development.[54] Austria is in a similar position. The fact that applications against Austria have provided the Court with the opportunity to render landmark decisions in many areas shows that, in family law matters, Austria has not belonged to the most liberal countries in Europe in the recent past. However, compared to the Swiss courts, the Austrian judiciary – most prominently the Austrian Constitutional Court – have been receptive of the Strasbourg jurisprudence. It is therefore fair to say that, under the influence of the Convention and its organs, the Austrian legal framework is catching up considerably where family law is concerned.

3.5. THE CONVENTION'S MINIMAL STANDARD AS A THRESHOLD

While the above has shown that states are free to go beyond the standard protected under the Convention, the inverse is not true: as noted above, Article 53 ECHR indicates that the Convention guarantees a minimal standard to which all states are bound. States may not opt for a standard of human rights protection below the one guaranteed under the Convention system. However, the Polish report has shown that there may be instances in which the Strasbourg jurisprudence can have a retrogressive effect.[55] Retrogression may occur if states become aware that the level of protection offered by the domestic legal

47 Martín-Casals Miquel and Ribot Jordi, Report on Spain, section 2: "that goes far beyond even minimum requirements set out by the ECtHR", section 2.1.1 and section 3.4.
48 Singer Anna, Report on Sweden, section 2.6, note 50.
49 Scherpe Jens, Fenton-Glynn Claire and Hughes Kirsty, Report on England and Wales, section 2.6.
50 Coester-Waltjen Dagmar, Report on Germany, section 4.
51 Forder Caroline, Report on the Netherlands, section 2.2.2.4, note 121.
52 For the situation in Poland, Hungary and Slovakia, see below, section 4.
53 Cottier Michelle and Wyttenbach Judith, Report on Switzerland, section 3.1.
54 *Ibid.*, section 3.1, note 136 ff.
55 Sokołowski Tomasz, Report on Poland, section 3.2.

system is not required under human rights law. In the case of Poland, this is precisely what occurred regarding the rights of transgender persons.

As early as the mid-1960s, Polish courts recognised a diagnosis of gender dysphoria as a sufficient basis for a legal change of gender on the condition that the individuals concerned predominantly displayed sexual characteristics associated with their acquired gender. In 1978, the Polish Supreme Court more generally acknowledged the permissibility of a legal change of gender before gender reassignment surgery.[56] Then, in 1986, the ECtHR gave its judgment in the case of *Rees v. the United Kingdom*. In *Rees*, the Court held that the Convention did not guarantee access to recognition of an acquired gender on the basis of gender dysphoria alone.[57] Three years later, in 1986, the Polish Supreme Court similarly decided that a diagnosis of gender dysphoria alone does not provide sufficient grounds for a change of legal gender and for the amendment of birth certificates.[58] The Supreme Court and the Polish Attorney General argued that the previous approach as recognised by the Supreme Court in 1978 seriously endangered public order.

One year later, in *Cossey v. the United Kingdom*,[59] the ECtHR held that the respondent state's refusal to issue a birth certificate reflecting the acquired sex of an individual who had undergone gender reassignment surgery did not violate Article 8 ECHR. *Cossey* stimulated the debate on the issue among Polish commentators, and the Supreme Court took the resulting opinions into consideration in its judgment of 1991. Therein, it held that individual perception of gender is an aspect of personality and that the institution of a declaratory procedure for the legal change of gender was not incompatible with its 1986 findings, but that the change of legal gender is, as a rule, to be permitted only after the individual in question has undergone sexual reassignment surgery.[60]

While the ECtHR soon after departed from its previous jurisprudence, holding that the possibility for legally changing one's gender should be more accessible,[61] the Polish Supreme Court continued to develop its new concept by finding, in 1992, that the correction of birth certificates is not permissible if gender reassignment surgery and hormone therapy have not brought about a complete change in gender. The Court went on to give the parents, spouses and

56 Resolution of the Polish Supreme Court of 25 January 1978, III CZP 100/77 (1983) 10 OSPiKA, §217.
57 *Rees v. the United Kingdom* (no. 9532/81), Judgment (Plenary) of 17 October 1986, Series A, Vol. 106.
58 This judgment (Resolution of the Polish Supreme Court of 22 June 1989, III CZP 37/89 (1991) 2 OSPiKA, §35) received the status of a legal rule, which renders it mandatory for the Polish Supreme Court.
59 *Cossey v. the United Kingdom* (no. 10843/84), Judgment (Plenary) of 27 September 1990, Series A, Vol. 184.
60 Resolution of the Polish Supreme Court of 22 March 1991, III CRN 28/91 (1991) 56 PS 118.
61 *B. v. France* (no. 13343/87), Judgment (Plenary) of 25 March 1992, Series A, Vol. 232-C.

children of transgender individuals standing in the declaratory proceedings and to abandon the recognition of self-perceived gender as an aspect of personality.[62]

In short, the jurisprudence of the ECtHR led to a domestic debate in Poland that ultimately weakened what had once been a strong standard of protection of the rights of transgender persons. This is contrary to the purpose of the ECHR as enshrined in Article 53 thereof. Fortunately, the Polish example seems to be an isolated incident; however, it must remain clear that the jurisprudence of the Court should not be used in order to justify weakening domestic rights protection.

4. GENERAL TRENDS ACCORDING TO GEOGRAPHIC, HISTORICAL AND RELIGIOUS ASPECTS

Reading the different country reports, several differences stand out. This includes the distinction between receptionist countries seeking inspiration from the Court's case law on the one hand and rather parochial courts referring nearly exclusively to the national constitution on the other; the distinction between an open concept of marriage and a conservative notion limited to heterosexual couples; and that between liberalised and highly regulated, limited access to medically assisted procreation, to mention only a few.

Starting with *Marckx v. Belgium*, the ECtHR's case law began building up a minimal standard for a European family law. However, the country reports in this volume reveal that family law is still considered a national matter and extensively influenced by national idiosyncrasies.[63] We asked ourselves whether some differences could be explained along the dichotomy of "old" and "new" Member States of the Council of Europe, "Western" and "Central and Eastern" European countries, countries with a strong religious tradition and secular states, civil law courts vis-à-vis public law courts and, finally, areas characterised by a simple state-individual conflict and those in which a multipolar human rights situation is at stake. Being aware that, by its very nature, this approach is problematic in the sense that it runs the risk of perpetuating pre-existing prejudices, we nonetheless believe that certain features of the country reports can be explained along these lines.

The legal tradition in the former socialist countries was a solid basis for a progressive family law concept.[64] It comes as no surprise that the Court has

62 Resolution of the Polish Supreme Court of 22 September 1995, III CZP 118/95, OSNC 1996, No. 1, position 7; Resolution of the Polish Supreme Court of 6 December 2013, I CSK 146/13, LEX No. 1415181.

63 See below, sections 5.2 and 6.1.

64 For example, on the very broad notion of family as understood in Hungary as early as the 1950s, see Szeibert Orsolya, Report on Hungary, section 3.1.

hardly rendered any judgments concerning classical gender discrimination issues in respect of Poland, Hungary and Croatia, whereas the Court has twice criticised Switzerland, for example, for discriminatory regulation concerning the family surname.[65] On the other hand, problems concerning the Court's case law on the guarantee of effective contact rights between a child and a parent, mostly the father, after a parental divorce or breakup are rather typical for the former socialist countries.[66]

The liberal trend in the former socialist countries did not last long. The progressive attitude in many traditional family matters was challenged by attention directed at more contested issues. In this context, it is striking that the aim of the first amendment to the Croatian Constitution was to prevent the possible introduction of same-sex marriage.[67] Compared with the situation in Sweden[68] and Spain,[69] the reluctance towards an opening of marriage to homosexual couples in Hungary and Poland is striking as well. These countries are joined in their reluctance by Greece.[70] Apart from the differences between "old" and "new" Council of Europe Member States, it might very well be that this difficulty is aggravated in countries that have a strong religious tradition.[71] Another reason that might possibly explain the difference between the "old" and the "new" Member States of the Council of Europe is the fact that, in the newer Member States, both lawyers and academics active in the area of family law are only now beginning to discover the potential of the Convention.[72]

65 Cottier Michelle and Wyttenbach Judith, Report on Switzerland, section 3.2.1, notes 125 and 128.

66 See *inter alia Gluhaković v. Croatia* (no. 21188/09), Judgment of 12 April 2011 (not reported); *Prodělalová v. the Czech Republic* (no. 40094/08), Judgment of 20 December 2011 (not reported), §§63 f.; *Bergmann v. the Czech Republic* (no. 8857/08), Judgment of 27 October 2011 (not reported), §§61 f.; *Lyubenova v. Bulgaria* (no. 13786/04), Judgment of 18 October 2011 (not reported), §§62 f.; *S.I. v. Slovenia* (no. 45082/05), Judgment of 13 October 2011 (not reported), §§70 f.; *T. v. the Czech Republic* (no. 19315/11), Judgment of 17 July 2014 (not reported), §§124 f.; and *Krasicki v. Poland* (no. 17254/11), Judgment of 15 April 2014 (not reported), §§83 f., all concerning parental visitation rights that were not effectively implemented or guaranteed. See also Szeibert Orsolya, Report on Hungary, section 3.3.2. Of course, problems in effectively guaranteeing parental contact and access rights are not limited to countries in Central and Eastern Europe; there are also judgments concerning other countries, such as for example *Santilli v. Italy* (no. 51930/10), Judgment of 17 December 2013 (not reported), §§71 f.; *Zhou v. Italy* (no. 33773/11), Judgment of 21 January 2014 (not reported), §§54 f.; *Elsholz v. Germany* (no. 25735/94), Judgment (Grand Chamber) of 13 July 2000, ECHR 2000-VIII, §§43 ff.

67 Korać Graovac Aleksandra, Report on Croatia, section 1.2, note 15.

68 Singer Anna, Report on Sweden, section 3.2, note 58.

69 Martín-Casals Miquel and Ribot Jordi, Report on Spain, section 3.3.2, note 162.

70 Koutsouradis Achilleas and Papadopoulou Lina, Report on Greece, section 1.4.

71 On the conservative notion of family in the Polish context, see Sokołowski Tomasz, Report on Poland, section 3.1.

72 Sokołowski Tomasz, Report on Poland, section 2.2. It seems that the influence on the Polish legislator is more significant, see *ibid.*, section 2.2.1.

