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UNMARRIED COHABITING COUPLES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: PARITY WITH MARRIAGE?

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The court finds that, though in some fields the de facto relationship of cohabitants is recognised, there still exist differences in legal status and legal effects. Marriage continues to be characterised by a corpus of rights and obligations that differentiate it markedly from the situation of a man and woman who cohabit.¹

The European Court of Human Rights (“ECourtHR”) is the court created by the European Convention of Human Rights and Fundamental Liberties (“EConvHR”) to protect the authentic interpretation of that treaty. Keeping in mind two points, first, that the EConvHR is the most emblematic and fundamental agreement in Europe concerning human rights, and second, that the State parties to the EConvHR have committed themselves to fulfill the judgments of the ECourtHR (Art. 46), it is easy to understand why the Court’s case law has become a source of inspiration for national law.

In this respect, it is necessary to begin by stating that the EConvHR does not contain a single article protecting unmarried cohabiting couples as such.² On the contrary, it contains several articles protecting private and family life (Art. 8) and the right to found a family and to marry (Art. 12), and it even includes an article outlawing discrimination (Art. 14). It is in these dispositions that the judgments of the Court on cohabitation are based.³ The ECourtHR is only interested in unmarried cohabiting couples so long as they generate private or family life as well as when they are unreasonably discriminated against. One of the first questions that emerges, therefore, is how the ECourtHR defines the concept of “family.” The answer to this question, however, is not a simple one, because the ECourtHR has never defined the term. The Court has voluntarily maintained a certain aureole of indeterminacy over the concept, because family life is very susceptible to the moral and sociological changes of society.⁴ Nevertheless, from the Court’s case law, a progressive enlargement of the concept can be deduced. The ECourtHR refuses to limit the protection to a certain idea of “family.” The EConvHR is a living instrument and should

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¹ Nylund v. Finland, 1999-VI Eur. Ct. H.R. 361, 378.

² See Susana Sanz Caballero, *Las uniones de hecho en la jurisprudencia del Tribunal Europeo de Derechos Humanos*, in *La Ley Valenciana de Uniones de Hecho*, 37 (Manuel Martínez Sospedra ed., 2002).

³ See also Michelle Grigolo, *Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject*, 14 *Eur. J. Int’l L.*, 1023 (2003).

⁴ Vincent Coussirat-Coustère, *Famille et Convention européenne des Droits de l’Homme*, in *Protection des droits de l’homme: la perspective européenne*, 281, 281-282 (Paul Mahoney et al. eds., 2000); David Feldman, *The Developing Scope of Article 8 of the European Convention on Human Rights*, 3 *Eur. Hum. R. L. Rev.* 265, 267 (1997); Hanspeter Mock, *Le droit au respect de la vie privée et familiale, du domicile et de la correspondance (article 8 CEDH) à l’aube du XXIème siècle*, 10 *Revue universelle des droits de l’homme* 237, 237-41 (1998); Stanley Naismith, *Private and Family Life, Home and Correspondence*, in *The Birth of European Human Rights Law*, 141-164 (Michele De Salvia & Mark Eugen Villiger eds., 1998).

always be interpreted by taking into account the social context that prevails in each historical moment in a democratic society.⁵

The potential of the EConvHR is easily demonstrated when we note that, through the concept of “family life,” the ECourtHR has gone from protecting the mere traditional nuclear family (married parents and the children born from that union) to protecting other *de facto* situations, including those of unmarried cohabiting couples,⁶ grandparents and grandchildren,⁷ uncles and nephews,⁸ siblings,⁹ single fathers and the children conceived when the mother and the father cohabited,¹⁰ as well as divorced father and child.¹¹ All this reflects a realistic and flexible approach to the family institution, wide enough to encompass all types of relationships, including various effective ties (and this effectiveness requirement turns out to be especially important when natural family is concerned) among people who mutually support and care for each other from an economic, educational and emotional point of view. However, the generosity of the ECourtHR does not amount to the enlargement of the concept *ad infinitum*. Systematically, the Court has rejected the inclusion of homosexual relationships in the concept of family life. Furthermore, it has qualified those kinds of ties as merely generative of private life rather than family life.¹²