A general assumption would start by qualifying family law as liberal and progressive in northern Europe and as rather conservative in the south. This assumption is certainly confirmed when contrasting the reports on Sweden and the Netherlands on the one hand and the report on Greece on the other. However, the Spanish report radically clears up this prejudice, as Spain belongs to the group of countries with very liberal family law concepts in areas such as same-sex partnerships, access to reproductive medicine, and the rights of transgender persons.[73]

5. THE COURT'S ROLE IN ARTICLE 8 ECHR CASES

5.1. THE COURT AS A TRENDSETTER IN AN ENVIRONMENT OF SUBSIDIARITY?

Like any court in a multi-layered judiciary system, the Court has developed several strategies in order to harmonise the lower and higher levels while securing the legitimacy of a progressive jurisprudence on the higher level. The rhetoric of this interplay is well-known. On the one hand, the dynamic interpretation of the Convention and the guarantee of rights that are practical and effective, not theoretical and illusory,[74] serve the purpose of rendering the Convention a living instrument that copes with modern challenges in law and society. On the other hand, the instrument of European consensus, the margin of appreciation and the subsidiarity principle serve the purpose of judicial restraint vis-à-vis the national level.[75]

It goes without saying that the Court's role cannot be the same in the area of Article 3, for example, as under Article 8. Under the former provision, the Convention guarantees an absolute right with no possibility of legitimate constraint, whereas the latter concerns a particularly broad area of human rights regarding which the Convention itself enshrines the possibility of restrictions. One might criticise the broadening of the scope of Article 8 over the last decades.[76] However, this development is understandable when considering that the radical technical and scientific advances that have challenged the need for human rights protection under this provision are second to no other area of the Convention. The Court's case law on Article 8 gives rise to concern for another reason as well: in no other area are morals, tradition and historical context more important than in family and private law matters. Therefore, the pressure on the Court to defer to

73 Martín-Casals Miquel and Ribot Jordi, Report on Spain, sections 2.2 and 3.2.

74 *Airey v. Ireland* (6289/73), Judgment (Chamber) of 9 October 1979, Series A, Vol. 32, §24; *Nada v. Switzerland* (no. 10593/08), Judgment (Grand Chamber) of 12 September 2012, ECHR 2012-V, §182.

75 Føllesdal Andreas, Peters Birgit and Ulfstein Geir (2013), 13–17.

76 Gerards Janneke (2013).

these values and preferences on the national level is particularly strong.[77] For the same reasons, Article 8 claims are often combined with allegations that Article 14 ECHR has been violated. Any distinction on moral or traditional grounds can raise a discrimination issue. This has given rise to a heated debate concerning the jurisprudence under Article 8.[78] Furthermore, criticism concerning the lack of predictability of the circumstances under which the Court will rely on a lack of consensus, as opposed to those under which it will instead define a minimal standard, is comprehensible. The Court has to walk a tightrope between bringing the latecomer states on board and maintaining its credibility.[79]

5.2. DEFERENCE TO THE NATIONAL LEGISLATOR OR JUDICIARY

Article 8 cases are frequently multipolar constellations, meaning that the interests of multiple rights holders typically come into conflict in these situations. In most cases, the courts are not confronted with a classical conflict between the state's interest on the one hand and an individual's interest on the other. Instead, the interests of children and their legal, biological and social parents are at stake and must be taken into account. A reasonable result can only be achieved if the different interests are balanced against each other. This is normally done in the framework of the legislative process. However, whatever law on the matter exists, it will not cover all of the cases that may come before the courts. The Court's case law therefore requires a certain degree of flexibility in applying the law in the particular circumstances (*avec une certaine souplesse*).[80] If the government can convincingly show that both the legislator and the courts balanced the interests involved, the Court will not question the result of this balancing process at the European level. It is fair to say that the Court will then defer to the decision taken by the national authorities instead of

77 Føllesdal Andreas (2014), and Letsas George (2006), especially 721–722.

78 Compare §§17–20 of the joint dissenting opinion of Judges Sajó, Keller and Lemmens in the case of *Hämäläinen v. Finland* (no. 37359/09), Judgment (Grand Chamber) of 16 July 2014 (not reported); Letsas George (2006), 722–723.

79 Bamforth Nicholas (2011), 140, addressing the judgment of the Court in *P.B. and J.S. v. Austria* (no. 18984/02), Judgment of 22 July 2010 (not reported).

80 *Schlumpf v. Switzerland* (no. 29002/06), Judgment of 8 January 2009 (not reported), §§44 and 112–115; *Buchs v. Switzerland* (no. 9929/12), Judgment of 27 May 2014 (not reported), §37; *Oleksandr Volkov v. Ukraine* (no. 21722/11), Judgment of 9 January 2013, ECHR 2013-I, §175. See also *Mugenzi v. France* (no. 52701/09), Judgment of 10 July 2014 (not reported), §§56 and 62, *Tanda-Muzinga v. France* (no. 2260/10), Judgment of 10 July 2014 (not reported), §§76 and 82, and *Senigo Longue and Others v. France* (no. 19113/09), Judgment of 10 July 2014 (not reported), §§69 and 75 (all requiring a certain *souplesse* regarding the proof of family ties required by authorities in proceedings for family reunification brought by persons with refugee status or legal residence in France).

making its own legal assessment.[81] One illustrative example for this balancing of interests is the legislative framework for the right to know one's origin in the Dutch context.[82]

5.3. TOWARDS A PREDOMINANTLY PROCEDURAL UNDERSTANDING OF ARTICLE 8

As noted in Helen Keller's chapter on Article 8 in the system of the Convention in this volume, the Court has formulaically noted that "whilst Article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8."[83] The Court has thus recognised procedural requirements as implicit in Article 8 in various areas: as concerns taking a child into state care and consequently in adoption proceedings,[84] in international child abduction proceedings,[85] regarding custody of a child after the divorce of his or her parents,[86] as concerns establishing and challenging fatherhood,[87] and in the context of child care measures and the withdrawal of parental authority.[88]

In those cases, the Court emphasises three aspects: first, in assessing the decision-making process, the Court will give due account to the fact that the national authorities had the benefit of direct contact with all of the persons concerned.[89] It goes without saying that all persons involved must have the opportunity to express their views and to take due part in the decision-making

81 Compare *Sommerfeld v. Germany* (no. 31871/96), Judgment (Grand Chamber) of 8 July 2003, ECHR 2003-VIII (extracts); *Z.J. v. Lithuania* (no. 60092/12), Judgment of 29 April 2014 (not reported), especially §§96–106; *Krisztián Barnabás Tóth v. Hungary* (no. 48494/06), Judgment of 12 February 2013 (not reported), §§30–38.

82 Forder Caroline, Report on the Netherlands, section 2.5.1, note 237 ff. Similarly, see the German legislative framework (Coester-Waltjen Dagmar, Report on Germany, section 2.1.1, note 43 ff.).

83 *Kopf and Liberda v. Austria* (no. 1598/06), Judgment of 17 January 2012 (not reported), §39, in Keller Helen, Article 8 in the System of the Convention, section 3.

84 For the cases against the UK and the impact on the English and Welsh courts see Scherpe Jens, Fenton-Glynn Claire and Hughes Kirsty, Report on England and Wales, 2.4.2, note 70 f.; see also *Yousef v. the Netherlands* (no. 33711/96), Judgment of 5 November 2002, ECHR 2002-VIII, §§65 f. and, for the consequences in the Dutch context, see Forder Caroline, Report on the Netherlands, section 2.2.2.1, note 78.

85 *X. v. Latvia* (no. 27853/09), Judgment (Grand Chamber) of 26 November 2013, ECHR 2013-VI.

86 *McMichael v. the United Kingdom* (no. 16424/90), Judgment of 24 February 1995, Series A, Vol. 307-B, §92; *C. v. Finland* (no. 18249/02), Judgment of 9 May 2006 (not reported), §§51–59.

87 Most recently in *Ostace v. Romania* (no. 12547/06), Judgment of 25 February 2014 (not reported), §§40 f.; *Tsvetelin Petkov v. Bulgaria* (no. 2641/06), Judgment of 15 July 2014 (not reported), §§57 f. See also *Krisztián Barnabás Tóth v. Hungary* (*supra* note 81), §§34–36, in Keller Helen, Article 8 in the System of the Convention, section 3.

88 *B.B. and F.B. v. Germany* (nos. 18734/09 and 9424/11), Judgment of 14 March 2013 (not reported), §§47 f.

89 *Krisztián Barnabás Tóth v. Hungary* (*supra* note 81), §32.

process. It is important to bear in mind that, in many family-related matters ending up in Strasbourg, only one parent is party to the proceedings before the Court. The other parent may, however, ask the President for permission to intervene as a third party according to Article 36(2) ECHR. Second, it is not the Court's task to substitute itself for the domestic authorities in the exercise of their responsibilities in the respective matter.[90] Third, domestic decisions can only be examined in light of the situation such as it presented itself to the domestic authorities at the time when these decisions were taken.[91]

Having regard to these features of state obligations under Article 8, the Court will then go on to assess the domestic decision-making process, seeking to determine whether the interests of those involved were adequately taken into consideration, with particular weight being attached to the interests of the child, and whether the domestic investigation provided sufficient procedural safeguards. Based on this examination, the Court will determine whether the domestic authorities' margin of appreciation, which varies according to the particular context, has been overstepped.[92]

5.4. LIMITS TO THE MARGIN OF APPRECIATION AND SUBSIDIARITY IN FAMILY LAW MATTERS

While supporters of the Court's concept of the margin of appreciation consider the doctrine a necessary expression of deference to national sovereignty and democratic decision-making processes, this aspect of the Strasbourg jurisprudence has also been heavily criticised as "standardless" and as providing a gateway to "moral relativism".[93] The Court has demonstrated that there is a limit to its leniency in this regard: as the typology created by Helen Keller in her chapter on Article 8 in the system of the Convention has shown, the breadth of the margin of appreciation under Article 8 varies according to the situation in question.[94] The margin of appreciation serves as a mechanism of deference to the democratic processes that shape state policy[95] and of dealing with divisive moral, ethical, social and religious matters, such as the question of permitting same-sex

90 *Ibid.*

91 *B.B. and F.B. v. Germany* (*supra* note 88), §48.

92 The Court has held, for example, that the domestic margin of appreciation is broader as concerns recognition of paternity by a child's biological father than regarding rights of contact or information (*Krisztián Barnabás Tóth v. Hungary* (*supra* note 81), §§37 and 38). For more in-depth information on the margin of appreciation under Article 8 ECHR, see Helen Keller's chapter on Article 8 in the System of the Convention, section 2.

93 See Keller Helen, Article 8 in the System of the Convention, section 2.1, with further references; von Staden Andreas (2012).

94 Keller Helen, Article 8 in the System of the Convention, sections 2.2, 2.2.1 and 2.2.2.

95 *Ibid.*, section 2.2.4.

couples to marry or issues of reproductive medicine.[96] Absent a European consensus on a given issue, the Court affords states a wide margin of appreciation. The margin will narrow if and when social attitudes on the issue in question evolve to become more favourable.[97] The margin of appreciation is narrow in situations in which the very essence of an Article 8 right is at stake, for example regarding parental rights of access to their children.[98] Beyond such areas, however, the doctrine has led to a Europe of variable standards under Article 8, for it allows states to retain a wide margin of appreciation in many matters falling under that provision.

5.5. COMPLEMENTARITY OF ARTICLE 14 ECHR

While Articles 8 and 14 of the Convention are often invoked together, there are limits to the Court's approach of examining only whether discrimination in a strict sense has taken place. The Court's case law regarding adoption by same-sex couples serves as an illustration. In *Gas and Dubois v. France*, the Court held that the Contracting States are not obliged to grant same-sex couples access to marriage or to the rights reserved to married couples, including adoption rights.[99] However, in *X. v. Austria* – handed down by the Grand Chamber only a year later – the Court qualified the Austrian law according to which stepchild adoption by same-sex couples was not possible as contrary to Article 14 in conjunction with Article 8. The decisive fact was that, in France, stepchild adoption was not open to unmarried heterosexual couples, whereas this was allowed in Austria. On the basis of this difference, the Court held that the Austrian legal framework was discriminatory.[100] Put differently, the Court only interferes if a legislative framework distinguishes between opposite-sex *de facto* couples and same-sex couples.

Another example is that of joint custody: whereas the Court held in *Cernecki v. Austria*[101] and *R.W. and C.T.G.-W. v. Austria*[102] that a state is entitled to choose not to provide for joint custody by divorced parents, in *Zaunegger v. Germany* it qualified the provision of access to joint custody only to divorced

96 *Evans v. the United Kingdom* (no. 6339/05), Judgment (Grand Chamber) of 10 April 2007, ECHR 2007-I, §58; Keller Helen, Article 8 in the System of the Convention, section 2.2.4.

97 Keller Helen, Article 8 in the System of the Convention, section 2.4, citing *Mata Estevez v. Spain* (no. 56501/00), Decision of 10 May 2001, ECHR 2001-VI.

98 *Görgülü v. Germany* (no. 74969/01), Judgment of 26 February 2004 (not reported), §50.

99 *Gas and Dubois v. France* (no. 25951/07), Judgment of 15 March 2012, ECHR 2012-II.

100 On the implementation into the Austrian legal framework, see Grabenwarter Christoph and Störck Marie-Therese, Report on Austria, section 2.3.2.3; for the impact of this case law on the Swiss legal order, see Cottier Michelle and Wyttenbach Judith, Report on Switzerland, section 2.3, note 75.

101 *Cernecki v. Austria* (no. 31061/96), Judgment of 11 July 2000 (not reported).

102 *C.T.G.-W. v. Austria* (no. 36222/97), Decision of 22 November 2001 (not reported).

parents, but not to those who were unmarried, as discriminatory.[103] In *Buchs v. Switzerland*, the Court held that, as long as the law provides a non-discriminatory regulation of joint custody within a given group (i.e. for divorced couples), this is compatible with Article 14.[104]

Finally, the comparison of *Schalk and Kopf v. Austria* on the one hand and *Vallianatos and Others v. Greece* on the other illustrates the paradox. In the former case, the Court held that the Contracting States are not under a duty to open marriage to same-sex couples or to provide for any other means of legal recognition of homosexual relationships.[105] However, in the latter case, the Court found that if states provide a means of legal recognition other than marriage to individuals in heterosexual partnerships, then they have to offer "convincing and weighty reasons" for not providing access to these institutions to homosexual couples as well.[106]

Article 14 does not, in and of itself, grant rights under the Convention. In the Court's case law, Article 14 can play only a limited role in the sense that, for Article 14 to apply, the ECtHR always requires not only that a Convention right be at stake, but that a comparable group be identifiable. The Court's case law therefore remains fragmented and difficult to make out in this area.

6. CONVERGENCE AND DIVERGENCE IN FAMILY LAWS IN THE LIGHT OF ECtHR JURISPRUDENCE

6.1. HARMONISED OR CULTURALLY CONSTRAINED FAMILY LAW?

For some time now, there has been a debate in comparative family law on the extent to which this particular branch of the law can be harmonised or whether it is so deeply influenced by cultural considerations that any attempts at harmonisation will necessarily be limited in their application.[107] Both the opportunities for harmonisation of European family law and the constraints placed on such harmonisation find notable expression in the *principles*[108]

103 *Zaunegger v. Germany* (no. 22028/04), Judgment of 3 December 2009 (not reported).

104 *Buchs v. Switzerland* (no. 9929/12), Judgment of 27 May 2014 (not reported), §105.

105 *Schalk and Kopf v. Austria* (*supra* note 27), §105.

106 *Vallianatos and Others v. Greece* (*supra* note 28), §92.

107 See, concerning the debate on the Europeanisation of family law, Antokolskaia Masha (2004), 29 ff.; Boele-Woelki Katharina (2003), *passim*; see also Büchler Andrea (2011), 285 ff.

108 In 2004, after a three-year period of work, the Commission presented its first principles on divorce and maintenance law; these were followed, at the beginning of 2007, by a set of principles concerning parental responsibility and, in 2013, by the principles regarding property relations between spouses.

promulgated by the Commission on European Family Law,[109] which was established in 2001. The debate surrounding the creation of European family law norms has proven remarkably productive, since it has forced its participants to consider what family law can achieve and what place each individual national jurisdiction chooses to occupy in the wider European context.[110]

Critics of harmonisation take the view that of all the branches of the law, family law is that which is most intensely permeated by tradition, religion and cultural values. The arguments advanced to counter efforts at harmonisation are multi-faceted. One radical school of thought sees efforts at harmonisation as totalitarian in their intent, arguing that their purpose is to undermine plurality, autonomy and cultural diversity and that they represent a threat to the cultural identities of individual nations.[111] A further argument is that law is a phenomenon deeply rooted in culture, that it is an emanation of culture itself and that both its origins and its continuing development are wholly organic in nature, reflecting the society which created them. For those reasons, it is therefore argued, societies will not accept any reforms which did not themselves evolve from their own specific cultural context.[112] Others have argued that, at the very least, the developments which have occurred in family structures over time have been closely linked with economic, social and political factors, especially since the family itself carries out key functions in these areas. Indeed, this line of argument holds, it is economic, social and political circumstances which have shaped family law reforms, which in turn have demonstrated their ability to take different courses in different Western countries.[113]

A comparison of the evolution of family law in different jurisdictions clearly demonstrates a convergence between the reforms undertaken across Europe. For the purposes of this analysis, the key objective will of course be to identify the factors which have led to changes in family law and which continue to promote such changes today. Clearly, spontaneous, evolutionary reforms, initiated by society and rooted in the ways a population lives, need to be interpreted quite differently from reforms which have been imposed on a country by international treaties and the decisions resulting from their application.[114]

Trends in the evolution of family law have undoubtedly been catalysed by congruent developments in society and technology. Despite all the specific

109 For more detail regarding the working methods applied by the Commission, see Boele-Woelki Katharina (2005), 15 ff.

110 See Schwenzer Ingeborg (2003), 322 ff.

111 See Legrand Pierre (1997), 53.

112 For a summary of the debate, see Antokolskaia Masha (2006), 12 and 38 ff.

113 See Bradley David (1999), 128.

114 For a detailed analysis of the different reasons that can lead to a harmonisation of family law, Antokolskaia Masha (2006), 17 ff. Masha Antokolskaia distinguishes between the top-down and the bottom-up methods. She speaks of convergence only in the latter case. In the present context, we will refer to convergence in a broader sense, focusing on the results of the process and not its causes.

particularities they have exhibited in individual countries, the socio-demographic changes that have taken place across Europe over the last few decades have all followed a similar trajectory. The new problems these changes have brought in their wake – the increased number of children born outside marriage or the greater incidence of divorce being prime examples – have prompted many countries to adopt parallel reforms to their family laws. This is even more apparent in the case of changes due to advances in technology, as is evidenced by the changes in laws on descent which have accompanied the development of new procedures in reproductive medicine and genetic science.

There is another influential factor at work here too. The guiding principles which have informed family law reform over the last few decades have been based on the concepts of equal rights for both spouses, equality of status for all children, whether born in or out of wedlock, no-fault divorce and the freedom of marriage. These concepts undoubtedly all have their place in human rights discourse, and the ECHR certainly exercises significant influence on the formulation of family law and on family law jurisprudence at the national level.[115] Indeed, much of the convergence in family law seen across Europe can be attributed to the Convention.[116] In its 1979 *Marckx v. Belgium* judgment, the ECtHR noted that its judgment should provide an incentive for national laws to be formulated in accordance with the Convention, thus helping to establish the view that the Convention can also be cited as a basis for changes in family law at the national level.[117] *Marckx v. Belgium* thus represents the beginning of so-called European family law.[118]

The ECtHR regularly carries out a comparative analysis in order to determine whether a European consensus has been established with regard to a particular legal issue.[119] Where there is far-reaching consensus on a given matter, the margin of appreciation granted by the Court will be reduced. Conversely, where no such consensus exists, the Court continues to allow a wide margin of appreciation, as is the case, for example, on the question as to whether same-sex couples should be permitted to marry.[120] In areas where wide-ranging consensus is in the process of becoming established but remains comparatively new and based on principles that are not yet rooted in national law, the Court

115 See Grabenwarter Christoph and Störck Marie-Therese, Report on Austria, section 1; Coester-Waltjen Dagmar, Report on Germany, sections 1.2.2 and 1.2.3; Forder Caroline, Report on the Netherlands, sections 1.2 and 4; but also Korać Graovac Aleksandra, Report on Croatia, section 1.1; Scherpe Jens, Fenton-Glynn Claire and Hughes Kirsty, Report on England and Wales, section 2.1.

116 For greater detail, see Vlaardingerbroek Paul (2002), 120 ff.

117 *Marckx v. Belgium* (no. 6833/74), Judgment (Plenary) of 13 June 1979, Series A, Vol. 31.