Generally speaking, the ECourtHR’s case law is generous and evolutionary. The Court acts in favor of new formulas of family life – with the exception, for the moment, of homosexual couples. However, this “generosity” does not hide a certain preference for the traditional family – the so called “family cell” (a man and a woman joined together by marriage and their children, if any). Even if the ECourtHR admits that Article 8 covers cases both of families that have arisen out of marriage as well as stable relationships of unmarried cohabiting couples (especially when there are children involved), it has nevertheless indicated that “it is legitimate, and even meritorious, to support and to strengthen the traditional family”¹³ and that married couples are still characterized by “a corpus of rights and obligations that differentiate them clearly from a couple that cohabits.”¹⁴

⁵ Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) para. 49 (1976).

⁶ Johnston v. Ireland, 112 Eur. Ct. H.R. (ser. A) (1986).

⁷ Bronda v. Italy, 1998-IV Eur. Ct. H.R. 1489.

⁸ X. and Y. v. United Kingdom, 12 Eur. Ct. H.R. (ser. A) para. 32 (1977).

⁹ X. v. United Kingdom, App. No. 5532/72 (1973), available at www.echr.coe.int.

¹⁰ Keegan v. Ireland, 290 Eur. Ct. H.R. (ser. A) (1994).

¹¹ Berrehab v. The Netherlands, 138 Eur. Ct. H.R. (ser. A) (1988).

¹² Simpson v. United Kingdom, App. No. 11716/85, 47 Eur. Comm’n H.R. Dec. & Rep. 274 (1986).

¹³ Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) at 19 para. 40 (1979). Indeed, elsewhere the European Commission of Human Rights indicates that the different treatment between married and unmarried cohabiting couples regarding survival pensions has a legitimate goal and is justified in objective reasons, especially, the protection of the traditional family. G.A.B. v. Spain, App. No. 21173/93, (1993); Galvez Perez v. Spain, App. No. 32628/96, (1997), available at www.echr.coe.int. Likewise, the difference of treatment in the adjudication of the family home, is also based on a legitimate goal and is grounded in a reasonable justification (the protection of the traditional family). Saucedo Gomez v. Spain, App. No. 37784/97, (1999). See also Lindsay v. United Kingdom, App. No. 11089/84, 49 Eur. Comm’n H.R. Dec. & Rep. 181, 191-192 (1986). The European Commission of Human Rights ruled: “The applicants in the present case seek to compare themselves, a married couple, with a man and woman who receive the same income, but who live together without being married. The Commission is of the opinion that these are not analogous situations. Though in some fields, the *de facto* relationship of cohabitants is now recognised, there still exist differences between married and unmarried couples, in particular, differences in legal status and legal effects. Marriage continues to be characterised by a corpus of rights and obligations which differentiate it markedly from the situation of a man and woman who cohabit.”

¹⁴ Lindsay, 49 Eur. Comm’n H.R. Dec. & Rep. at 192.

Although these statements may sound harsh, the Strasbourg institutions have also declared on numerous occasions that Articles 8 and 12 of the EConvHR protect not only the family that is created through marriage but also the natural family.¹⁵ In particular, the parents' marital status should not in any case lead to discrimination between children born from traditional families, on the one hand, and those of natural or single-parent families, on the other. The ECourtHR must always look after the child's best interests. In this sense, the circumstances of birth should not affect the child, regardless of the parents' civil state.¹⁶ Presumption of family life becomes irrefutable when the unmarried couple has children. In such a case the natural child becomes *ipso jure* a member of the family from the moment of birth.¹⁷ The ECourtHR has even maintained that family life can exist if the members of that family do not cohabit under the same roof. Of course, we can easily imagine a situation where a father or mother who, for job related reasons, happens to spend long periods of time apart from his or her children and partner. We can also imagine a child in boarding school living far away from his parents. Nothing in the previous cases prevents the existence of family life. But the ECourtHR also considers much more complicated situations, such as the possibility that one of the parents does not cohabit with his or her child for reasons pertaining to separation or divorce or even because the couple simply prefers not to share their home with one another. The ECourtHR does not deny that in these cases family life can develop between father or mother, on one hand, and child, on the other. The ECourtHR goes even further in contending that family life also exists when the unmarried parents do not share the family home.¹⁸ The ECourtHR has been particularly clear about

¹⁵ See, e.g., *Nylund*, 1999-VI Eur. Ct. H.R. 361; *Quintana Zapata v. Spain*, App. No. 34615/97, 92 Eur. Comm'n H.R. Dec. & Rep. 139 (1998).

¹⁶ See *Carol v. France*, App. No. 50832/99, (2002) (on the successory rights of a son born out of wedlock with respect to the matrimonial children of the deceased). The Court declared this application inadmissible because France had already carried out the legal changes that were needed to render equal with respect to successory rights both categories of children. See also *Fornaciari v. Suisse*, App. No. 22940/93, (1996). This complaint concerned the legal ban for a boy born from an unmarried couple to bear his father's surname together with his mother's, as his parents wished. Nevertheless, the case was struck off the list of the organ because the Swiss legislation only allows its nationals to have one surname but not two (in the case of unmarried cohabiting couples, they normally bear the mother's surname although, under certain circumstances, it is possible to choose between the father's and the mother's). The Court understood, as did the Swiss government, that parents should be able to choose between one of their last names, but allowing them to give their son both surnames at the same time would accentuate the child's status in society as a natural son. This way, the Court tried to protect the child against his own parents' wishes.

¹⁷ See *Camp and Bourimi v. The Netherlands*, 2000-X Eur. Ct. H.R. 117 (2000). The case turns on the *de facto* legal situation of the daughter of a couple when the father unexpectedly dies before the childbirth without having the opportunity to recognize the fruit of that union.

¹⁸ The European Court of Human Rights has, on several occasions, faced this situation. See *Keegan v. Ireland*, 290 Eur. Ct. H.R. (ser. A) (1994); and *Kroon v. The Netherlands*, 297 Eur. Ct. H.R. (ser. A) 43 (1994). In *Keegan*, the issue was the decision of an unmarried mother to give her new born up for adoption without informing the father. The Irish government defended the unmarried mother's position, arguing that there were no family ties between the father and the son. The root of the problem was Irish legislation that did not recognize in the unmarried father any rights unless he was legally designated as tutor of his own child, something that he completely ignored. Besides, the government argued that this son was the result of a sporadic, unstable and terminated relationship. The situation was, however, quite different: the couple had lived together for years. They had consciously and voluntarily decided to have a son and were preparing their wedding when they argued and the relationship ended. The father maintained the contact with the future mother of his son and he even visited them in hospital after the birth. The mother never informed the father about her decision to give the boy up for adoption. Based on all this data, the European Court of Human Rights considered that Ireland had violated article 8 of the Convention for the Protection of Human Rights. Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, Eur. T.S. No. 5, amended by Eur. T.S. No. 155. The fact that the

this in its *Boughanemi* decision: “The concept of family life on which Article 8 is based embraces, even where there is no cohabitation, the tie between a parent and his or her child, regardless of whether or not the latter is illegitimate.”¹⁹

The generosity of the ECourtHR in granting the benefit of the recognition of family life in cases where cohabitation does not exist due to the lack of interest of the parties involved can have the effect of rendering the expression “family life” meaningless. Moreover, though it is true that family life can exist without cohabitation, we should distinguish between not being able to cohabit, on the one hand, and not wanting to cohabit, on the other. The person who, while being capable of cohabiting, decides voluntarily not to do so, is not strengthening his family life. In our opinion, the case law of the ECourtHR merits criticism, because the recognition of a family that is unable to cohabit differs substantially from the recognition of family life where the desire to maintain a common life is completely lacking. This intensely liberal approach by the ECourtHR amounts to a dispersion of the concepts “family” and “family life,” which become so diluted that they can encompass endless meanings. If family life can exist between people that do not want to cohabit although they do maintain periodic contacts and provide all the necessary material and financial means for the upbringing of the children, then “family life” becomes a term that is so loosely defined that it encompasses mere affective links that empty the substantial content of the expression.²⁰ Obviously, the recognition of family life despite non cohabitation also expands to cover matrimonial children²¹ even after the divorce of the parents.²²