118 Scherpe Jens, Fenton-Glynn Claire and Hughes Kirsty, Report on England and Wales, section 2.3.

119 This procedure is also viewed critically, see Gerards Janneke (2014), 44 f.

120 *Schalk and Kopf v. Austria* (*supra* note 27), §62.

continues to grant a wide margin of appreciation. An example of this can be seen in its pronouncements on the admissibility of sperm donation.[121]

Where the ECtHR does limit the margin of appreciation of the states, it places its *imprimatur* on the harmonisation of European family law which either has already taken place or is currently ongoing, while at the same time compelling those countries to act which have not yet taken action in the area concerned. To that extent, the ECtHR not only reacts to developments in European countries but also initiates these developments. Moreover, even in cases where it continues to grant a wide margin of appreciation, the Court frequently takes prospective developments into account, admonishing the Member States to reflect these in their own laws and setting new guidelines.[122] Indeed, it is often the case that an individual state's jurisprudence goes further in its application of Article 8 ECHR than would be required by the Court at that time, and this in turn exerts some influence on the Court's jurisprudence. There is thus a dialectic relationship between national legislators and their judiciaries on the one hand and the ECtHR on the other. Christoph Grabenwarter and Marie-Therese Störck mention the dialogue between the ECtHR and Constitutional Court of Austria,[123] referring to the well-established and intensely discussed notion of shared responsibility between the ECtHR and national courts in protecting the rights guaranteed by the Convention.[124] It is this interaction which explains the continuing evolution of family law at the national level, not as part of some coherent effort at harmonisation but rather as an ongoing search for solutions which appropriately address new problems from a human rights perspective.

6.2. UNMARRIED COUPLES AND PERSISTENT INSTITUTIONAL APPROACHES

Generally speaking, the ECtHR affords protection not only to traditional relationships but also to other constellations in all their various forms. The notion of family life is, in principle, functional, and it encompasses stable *de facto* relationships. Nevertheless, and perhaps somewhat contradictorily, the ECtHR continues to accept that states afford particular protection to marriage in its traditional form as an institution uniting a man and a woman. It stresses that marriage confers a "special status" on those who enter into it, and that its promotion by way of the grant of benefits is within the state's margin of appreciation as it pursues the legitimate aim of encouraging stable, committed

121 *S.H. and Others v. Austria* (no. 57813/00), Judgment (Grand Chamber) of 3 November 2011, ECHR 2011-V, §96.

122 *Ibid.*, §§117 f.

123 Grabenwarter Christoph and Störck Marie-Therese, Report on Austria, section 3.3.1.2.3.

124 Gerards Janneke (2014), 71 ff.

different-sex – and, in some states, same-sex – relationships.[125] First, the ECtHR does not require Contracting States to grant same-sex couples the right to marry. Second, it permits Contracting States to reserve access to specific family law institutions, such as adoption, to married couples. The Court also expressly regards the protection of the traditional family, based on marriage between a man and a woman, as a legitimate objective of legislative action, though it does place particular emphasis on the requirement that any measures taken in this regard must respect the principle of proportionality.

Marriage is central to the traditional middle-class model of family. To this day, the laws of many countries do not grant state protection to couples who are not married, and there is certainly no European consensus on the legal status of unmarried couples. A wide range of legal constructs have been put in place to afford some degree of protection to unmarried couples, and there are considerable differences in the extent to which these arrangements have been institutionalised. Generally, the importance of marriage as an institution is on the wane.

While in some countries there are no family law norms governing unmarried couples, efforts are being made in this direction, particularly with regard to the dissolution of these relationships.[126] In these countries, particular protection is afforded to marriage as an institution in its role as a defined construct which surpasses the individual. This view of marriage as an institution is most evident in the way marriage is regarded as providing the only institutionalised framework for relationships between the sexes and other forms of cohabitation are discriminated against.

In other countries, unmarried couples are granted access to certain family law institutions, such as that of adoption.[127] There may also be areas in which they are afforded legal protection comparable to that enjoyed by married couples.[128] Indeed, it may be that there is even a broad trend towards equal legal treatment for married and unmarried couples. Aleksandra Korać Graovac reports that the most recent family law reforms in Croatia have introduced the principle that unmarried couples who have either lived together for at least three years or have a common child must be treated in the same way as married couples, unless there are objective grounds for treating them differently, and that

125 *Burden v. the United Kingdom* (no. 13378/05), Judgment (Grand Chamber) of 29 April 2008, ECHR 2008-III, §63.

126 Grabenwarter Christoph and Störck Marie-Therese, Report on Austria, section 3.1; Cottier Michelle and Wyttenbach Judith, Report on Switzerland, section 3.1; Coester-Waltjen Dagmar, Report on Germany, sections 3.1 and 3.3.

127 Grabenwarter Christoph and Störck Marie-Therese, Report on Austria, section 2.3.2.3, with regard to step-child adoption; unmarried couples are not allowed to adopt jointly; Korać Graovac Aleksandra, Report on Croatia, section 3.2.

128 Singer Anna, Report on Sweden, section 3.2; Szeibert Orsolya, Report on Hungary, section 3.2, regarding the family law effects that occur in such cases if the couple has children.

the rights granted to married and unmarried couples are now in fact the same in most areas, including maintenance, property rights and welfare.[129]

By contrast, it is interesting to note that Miquel Martín-Casals and Jordi Ribot, in their country report on Spain, illustrate how scholarship not only argues in favour of legal recognition of *de facto* relationships by invoking the protection of family life in conjunction with the principle of non-discrimination, but also how the partners' rights to respect for their private life and to contractual freedom are now sometimes advanced as arguments against according excessive legal rights to unmarried couples.[130] They explain that "widening the subjective scope of marriage may have resulted in a renewed restrictive stance vis-à-vis arrangements outside marriage, particularly heterosexual cohabitation."[131] The authors conclude that "Spanish judicial practice and legal scholarship are shifting towards emphasising the legal distinctiveness of marriage as against cohabitation."[132]

Greece has introduced a civil union, or covenant of cohabitation as it is also called, as an alternative to marriage. Out of respect for conservative ideas, this arrangement is available only to heterosexual couples.[133] In their country report on Greece, Achilleas Koutsouradis and Lina Papadopoulou refer to the difficulties which have arisen in the wake of the ECtHR's *Vallianatos and Others v. Greece*[134] judgment. In order to bring an end to the discrimination identified by the Court, two courses of action are possible: that of making the covenant of cohabitation accessible to same-sex couples and that of abolishing the covenant and the protection it affords cohabiting partners altogether.[135]

For many years, the concept of "protecting marriage" was synonymous with the idea that marriage provided the only legitimate framework for an emotional, economic and sexual union as well as the necessary basis for bringing up children and creating a family. Today, purely utilitarian considerations are gaining ground. Accordingly, while marriage is understood as evidencing a couple's wish to live together and is thus – for example – taken as an undisputed point of reference for establishing parenthood, there is now increasing dispute as to what other functions, other than such proof, it should fulfil. Moreover, while there are multiple forms of relationships based on support without relying on the institution of marriage, marriage provides no guarantee of responsibility and commitment. In other words, "marriage/civil partnership are actually empty

129 Korać Graovac Aleksandra, Report on Croatia, sections 4.1 and 4.2.

130 Martín-Casals Miquel and Ribot Jordi, Report on Spain, sections 3.1 and 3.4, according to whom the Constitutional Court decided that "the application of legal rights and duties between unmarried parties, without the explicit consent of both parties, violates the right to free development of personality and is therefore unconstitutional".

131 *Ibid.*, section 3.5.

132 *Ibid.*, section 3.5.

133 Koutsouradis Achilleas and Papadopoulou Lina, Report on Greece, sections 1.4 and 3.2.

134 *Vallianatos and Others v. Greece* (*supra* note 28).

135 Koutsouradis Achilleas and Papadopoulou Lina, Report on Greece, section 1.4.

signifiers, statuses which can be attained by mere registration on the one hand, but are presumed or imagined to signify stable relationship on the other hand."[136]

Furthermore, the number of other forms of relationships is on the increase. It thus seems likely that any attempt by the state to establish a *numerus clausus* of regulated and therefore privileged family forms will be challenged by a more and more widely disparate social reality. In this context, due deliberation will need to be given to the precise functions which family law can legitimately fulfil.[137] If, as far as largely economic considerations are concerned, the focus is on the protection afforded to the weaker partner in a couple who, for example, has taken on unpaid tasks on behalf of both partners over a long period of time, then any decision on the protection granted to him or her can hardly be based on the legal status of the relationship. In any case, as far as questions directly or indirectly relating to children are concerned, differences in legal treatment based on the legal status of the couple have been recognised as violating the Convention, and all such decisions are required to be based on the wellbeing of the child. Finally, liberal, modern family law must respect the autonomous decisions made by people on how they choose to live with each other.[138]

As concerns the functions which Article 8 ECHR is required to fulfil with regard to the protection of family life, the direction of ongoing developments seems clear: family models are not solely built around different-sex relationships, and the protection of the Convention is owed to the function and needs of all families. There is no other tenable conclusion than to guarantee the same protection to all relationships that fulfil the specific functions of a family.

6.3. SAME-SEX COUPLES' ACCESS TO FAMILY LAW INSTITUTIONS

The extent to which same-sex couples are granted access to family law institutions such as marriage, adoption, reproductive medicine, a family name, parenthood and parental responsibility are important aspects of Article 8 ECHR. As has been observed above, the ECtHR does not require its Contracting States to grant same-sex couples access to marriage.[139] Contracting States are also permitted to restrict specific family law institutions, such as adoption, to married couples. Where marriage is not accessible to same-sex couples and certain rights and institutions are restricted to married couples only, this effectively excludes same-sex couples from the provisions of legislation in certain areas. This situation has given rise to numerous inconsistencies. Indeed, as the Court itself

136 Gross Aeyal (2013), 276 f.

137 Büchler Andrea (2011), 286 f., 300.

138 Schwenzer Ingeborg (2006), 2 ff.

139 *Schalk and Kopf v. Austria* (*supra* note 27), §§60–63.

recognised in *Schalk and Kopf v. Austria,* where it defined family life in a primarily functional and non-discriminatory manner:

> "While the parties have not explicitly addressed the issue whether the applicants were in a relevantly similar situation to different-sex couples, the Court would start from the premise that same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship."[140]

The Court no longer considers sexual orientation a legitimate basis for justified differences in treatment as regards the access to specific rights and institutions granted to different individuals. In this regard, the Court has taken a clear-cut, principled stance by stating that "differences based solely on considerations of sexual orientation are unacceptable under the Convention."[141] Moreover, where national legislation confers rights and obligations on unmarried couples – with regard to adoption rights, succession in tenancy or survivor's pension benefits, for example – the Court requires the Contracting States to apply these in a non-discriminatory way to both different-sex and same-sex couples alike.

As far as the access granted to same-sex couples to family law institutions is concerned, the ECtHR has made a number of important decisions and has exerted considerable influence on the evolution of legislation at the national level. Nevertheless, there are substantial differences in the ways in which the legal systems of individual countries treat same-sex couples. There is, however, now considerable convergence with regard to the initial premise adopted by national courts in that, in accordance with the most recent ECtHR jurisprudence,[142] these courts have come to regard cohabiting same-sex couples as falling within the notion of family life[143] in the same way as heterosexual couples. Accordingly, the emphasis is no longer on sexual orientation, and thus on private life, but on the relationship between the persons concerned.