authorities had accepted in secret the mother’s decision to give the boy up for adoption without the consent of the father simply because he was an illegitimate child, constituted an interference with the family life of both father and son. The European Court of Human Rights established that, if a child is born from an extramarital relationship which has lasted for a long period of time - when there has been a certain degree of commitment in that relationship - there always exists a presumption in favor of family life between father and son. Similar to *Keegan* is the *Kroon* case, if not as much in the facts in which both are based, at least in the legal argument used by the European Court of Human Rights. Mrs. Kroon, a Dutch national, married a citizen from Morocco. They later separated and one day in 1986 he disappeared. The following year she had a son who was registered as his husband’s son. Later she obtained the divorce and she had other three children who were all registered as children of her new partner. The new partner contributed economically to the support of all the children and visited them frequently. He maintained a very stable extramarital relationship with the mother. But neither of them had the intention to legalize their situation or to live together. When Mrs. Kroon’s new partner decided to recognize the paternity of her eldest son, the authorities denied the authorization, despite the more than probable possibility that he was the true father. The government insisted on demanding that they should get married and cohabit in order to change the birth register. They both rejected the idea of marriage. The European Court of Human Rights recognized that there was family life *de facto*: the Dutch government should recognize a legal bond with the son, independent of whether the parents decided to marry, live together or live as couple in a much more flexible and less committed way. According to the Court, respect for family life demanded the acceptance of the biological and social reality, both of which prevailed over a legal presumption which was contrary to the parents’ wishes and did not benefit the minor at all. In this way the Court adapts to the times, accepting the existence of non-traditional families, beyond the classic structure of married parents who coexist under the same roof. *Kroon*, 297 Eur. Ct. H.R. 43 at 55, paras. 29-30 (1994). It is interesting to underline that with this case the Court shows an evolution. In previous cases it had indicated that family life implied cohabitation and that the right to found a family could not be conceived without living together. *Abdulaziz v. United Kingdom*, 94 Eur. Ct. H.R. (ser. A) (1985).

¹⁹ *Boughanemi v. France*, 1996-II Eur. Ct. H.R. 593 at 608, para. 35.

²⁰ Henri Labayle, *Le droit de l'étranger au respect de sa vie familiale*, 9 *Revue française de droit administratif* 511, 529 (1993).

²¹ This assertion was put in doubt by Switzerland in the case *Gül v. Switzerland*, 1996-I Eur. Ct. H.R. 159. The case involved a Turkish citizen who travelled to Switzerland for work, leaving his family in his country. His wife managed to join him for humanitarian reasons, being epileptic and having suffered a domestic accident that caused her body injuries difficult to cure in Turkey. Both wanted to obtain family reunification on Swiss ground. One of their children managed to join them

It would be fatuous not to recognize and protect biological reality, especially if real and deep effective bonds can be derived from it, as in the case where a financial and affective relationship of dependence is included, although mutual coexistence is not a *sine qua non* requirement. For that reason the tribunal understands that the existence of family life depends on the existence in practice of very tight and real personal bonds. Not only is there a family when derived juridical bonds of the marriage exist,²³ but family ties can also exist

in Switzerland for humanitarian reasons, given her mental deficiency. Nevertheless, the Swiss government prevented their 7-year-old son from joining them. Switzerland argued that nothing prevented the parents from proceeding with their family life in Turkey, once the wife was healed and once the husband had been exempted from the obligation to work after a labor accident that left him disabled. In addition, the Swiss government alleged that given the long period that Mr. Gül had lived in the country, there were no longer family ties between him and his son, who had been brought up by his uncles. Although the European Court of Human Rights determined that the Swiss government could not be forced to accept the family reunification of the Güls, its judgment reflects its opposition to the Swiss interpretation of the term family: parents and their minor children constitute a family *ipso jure* from the moment of the child's birth, independently of whether or not they live together. *Id.* at 173-174, para. 32.