Increasingly national legal systems are now making marriage accessible to same-sex couples.[144] There is, however, also evidence of trends going in the opposite direction, with Croatia having recently introduced a constitutional

140 *Ibid.*, §99.

141 *X. and Others v. Austria* (no. 19010/07), Judgment (Grand Chamber) of 19 February 2013, ECHR 2013-II, §99.

142 *Schalk and Kopf v. Austria* (*supra* note 27), §§93–94.

143 Grabenwarter Christoph and Störck Marie-Therese, Report on Austria, section 2.3.3.2; Scherpe Jens, Fenton-Glynn Claire and Hughes Kirsty, Report on England and Wales, section 3.2; also Korać Graovac Aleksandra, Report on Croatia, section 2; differently, however somewhat contradictorily, Szeibert Orsolya, Report on Hungary, section 3.1; differently Koutsouradis Achilleas and Papadopoulou Lina, Report on Greece, section 3.2.

144 Forder Caroline, Report on the Netherlands, section 3.1; Martín-Casals Miquel and Ribot Jordi, Report on Spain, section 3.3.2; Scherpe Jens, Fenton-Glynn Claire and Hughes Kirsty, Report on England and Wales, section 3.1.

provision, based on the result of a popular referendum, stating that marriage is a union between a man and a woman, thus preventing same-sex couples from having access to marriage.[145] Nevertheless, most Contracting States now grant same-sex couples access to an institution which is similar to, but distinct from, that of marriage.[146] Finally, there are some Contracting States which either do not yet provide any legal framework granting protection to same-sex couples or do so to a minimal extent only.[147]

While much convergence can be found in the general attitudes toward the legal recognition of same-sex couples, there is still significant divergence between Contracting States with regard to the question of the access to parenthood granted to same-sex couples. For many years, the debate was focused on the opportunities for adoption open to same-sex couples. Particularly in those countries where same-sex couples are permitted to marry, they are regularly also permitted to adopt children jointly and to adopt stepchildren.[148] There is a general tendency to at least allow the adoption of stepchildren. In Austria, for example, the ECtHR jurisprudence to the effect that differences in the treatment accorded to same-sex and heterosexual couples wishing to adopt stepchildren are not justifiable under the ECHR[149] has resulted in a change in the law.[150] In 2014, the Constitutional Court went a step further and declared the prohibition of joint adoption for same-sex couples as unconstitutional.[151] In the case of Croatia, Aleksandra Korać Graovac has reported a less far-reaching solution, according to which the partner of a child's biological parent may make an application to be granted "partnership care", which would afford him or her the same rights and obligations as those applying to the child's legal parent, but

145 Korać Graovac Aleksandra, Report on Croatia, sections 1.2 and 4.2; see also Szeibert Orsolya, Report on Hungary, section 3.1, regarding the constitutional framework.

146 Grabenwarter Christoph and Störck Marie-Therese, Report on Austria, section 3.1; Korać Graovac Aleksandra, Report on Croatia, sections 2 and 4.2 (introduced only very recently); Coester-Waltjen Dagmar, Report on Germany, section 3.2; Cottier Michelle and Wyttenbach Judith, Report on Switzerland, section 3.2.2; Szeibert Orsolya, Report on Hungary, section 3.2; but also Scherpe Jens, Fenton-Glynn Claire and Hughes Kirsty, Report on England and Wales, section 3.2.3.

147 Koutsouradis Achilleas and Papadopoulou Lina, Report on Greece, section 3.3; Sokołowski Tomasz, Report on Poland, section 3.1.

148 Forder Caroline, Report on the Netherlands, section 2.3.1; Martín-Casals Miquel and Ribot Jordi, Report on Spain, section 3.3.2; Singer Anna, Report on Sweden, section 2.3.2; Scherpe Jens, Fenton-Glynn Claire and Hughes Kirsty, Report on England and Wales, section 2.4.1.

149 *X. and Others v. Austria* (*supra* note 141).

150 Grabenwarter Christoph and Störck Marie-Therese, Report on Austria, section 2.3.2.3; see also Coester-Waltjen Dagmar, Report on Germany, section 2.1.4.1; a change is currently under discussion in Switzerland, see Cottier Michelle and Wyttenbach Judith, Report on Switzerland, section 2.3.

151 Grabenwarter Christoph and Störck Marie-Therese, Report on Austria, section 2.3.2.3. Following this decision of the Constitutional Court the legislator legalised semen donation not only in the context of *in vivo* fertilisation but also in the context of *in vitro* fertilisation with regard to both same-sex and different-sex couples.

without the partner being registered as the child's legal parent and instead being registered only as a the child's "partner-care provider".[152]

In recent years, the extent to which same-sex couples are granted access to reproductive medicine has been a particular focus of debate. Some countries grant same same-sex couples the same rights in this area as they accord to heterosexual couples, thus significantly exceeding the requirements of the ECtHR's jurisprudence.[153] Austria's Constitutional Court has followed a differentiated approach, taking the view that a prohibition of semen donation for a same-sex couple in the context of an *in vivo* insemination would constitute a violation of Article 8 ECHR, whereas there is a wider margin of appreciation given to the legislator with regard to prohibition of semen donation in the context of an *in vitro* procedure.[154] The Court's observation that "the prohibition of artificial insemination might not be justified by the 'protection of the family' within Article 12 or Article 8 ECHR, because same-sex partnerships do not substitute marriages and different-sex relationships, but they exist additionally and do not endanger them"[155] is worthy of note in this regard. In other jurisdictions, initial applications for court hearings on granting same-sex couples access to reproductive medicine are currently under negotiation.[156]

6.4. STATUS OF THE BIOLOGICAL FATHER WHO IS NOT MARRIED TO THE MOTHER OF HIS CHILD

Across Europe, the number of children regarding whom several persons fulfil different or partial aspects of the roles of motherhood or fatherhood is on the increase. Depending on their viewpoint, family sociologists refer to these constellations as examples of multiple, split or fragmented parenthood. A further consideration here is that the notion of reproduction as the exclusive preserve of married couples has long been abandoned. The task of family law is to determine whether parenthood in the legal sense should be based on genetic certainty or a child's social bonds and what effects each of these particular roles should have. Individual jurisdictions have embarked on a variety of different paths in their quest for a system of child law which does not question the exclusive nature of genetic ties while at the same time providing a legal framework that protects actual relationships as they are lived by those concerned. Child law should be

152 Korać Graovac Aleksandra, Report on Croatia, section 4.2.

153 Forder Caroline, Report on the Netherlands, section 2.4.1.1; Martín-Casals Miquel and Ribot Jordi, Report on Spain, section 2.2, as long as the partners are married; Singer Anna, Report on Sweden, section 2.4.2; Scherpe Jens, Fenton-Glynn Claire and Hughes Kirsty, Report on England and Wales, section 2.5.

154 Grabenwarter Christoph and Störck Marie-Therese, Report on Austria, section 2.3.3.2.

155 *Ibid.*, section 2.3.3.2.

156 Korać Graovac Aleksandra, Report on Croatia, section 3.3.

able to capture and reflect the multiplicity of different realities that individual children experience.

These developments do, however, exhibit some elements of convergence. Whereas the principle of non-discrimination against illegitimate children was a central tenet of earlier family law reforms, and one largely inspired by the *Marckx* decision,[157] in recent times there has been increased emphasis on strengthening the position of the biological father who is not married to a child's mother. To a considerable extent, this second trend can also be attributed to the influence of the ECtHR.[158] There are numerous questions to be answered here. These relate first to how parenthood is established, second to the relationship between biological and social fatherhood, third to the rights of the biological father who has not been recognised as a child's legal father, and fourth to the effects of legal paternity outside marriage.

In matters relating to parental status, the ECtHR grants the Contracting States a substantial margin of appreciation. Indeed, "unmarried fathers have to establish a sufficient interest in and commitment to the child to attract Article 8 rights though that does not mean having to cohabit with the mother".[159] The biological reality has to be supported by a social reality. However, the situation is different if legal paternity already exists due to specific presumptions. In the event of a conflict of interest between the mother, the biological father, the child and the legal father, states are granted a wide margin of appreciation in finding solutions. Indeed, there is no obligation placed on the states to grant the biological father the right to contest another man's paternity. Only in cases where there is no social relationship meriting the protection of the law between a child and his or her legal father should the right to establish his own paternity be granted to the child's biological father.[160] It is assumed that the child has an interest in a stable and undisturbed family relationship that deserves protection, and it is on this basis that interference with the rights of the biological father is justified.[161]

157 In more detail Antokolskaia Masha (2004), 445 ff.

158 Forder Caroline, Report on the Netherlands, sections 2.2.1 and 2.2.2.1; Coester-Waltjen Dagmar, Report on Germany, sections 2.1.2.2 and 2.2.8.

159 Lowe Nigel V. (2011), 1106.

160 In *Kroon and Others v. the Netherlands* (no. 18535/91), Judgment (Chamber) of 27 October 1994, Series A, Vol. 297-C, §40, the ECtHR had held that where the legal father had never had any social relationship with the child, but the biological father did, the lack of any opportunity for the biological father to establish his paternity amounted to a violation of Article 8 ECHR.

161 See *Nylund v. Finland* (no. 27110/95), Decision of 29 June 1999, ECHR 1999-VI. Cohabitation of the biological father with the mother of the child before she married another man (before the birth of the child) and the efforts of the biological father to maintain a relationship with the child were held not to be sufficient to bring the said relationship within the scope of "family life". The (biological) father's right to private life had to give way to the interests of the child, which appeared to be best protected by maintaining the social family. The Court decided somewhat differently in *Różański v. Poland* (no. 55339/00), Judgment of 18 May 2006 (not reported). For an extensive analysis of the ECtHR's approach, see Forder Caroline and Saarloos Kees (2007), 218 ff.

There are numerous differences in the arguments put forward by the ECtHR depending on whether a man is contesting his own or another's paternity, as the Court allows the biological fact to prevail over social and presumed legal fatherhood only when a man is contesting his own paternity. This has resulted in non-conclusive and somewhat contradictory jurisprudence. While it may be extremely difficult for a man to have his own biological paternity acknowledged as paramount over that of an existing, legally recognised father in many jurisdictions whose decisions the ECtHR has upheld, it may be remarkably easy for a man, with the blessing of the ECtHR, to renounce his legal paternity of a child, even after the parent–child relationship has lasted for many years. It is also noteworthy that, where matters of parental status are concerned, ECtHR jurisprudence does not require the Contracting States to consider the competing interests at stake in each case and, in particular, that it does not require a case-by-case assessment of the best interests of the child.[162]

With regard to the nature of the relationship between a child and his or her parents, the ECtHR takes a different approach. Here, the Court requires the Contracting States to establish frameworks which make it possible to evaluate the competing interests of the parties involved in each case and, in particular, to accord appropriate weight both to the best interests of the child and to the child's own views. The Court requires that paramount consideration be given to the individual circumstances of each case. As far as the parent–child relationship is concerned, it is important to distinguish between cases relating to the attribution of parental responsibility, where the Court accords the Contracting States a relatively wide margin of appreciation, and those relating to contact and visitation rights, where the Court's more recent judgments have left little latitude to national jurisdictions.