²² *Berrehab v. The Netherlands*, 138 Eur. Ct. H.R. (ser. A) (1988). Mr. Berrehab, a Moroccan national, married a Dutch woman and had a daughter. They decided to divorce but continued the relationship. They had no problem with respect to the father's visiting regime. Mr. Berrehab was a responsible father who shared the expenses of raising his daughter with the mother. Nevertheless, the Dutch authorities denied renewal of his residence permit because he no longer cohabited with a European citizen. This led to the refusal to extend his work permit, and he was deported. The case was brought before the European Commission of Human Rights and afterwards to the European Court of Human Rights, because Mr. Berrehab considered that the expulsion was a measure that conflicted with the right to enjoy family life with his daughter. The Dutch administrative authorities defended the legality of their decision: in the absence of marriage or cohabitation, family life did not exist. However, the judges of the Court determined that the expulsion measure was entirely disproportionate. In addition, cohabitation was not a *sine qua non* for the existence of family life. *Id.* at 14, para. 21. Mr. Berrehab and his ex-wife had executed a valid marriage, from which a child was born. She *ipso jure* was part of that familiar relationship. The fact that the parents no longer lived together did not prevent continuation of the relationship with the daughter. While in some cases, divorce can put an end to family life, it is not necessarily the case. And in Mr. Berrehab's case, obviously this had not happened. Mr. Berrehab took care of the child's education. In this case, the State immigration policy interfered with this father's and daughter's family life. *Id.* at para. 28.

A similar result was seen in *Ciliz v. The Netherlands*, 2000-VIII Eur. Ct. H.R. 265. A Turk married a Dutch citizen who had a son. After the couple's divorce, his residence permit was not renewed. The European Court of Human Rights reached the conclusion that Mr. Ciliz's family life with his son could be truncated if he could not continue living in The Netherlands. After all, family life does not end when the parents separate or divorce and the child lives with one of them. *Id.* at 283-284, para. 60. The Court did not presuppose that the family relationship existed. Instead, its members studied the facts to determine whether the father cared about his son, whether he continued having contact with him, etc. *Id.* at 284, para. 61. It arrived at the conclusion that, although at one time the visits had not been regular, it was due to an episode of depression after the marriage failure. Once this episode was overcome, the father renewed his regular contacts with his son. In conclusion: it is always necessary to analyze each concrete case in order to know whether the divorced parents continue to enjoy family life with respect to the children who do not live with him/her anymore. It is not possible to establish in abstract terms a presumption in favor of family life. Everything depends on the facts of the concrete case and on the intensity of the paternal relationship. On this issue, see Agnès Bigot, *La responsabilité parentale après désunion du couple en Europe*, 465 *Revue du Marché commun et de l'Union européenne* 111 (2003).

²³ *Johnston*, 112 Eur. Ct. H.R. (ser. A.) (1986). In *Johnston* a couple with a common son wished to marry. Irish legislation, however, prevented the man, who was legally separated from another woman and had three other children from that marriage, from remarrying. The plaintiff argued that the legal ban on divorce affected his new family life. However, the European Court of Human Rights understood that the prohibition on divorce did not prevent the development of a new family life for Mr. Johnston because article 8 of the European Human Rights Convention applies to married life as well as extramarital family life. *Id.* At 25, para. 55. Nobody denies that Mr. Johnston, his new partner and their daughter constitute a family. *Id.* at 25, para. 56. Nobody forbade them to live together if they wished. *Id.* at 28, para. 66. Public authorities had to show as much respect for family life in the first situation as in the second one, without discrimination for any of them.