One difficulty facing the ECtHR is that some specific interests protected by the Convention are in conflict with other such interests. This is evident in cases where a child's social, biological and legal paternity are not united in one and the same person. The status-related and contact rights ascribed to a child's legally recognised social father are entitled to the same protection under the Convention as those accorded to the child's mother and his or her biological father. Children's best interests may also change over time. The ECtHR places great emphasis on the establishment of a stable social environment for the child and on protecting the relationships he or she already has. Judith Wyttenbach and Irene Grohsmann[163] are certainly right to point out, as far as the importance of the best interests of the child is concerned, that the ECtHR has formulated its requirements on specific rights protected by the Convention – be it the right to private life or to family life – with particular care. With regard to applications made by a child's biological father who does not live with the child, which can be made on the basis of the applicant's right to private life, the Court requires that

162 See also Wyttenbach Judith and Grohsmann Irene (2014), 161 ff.

163 Wyttenbach Judith and Grohsmann Irene (2014), 161.

the Contracting States assess whether it is in the best interests of the child to have future contact with his or her father.[164] Conversely, in matters relating to restrictions placed on existing family life, such as those relating to contact rights following divorce, the Court applies stricter criteria. In these cases, its position is that any limitations placed on contact rights can only be more restrictive than usual if this is in the child's best interests, and that contact rights can be completely suspended only in cases where such contact would place the child's wellbeing in serious jeopardy.[165] In other words, when a social relationship akin to family life exists between a father and a child, it is assumed that this contact is in the child's best interests. That same assumption does not apply, however, in cases where a child already has an established, legally recognised father and has never lived with his or her biological father, and where the biological father's application for contact rights is therefore only based on his own right to private life. In this case, the child's best interests have to be established. Despite the different weights it ascribes to the individual claims of the parties involved in such cases, it should be noted that ECtHR jurisprudence undoubtedly does acknowledge constellations involving multiple parenthood and that it recognises the legal entitlements of the various parties concerned.

The overall effect of this ECtHR jurisprudence has been to strengthen the position of unmarried fathers. A comparison of the approaches taken by individual national jurisdictions shows some evidence of convergence, despite the numerous differences in the approach taken by the various states.

First, hindrances which made it difficult for unmarried fathers to establish legal parenthood have either been abolished[166] or reduced.[167] This notwithstanding, there remain a number of difficult questions as regards the relationship between the biological father of a child and the man recognised as the child's legal father by virtue of his being married to the child's mother. The position of biological fathers has not yet been strengthened to an extent that always renders them able to contest the legal fatherhood of their child's mother's husband in order to be granted parenthood themselves.[168] National jurisdictions also permit and uphold a variety of timeframes during which paternity must be contested, some of which are still of fairly short duration, on the basis that these

164 *Anayo v. Germany* (no. 20578/07), Judgment of 21 December 2010 (not reported).

165 *Johansen v. Norway* (no. 17383/90), Judgment of 7 August 1996, ECHR 1996-III, §§64 and 78.

166 Martín-Casals Miquel and Ribot Jordi, Report on Spain, section 2.1.2.

167 Scherpe Jens, Fenton-Glynn Claire and Hughes Kirsty, Report on England and Wales, section 2.3; Forder Caroline, Report on the Netherlands, section 2.2.2.1.

168 See Grabenwarter Christoph and Störck Marie-Therese, Report on Austria, section 2.2.1, according to which, in Austria, biological fathers do not have the possibility to contest the paternity of the mother's husband; the biological father can, however, acknowledge paternity if the child consents to his acknowledgement; the same holds true for Switzerland (Cottier Michelle and Wyttenbach Judith, Report on Switzerland, section 2.2). See also Forder Caroline, Report on the Netherlands, section 2.2.2.1; Coester-Waltjen Dagmar, Report on Germany, section 2.1.2.2; Sokołowski Tomasz, Report on Poland, section 2.3.

help to protect the integrity of the family.[169] On the whole, however, national laws on descent are generally shifting in favour of biological fatherhood.[170]

Second, in cases where some form of family life falling under Article 8 ECHR has been established between a child and his or her biological (but not legal) father, national laws increasingly require that contact rights be granted to the biological father.[171] Indeed, even in cases where such family ties do not yet exist but the biological father intends to establish them and makes efforts to that end, national laws may now require – in accordance with ECtHR jurisprudence[172] – that contact rights be granted, thus making it possible for a relationship to be established between a child and his or her biological father.[173]

Third, a number of country reports have identified the question of whether a man has the right to knowledge about his own paternity as an upcoming issue.[174] Unless a person is aware of his biological fatherhood, he cannot claim the rights emanating from it.

Fourth, norms which prevent an unmarried father from being granted parental responsibility against the will of the child's mother are incompatible with Article 8 ECHR.[175] Legislative reforms have taken place to reflect this at the national level, with decisions in individual cases paying particular heed to the wellbeing of the child.[176]

Fifth, as far as parental responsibility and contact rights are concerned, initiatives have been taken which go considerably further than current ECtHR jurisprudence requires, namely by approving the possibility of granting parental responsibility to more than two persons. Such arrangements can be particularly relevant in the context of same-sex parenthood.[177]

Finally, more recent debate in various countries has been less concerned with parental responsibility, which is now regularly granted to both parents, than

169 Regarding the situation in Spain, where there are no longer time constraints for a husband who wants to contest his paternity, see Martín-Casals Miquel and Ribot Jordi, Report on Spain, section 2.1.2; see also Singer Anna, Report on Sweden, section 2.2.2.

170 Exemplarily and critically, see Martín-Casals Miquel and Ribot Jordi, Report on Spain, section 2.3.

171 Coester-Waltjen Dagmar, Report on Germany, sections 2.2.7 and 2.2.8; Forder Caroline, Report on the Netherlands, section 3.3.2.2; in the Dutch context, this also holds true for the private donor of semen, see sections 3.2.2.3 and 3.3.2.2.

172 *Lebbink v. the Netherlands* (no. 45582/99), Judgment of 1 June 2004, ECHR 2004-IV, §36; also *E.B. v. France* (no. 43546/02), Judgment (Grand Chamber) of 22 January 2008 (not reported), §41.

173 Forder Caroline, Report on the Netherlands, section 3.3.2.2.

174 Cottier Michelle and Wyttenbach Judith, Report on Switzerland, section 2.6.

175 *Zaunegger v. Germany* (*supra* note 103); *Sporer v. Austria* (no. 35637/03), Judgment of 3 February 2011 (not reported).

176 Grabenwarter Christoph and Störck Marie-Therese, Report on Austria, section 3.3.1.2.3; Singer Anna, Report on Sweden, section 3.3.; Cottier Michelle and Wyttenbach Judith, Report on Switzerland, section 3.3.1; Coester-Waltjen Dagmar, Report on Germany, section 2.2.3.

177 Korać Graovac Aleksandra, Report on Croatia, section 4.2.

with custody and the effect that alternating or shared custody has on the wellbeing of the child.[178] This is an area where considerable research needs to be carried out to improve the current state of knowledge.

It is clear, both from the ECtHR's jurisprudence and from developments at the national level, that parenthood is constantly being renegotiated. The complexity of family constellations is on the increase. Confronted with this reality, the guidance provided by the ECtHR in its *Kroon* judgment – to the effect that "'respect' for 'family life' requires that biological and social reality prevail over a legal presumption"[179] – frequently fails to offer much assistance. Future initiatives in this area will need to ensure that social, legal and biological parents are all recognised as concerns the function they exercise with regard to the wellbeing of the child in the context of a multiple parent framework.[180]

6.5. REPRODUCTIVE MEDICINE AND PARENTHOOD

Technical advances in reproductive medicine have not only confronted European countries with the question of which procedures to authorise and which to ban, but have also required them to decide who should be granted parenthood and what rights and obligations should be conferred on the various parties involved. Modern reproductive medicine has also shaken the old *mater semper certa est* dictum. Access to reproductive medicine goes hand in hand with the need to develop a new basis for regulating parenthood.

The right to respect for private life encompasses the decision to become or not to become a parent, including the right to respect for the decision to become a genetic parent.[181] Nevertheless, the ECtHR grants individual Contracting States a wide margin of appreciation when it comes to determining which particular procedures of reproductive medicine should be permitted. This latitude reflects the lack of consensus on the highly sensitive ethical issues involved. The Court does, however, require the Contracting States to ensure that their laws keep pace with both scientific progress and societal developments. This is best illustrated by the ECtHR's remarks in *S.H. and Others v. Austria*:

178 See, by way of example, Sokołowski Tomasz, Report on Poland, section 2.2; Singer Anna, Report on Sweden, section 3.3; Grabenwarter Christoph and Störck Marie-Therese, Report on Austria, section 3.3.1.2.3, explaining that, in Austria, an agreement according to which a child should spend half of his or her time with one parent and the other half with the other parent (double residency) is not valid. An innovative legal situation exists in Hungary, where it is possible to divide parental responsibility between the parents instead of sharing it between them (see Szeibert Orsolya, Report on Hungary, section 3.3.1).

179 *Kroon and Others v. the Netherlands* (*supra* note 160), §40.

180 See also Coester-Waltjen Dagmar, Report on Germany, section 2.2.8, on what remains to be done in order to accommodate multiple relationships between children and parents.

181 *Evans v. the United Kingdom* (*supra* note 96), §§71 ff.; see also *E.L.H. and P.B.H. v. the United Kingdom* (nos. 32094/96 and 32568/96), Decision of 22 October 1997 (not reported).

"Nevertheless, the Court observes that the Austrian Parliament has not, until now, undertaken a thorough assessment of the rules governing artificial procreation, taking into account the dynamic developments in science and society noted above. The Court also notes that the Austrian Constitutional Court, when finding that the legislature had complied with the principle of proportionality under Article 8 §2 of the Convention, added that the principle adopted by the legislature to permit homologous methods of artificial procreation as a rule and insemination using donor sperm as an exception reflected the then current state of medical science and the consensus in society. This, however, did not mean that these criteria would not be subject to developments which the legislature would have to take into account in the future.

[...] The Government have given no indication that the Austrian authorities have actually followed up this aspect of the ruling of the Constitutional Court. In this connection, the Court reiterates that the Convention has always been interpreted and applied in the light of current circumstances [...] Even if it finds no breach of Article 8 in the present case, the Court considers that this area, in which the law appears to be continuously evolving and which is subject to a particularly dynamic development in science and law, needs to be kept under review by the Contracting States".[182]

There is a wide range of regulations governing medical procedures and, at the national level, the scope of permissible techniques of reproductive medicine has been the subject of intense discussion from the standpoint of the right to respect for private life.[183] Because there are considerable differences between the ways in which individual countries regulate access to various types of procedures of reproductive medicine, these differences have raised a number of questions under private international law which also have human rights ramifications. Particularly with regard to the question of whether, and if so in what circumstances, a parent–child relationship based on an agreement between intended parents and a surrogate mother should be recognised in a country in which surrogacy is forbidden, it can be said that a dialogue is developing between court judgments at the national level[184] and the guiding jurisprudence handed down by the ECtHR. In its recent judgments in this area, the ECtHR[185] has established a set of standards which, while they had already been recognised by

182 *S.H. and Others v. Austria* (no. 57813/00), Judgment (Grand Chamber) of 3 November 2011, ECHR 2011-V, §§117–118.

183 Coester-Waltjen Dagmar, Report on Germany, section 2.1.3; Grabenwarter Christoph and Störck Marie-Therese, Report on Austria, sections 2.3.3 and 2.3.3.3; Cottier Michelle and Wyttenbach Judith, Report on Switzerland, section 3.4.

184 See Grabenwarter Christoph and Störck Marie-Therese, Report on Austria, section 2.2.2, and the Austrian Constitutional Court's convincing rulings on the non-applicability of the *ordre public* reservation in such cases.

185 *Paradiso and Campanelli v. Italy* (no. 25358/12), Judgment of 27 January 2015 (at the time of writing pending before the Grand Chamber); *Mennesson v. France* (*supra* note 41); *Labassee v. France* (*supra* note 41).

the courts in some countries,[186] also gave rise to controversy in other jurisdictions.[187] Moreover, there are of course some countries which permit surrogacy under certain circumstances.[188]

Procedures of reproductive medicine have led to a reconsideration and redefinition of legal parenthood.[189] In these cases, it is intention, rather than genetic affiliation, which provides the basis for establishing legal parenthood.[190] This has resulted in new constellations, particularly in cases where same-sex couples have access to reproductive medicine. In such cases, parenthood is usually established on the basis of the same traditional assumptions that apply to (married) heterosexual couples,[191] or of stated intention and consensus,[192] or – in the words of Miquel Martín-Casals and Jordi Ribot – of the "conclusive acts of both parties as to the procreation project undertaken jointly."[193]

Developments in reproductive medicine have unquestionably challenged conventional concepts of parenthood, since they have resulted in a deconflation of the biological and social aspects of the parent–child relationship. The intentions of the parties involved have become an important new factor in determining legal parenthood. This renegotiation of parenthood must take into account that, even in cases where reproductive medicine has been used, there may be more than two people who have, or would like to have, a relationship to the child and that those relationships require protection. A legal framework must therefore be able to accommodate multiple parenthood.

6.6. THE BEST INTERESTS OF THE CHILD AS THE KEY PRINCIPLE

In many countries, the notion of the best interests of the child has, for decades, been used predominantly to consolidate the privileges of marriage.[194] More

186 Coester-Waltjen Dagmar, Report on Germany, section 2.1.3; Grabenwarter Christoph and Störck Marie-Therese, Report on Austria, sections 2.2.2, 2.2.2.1 and 2.2.2.2.

187 Martín-Casals Miquel and Ribot Jordi, Report on Spain, section 2.2; but also Cottier Michelle and Wyttenbach Judith, Report on Switzerland, section 2.4.

188 Koutsouradis Achilleas and Papadopoulou Lina, Report on Greece, section 2.4; Scherpe Jens, Fenton-Glynn Claire and Hughes Kirsty, Report on England and Wales, section 2.5; Forder Caroline, Report on the Netherlands, section 2.4.1.1 (however, commercial surrogacy is subject to criminal penalties and altruistic surrogacy, while permitted, gives rise to complex procedures for establishing the parenthood of the intended parents, section 2.4.2).

189 For an analysis of these developments and the challenges they bring with them, see Lowe Nigel V. (2011), 1108 ff.

190 Singer Anna, Report on Sweden, section 2.4.3.

191 Forder Caroline, Report on the Netherlands, sections 2.2.1.2 and 2.2.1.4.

192 Singer Anna, Report on Sweden, section 2.4.3, where an acknowledgement or a court decision is required.

193 Martín-Casals Miquel and Ribot Jordi, Report on Spain, section 2.2, on the more recent decision of the Spanish Supreme Court.

194 See Cottier Michelle and Wyttenbach Judith, Report on Switzerland, section 4.

recently, this notion has assumed an autonomous role in its own right, and one which has become an important element in the Court's jurisprudence. Of course, any assessment of the best interests of the child needs to be carried out on a case-by-case basis. Blanket legislative presumptions – such as the notion that the attribution of shared parental responsibility against the will of the mother is against the best interests of the child,[195] or that contact between a child and his or her biological father is automatically injurious to the child if he or she is living with a legally recognised father[196] – are no longer accepted by the ECtHR. The Court also tends to subject national frameworks to critical examination whenever they promulgate an absolute prohibition that falls within the scope of Article 8 ECHR. This can be seen, for example, in cases where national legislation makes it generally impossible for a child to know his or her origin.[197]

The principle of the best interests of the child also plays a central part in legal systems at the national level, which are now increasingly directed towards that principle.[198] Arguments based on the best interests of the child are increasingly advanced as a means of calling rigid determinations into question and as a basis for requesting and justifying a consideration of the specific circumstances of an individual case.[199] This is commensurate with the jurisprudence of the ECtHR, which has also adopted the approach of requiring Contracting States to engage in individualised forms of decision-making, rather than placing the primary emphasis on a particular law. The Court also requires Contracting States to evaluate the proportionality of interfering in private and family life[200] and to adhere to certain procedural obligations.[201] Indeed, these procedural obligations have been central to the Court's jurisprudence concerning children.

195 *Zaunegger v. Germany* (*supra* note 103), §19.

196 *Anayo v. Germany* (*supra* note 164), §67; *Schneider v. Germany* (no. 17080/07), Judgment of 15 September 2011 (not reported), §95 ff.

197 *Godelli v. Italy* (no. 33783/09), Judgment of 25 September 2012 (not reported), concerning the absolute impossibility of knowing one's own origin in the case of an abandoned child who was subsequently adopted.

198 Grabenwarter Christoph and Störck Marie-Therese, Report on Austria, section 2.1; Scherpe Jens, Fenton-Glynn Claire and Hughes Kirsty, Report on England and Wales, section 2.2; Sokołowski Tomasz, Report on Poland, section 2.2.

199 Grabenwarter Christoph and Störck Marie-Therese, Report on Austria, section 2.3.1.1, regarding the age difference in step-child adoption and regarding contact rights between biological parents and their child; Singer Anna, Report on Sweden, section 3.4.2, with regard to the transfer of parental responsibility to foster parents when it is in the best interest of the child; Scherpe Jens, Fenton-Glynn Claire and Hughes Kirsty, Report on England and Wales, section 2.2, with regard to denying the parents the right to consent to the adoption of their child; Coester-Waltjen Dagmar, Report on Germany, section 2.2.7 (regarding contact rights).

200 Scherpe Jens, Fenton-Glynn Claire and Hughes Kirsty, Report on England and Wales, section 2.2, with regard to the access to reproductive medicine.

201 Singer Anna, Report on Sweden, section 3.3, with regard to the length of the procedure for attributing parental custody.

However, in their country reports, Jens Scherpe, Claire Fenton-Glynn and Kirsty Hughes, in the case of England and Wales,[202] and Tomasz Sokołowski, in the case of Poland,[203] all emphasise that the relationship between the primacy of the best interests of the child in national legal systems and the parental rights enshrined in Article 8 ECHR is uncertain, and they even question the compatibility of these two aspects. Jens Scherpe, Claire Fenton-Glynn and Kirsty Hughes explain that, in national law, "the welfare of the child is the single deciding factor, and displaces all other considerations, and indeed rights", whereas "Article 8 of course requires the judge first to evaluate the right of the applicant to respect for family and private life, and then determine whether the infringement of this right has been in accordance with the law, pursued a legitimate aim, and was necessary in a democratic society".[204] They draw attention to the semantic and practical difficulties arising from the conflicting demands of the "welfare-based" approach and the "rights-based" approach, illustrating their point by reference to the question of how parents should be involved in the decision-making process relating to adoption.[205] Tomasz Sokołowski argues along similar lines, pointing out that whereas the child is granted protection both of his or her human rights and of his or her welfare, the only protection enjoyed by parents is that accorded to their human right to respect for family life.[206] In his view, "[t]he influence of the ECtHR's jurisprudence would be more significant only if the Court were to recognise the priority of the protection of child welfare in connection with the protection of the child's human rights over the protection of the human rights of an adult person".[207]

It is also apparent that the position of the child is increasingly based not only on his or her best interests, but is also conceptualised as a position determined by rights.[208]

Finally, a person's right to know his or her genealogical origins, which in recent years has become a very important if not indeed unconditional right in many jurisdictions,[209] has also been based on the notion of the best interests of

202 Scherpe Jens, Fenton-Glynn Claire and Hughes Kirsty, Report on England and Wales, section 2.2.

203 Sokołowski Tomasz, Report on Poland, section 2.2.2, *passim*.

204 Scherpe Jens, Fenton-Glynn Claire and Hughes Kirsty, Report on England and Wales, section 2.2.

205 *Ibid.*, section 2.4.2; see also Sokołowski Tomasz, Report on Poland, section 2.2.1.

206 Sokołowski Tomasz, Report on Poland, section 2.2.2.

207 *Ibid.*, section 2.2.

208 Cottier Michelle and Wyttenbach Judith, Report on Switzerland, section 4; Grabenwarter Christoph and Störck Marie-Therese, Report on Austria, section 3.3.2.

209 Forder Caroline, Report on the Netherlands, section 2.5.1; Cottier Michelle and Wyttenbach Judith, Report on Switzerland, section 2.5; Singer Anna, Report on Sweden, sections 2.3.1 and 2.5; Korać Graovac Aleksandra, Report on Croatia, section 3.3 (with regard to reproductive medicine); Martín-Casals Miquel and Ribot Jordi, Report on Spain, section 2.1.1 (concerning adoption, the situation is different, however, in the context of gamete donation, where anonymity is guaranteed (Martín-Casals Miquel and Ribot Jordi, Report on Spain,

the child. Questions relating to mothers giving birth to children anonymously are also being reviewed in this light.[210]

6.7. CONCLUSION

The Court's jurisprudence is not alone in evolving dynamically. The same developments can be observed in legal systems at the national level and their jurisprudence. Such dynamism is essential in an area in which societal conceptions are undergoing such rapid and far-reaching change. While there is undoubtedly some evidence of convergence in response to the ECtHR's jurisprudence, there are still significant differences between the approaches taken by individual jurisdictions, which in turn are determined both by the economic, social and political circumstances of the country concerned and by its specific legal culture.

Convergence can be seen in the way national legal systems are moving towards a more open and more flexible approach to family law, focusing on the details of each individual case and becoming less beholden to established family law institutions. The role played by the Strasbourg jurisprudence in response to these developments has, however, also attracted critical comment, as exemplified by Marie-Thérèse Meulders-Klein:

> "[T]he binding case-law of the Strasbourg Court and its direct application to all Member States of the Council of Europe is likely to make paradoxically a significant contribution to an 'approximation' of European family laws by 'deconstructing' national family rules piece by piece on an unforeseeable basis. This in particular is the path that led to the splitting of the link between marriage and filiation and to the belief that marriage has outlived its usefulness. Consequently, the emergence of the phenomenon of 'unmarriage' – the so called 'démariage' in French – although the 'right to marry' is at the same time heralded as a conquest in other unprecedented circumstances such as same-sex or transsexual marriages. This statement notwithstanding, there can be absolutely no question of criticizing the principle of the equal right of the child born out of wedlock to have a *'normal family life'*, that is to have a *mother* (judgment in *Marckx v. Belgium*, 1979) and to have a *father* (judgment in *Johnston v. Ireland*, 1986) and the same rights as a legitimate child. [...] However, the over-ideologisation of Human rights and their constantly changing and unpredictable interpretation by the European judges are obviously a roadmap for a 'Journey without destination' and may still hold many a surprise in store. Indeed, Article 8 ECHR itself, in combined with Article 14 on non-discrimination contains a clear potential antagonism between 'private life', interpreted as an increasingly unfettered individual liberty on the ones versus the equal right to 'a normal family life' of the other family members who deserve the same protection".[211]

It is certainly true that the conflicting claims of private life and family life give rise to tension, which notably manifests itself in questions relating to parenthood. What this criticism fails to acknowledge, however, is that ECtHR's jurisprudence also serves, and may indeed even be seen as primarily serving, to reflect developments occurring at the national level and to incorporate these into the human rights context. That these developments are neither linear nor congruent is self-evident, and it is equally unsurprising that, given their highly sensitive and emotional nature, both for the individual and wider society, these questions will give rise to attitudes which are contradictory, ambivalent and controversial.

Article 8 ECHR has significant potential to develop further, and it is that very potential which will make it possible to formulate appropriate responses to societal change. In his analysis of how the content of Article 8 ECHR has developed, Burbergs draws an analogy with the growth of a tree:

> "with smaller or bigger branches springing out from each new interest that has been accepted as forming part of the article's scope. To illustrate, the *Marckx* case, in which matters of intestate succession were includes within 'family life', further developed to include matters of interpretation of testamentary dispositions. The right to respect for the decision to become and the decision not to become a parent blossomed: into rights to choose the circumstances of becoming a parent, to choose to become a genetic parent, to protect interests in conjugal visits, and in access to IVF."[212]

At this point, it is not clear where this development will lead. Much will depend on two key factors. The first factor is whether, and if so how, national legislatures will define the tasks which family law is expected to perform in an increasingly plural society. The second – and critical – factor is what purposes and content the ECtHR will ascribe to Article 8 ECHR.

section 2.2)); Grabenwarter Christoph and Störck Marie-Therese, Report on Austria, section 2.3.1.1 (in the case of adoption) and section 2.3.3 (in the case of semen donation); Szeibert Orsolya, Report on Hungary, section 2.3 (in the case of adoption); Coester-Waltjen Dagmar, Report on Germany, section 2.1.5; Koutsouradis Achilleas and Papadopoulou Lina, Report on Greece, section 2.4 (indicating that in Greece, such a right is very limited in the context of reproductive medicine).

210 Martín-Casals Miquel and Ribot Jordi, Report on Spain, section 2.1.1; also Forder Caroline, Report on the Netherlands, section 2.5.2.

211 Meulders-Klein Marie-Thérèse (2007), 276.

212 Burbergs Maris (2013), 326.

7. THE FUTURE OF ARTICLE 8 ECHR

Article 8 ECHR is assuming an increasingly important role in determining how family law at the national level develops. This is giving rise to criticism on a number of different fronts. First, there is general criticism of the approach taken by the Strasbourg institutions. Second, the specific interpretations that the Court has placed on Article 8 ECHR have also attracted criticism. For these reasons, an appreciation of the core functions of Article 8 ECHR is vital. While a detailed account of the development and interpretation of Article 8 ECHR would be beyond the scope of this volume, some observations nevertheless seem appropriate.

One source of criticism both in the literature and in the public debate on this topic relates, as previously mentioned, to the unpredictability of the ECtHR's jurisprudence. This needs to be seen in the light of the proliferation of human rights.[213]

As part of its evolving interpretation, the ECtHR also reads many positive obligations into Article 8 ECHR, the effect of which is greatly to expand the Convention's scope.[214] Positive obligations require action by the Contracting States to ensure that a Convention right is actively protected and fulfilled. It has been argued that the extent of such action is open-ended.

The complications arising from positive obligations are primarily apparent in the areas of parental status and parental responsibility. Here, the Court takes the view that the Contracting States have to bring the legal situation into line with biological and social facts, and it grants them a more or less wide margin of appreciation in achieving that objective. Not only is this a difficult task for states to fulfil, given the complexity of situations involving many different parties with divergent interests, but it is also questionable whether it is the genuine function of Article 8 ECHR to impose specific legal regimes on states. From a human rights perspective, it is primarily factual family life that needs to be guaranteed and protected from interference, whereas the specific legal framework implemented to this end cannot be of paramount importance.

In two other, interrelated respects, however, the jurisprudence of the Court has also faced criticism not for overreaching, but for failing to fulfil its essential function. The main point at issue here is that, despite the Court's claims to the contrary, the Strasbourg jurisprudence continues to promulgate, or at least protect, an institutional viewpoint. This is particularly true of the privileged status the Court ascribes to marriage. A genuinely functional approach would not focus on (marital) status but would instead equally encompass all relationships which fulfil the tasks of a family. Criticism in the literature not only objects to the fact that the Court allows the Contracting States to exclude

213 Gerards Janneke and Fleuren Joseph (2014), 3 ff.
214 Gerards Janneke (2014), 42.

unmarried and same-sex couples from particular institutions, benefits and forms of protection afforded by family law. It also remarks that, by focusing on conjugal relationships (whether between a man and a woman or two persons of the same sex), the ECtHR unfairly excludes other affiliations which are based on responsibility, trust and commitment and which have a mutually supportive structure. Aeyal Gross refers to the ECtHR decision in *Burden and Burden v. the United Kingdom*,[215] in which the Court and later the Grand Chamber saw no violation of the Convention in the fact that the state had denied two sisters, who had lived together all their lives and had a mutually supportive relationship, relief from inheritance tax which would otherwise be accorded to married persons and to couples living in a civil partnership (to which the sisters had no access).

> "In any case, conjugality then is not a prerequisite for a mutually supportive relationship, and thus it is not clear why it is justified to confine property related entitlements to couples which fall under this category. Adopting a 'functional' approach to family life raises these questions, and, even if indeed it is hard to devise a law which will cater to the myriad of circumstances possible, this does not mean that discriminatory consequences should not be remedied by courts entrusted with guaranteeing human rights. A functional approach would thus reject the 'form' approach taken by the Grand Chamber. It will, rather than aiming to give a 'one size fits all' answer, examine the purposes of the benefit in question – in this case, inheritance law exemption, and will deem offering the tax waiver justified or not from the perspective of anti-discrimination law, based upon the relationship between the benefit in question and the purposes which it seeks to advance. Applying such an approach to the facts of this case would warrant, in my opinion, awarding the applicants the tax waiver they requested (or avoiding discrimination in other possible ways [...]), based upon the fact that the relevant factors of stability, commitment and mutual support (as well as economic partnership and co-dependency), which justify awarding it to married or partnered couples, exist also in this case. Such a reasoning would consider that the privileging of what Fineman calls 'the sexual family' not only discriminates against individuals such as the Burden sisters, but also perpetuates the privileging of certain forms of life over others without any valid justification".[216]

In fact, it is unclear what legitimate interest a state has in privileging conjugality and making it the only basis for formal legal recognition and the rights associated therewith.

A related, and equally justified, criticism is that the Court defers to the Contracting States for determining the scope of the right to marriage and allows them a wide margin of appreciation in assessing whether their differential treatment of same-sex and different-sex couples can be justified.[217] Admittedly,

215 *Burden and Burden v. the United Kingdom* (no. 13378/05), Judgment of 12 December 2006 (not reported) and *Burden v. the United Kingdom* (*supra* note 125).
216 Gross Aeyal (2013), 288 f.
217 *Schalk and Kopf v. Austria* (*supra* note 27), §§96 f., 108.

it is the ECtHR's view that, when national law grants heterosexual couples access to a particular family law institution, such access must also be granted to same-sex couples, as any other course of action would infringe the Convention by permitting discrimination on the basis of sexual orientation. States are required to use their margin of appreciation in a non-discriminatory way, and any restrictions they do impose may not be either arbitrary or disproportionate. If domestic law denies unmarried heterosexual couples access to a particular institution, then it does not constitute a violation of Article 14 in conjunction with Article 8 ECHR if such access is also denied to same-sex couples, even though they, unlike their heterosexual counterparts, are generally not permitted to marry. Thus, the concept of equality practised by the Court remains a formal one, as same-sex couples are granted equality only with regard to rights which are also awarded to unmarried heterosexual couples. As a minimum, substantive equality would require that same-sex couples be granted access to the same rights as married couples.[218]

Generally speaking, the deference granted by the ECtHR with regard to the issue of non-discrimination is particularly misplaced.[219] The wide margin of appreciation granted to states contradicts the Court's pronouncements that any difference in treatment based on sexual orientation requires particularly weighty reasons by way of justification. Any difference in treatment is discriminatory if it has no objective and reasonable justification, i.e. does not pursue a legitimate aim, or if there is no reasonable proportionality between the means employed and the aim which those means seek to achieve. Such reasonable justifications, however, cannot be identified as regards differences in treatment vis-à-vis same-sex couples. Given the obvious shortcomings of the Court's Article 14 case law, it would seem preferable to rethink the Court's formal equality discrimination approach.

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218 Gross Aeyal (2013), 273.

219 For a detailed analysis, see Lau Holning (2013), 244.

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