among people who cohabit without getting married. It is true that establishing the existence of family life will be much more difficult if marriage does not exist. Unmarried cohabiting couples will have to prove the effectiveness of family life – especially in cases where one of the members is an immigrant and risks expulsion from the country unless he demonstrates that he has developed a family life in the country of residence through information evidencing the life together, the duration of the relationship, any mutual support, the financial dependence or the existence of common children. In *Levinet* terms, the intensity of the ties will have to be proved.²⁴ Even so, the country will enjoy, according to the largely maintained case law of the ECtHR, a wide margin of appreciation so as to show that the expulsion measure is necessary in a democratic society and is proportionate to the intended goal; in many cases, this goal is the prevention of new crimes, particularly when the immigrant has repeatedly committed offences in the country of residence.²⁵ From the aforementioned, it should not be deduced that married immigrants can take their permanency in the country for granted in spite of having committed crimes. The ECtHR case law has become tougher in recent years, indicating that even in the case of married couples with children, expulsion will depend upon two separate factors: a) whether the marriage occurred once the immigrant already knew about the administrative or judicial decision expelling him from the country, in which case getting married will not prevent expulsion and b) the gravity of the crime.²⁶

It seems, however, that in principle, the situation of unmarried cohabiting couples could be more precarious than that of married foreigners. In *Mock's* words: “*selon que vous serez marié ou misérable.*”²⁷ Nevertheless, the case law

Consequently, Ireland could not be forced to change its legislation so as to accept divorce, because family life can exist without marriage.

²⁴ Michel Levinet, L'Eloignement des étrangers délinquants et l'article 8 de la Convention européenne des droits de l'homme, 10 *Revue trimestrielle des droits de l'homme*, 89, 100. (1999).

²⁵ This also applies to the case of divorced immigrants who have children and to broken *de facto* couples with common children.

²⁶ On the application of the right to family life in cases of immigrants who are expelled from European countries because of offences committed and, especially, on the relevance they may have in the Court raising the fact that the immigrant is well integrated in the European country and has developed family ties through marriage or coexistence, see Dominique Turpin, La protection de la vie familiale des étrangers en France in *Perspectives du droit international et européen*. Recueil d'études à la mémoire de Gilbert Apollis 165-176 (René-Jean Dupuy ed., 1992); Hélène Clement, La Convention européenne des droits de l'homme et l'éloignement des étrangers, 400-401 *Après-demain*. Journal mensuel de documentation politique, 36-38, (1998); Olivier De Schutter, La Convention européenne des droits de l'homme et l'asile, 80/81 *Revue du droit des étrangers* 471, 475 (1994); Elise Corouge, Expulsion des étrangers et Article 8 de la Convention européenne des droits de l'homme, 13(2) *Revue française de droit administratif* 318 (1997); Jane Liddy, Article 8: The Pace of Change, 51(3) *Northern Ireland Legal Quarterly* 397 (2000); Françoise Mendel-Riche, L'Eloignement des étrangers entre défense de l'ordre public et impératifs humanitaires, 5 *Cahiers du CREDHO* 135 (1999); Olivier De Schutter, La proportionnalité de l'éloignement d'étrangers pour motifs d'ordre public, 93 *Revue du droit des étrangers* 177 (1997); Olivier De Schutter, La souveraineté de l'état et les droits de la personne immigrée, 84 *Revue du droit des étrangers* 261 (1995); Pierre Lambert, Extradition et expulsion d'étrangers dans la jurisprudence de la Cour européenne des droits de l'homme, speech at 11th Congress of the Union des Avocats Européens at Palma de Majorque (May 29, 1997), in *Les nouveaux droits de l'homme en Europe* 63-78 (1999); Delphine LeClercq-Delapierre, L'Article 8 et la protection de la vie privée et familiale: affaires Bouchelkia, Mehemi et El Boujaidi, 4 *Cahiers du CREDHO* 81 (1998). Despite its not always uniform case-law, the Strasbourg bodies have prevented States' arbitrariness concerning the expulsion of foreigners with solid and effective family ties.

²⁷ Hanspeter Mock, *Selon que vous serez marié ou misérable... Éloignement des étrangers délinquants: le mariage, une meilleure garantie que l'intégration contre la double peine?*, 13 *Revue trimestrielle des droits de l'homme*, 483 (2002). The author confirms this paradox: the European Court of Human Rights tends to state a breach in the right to family life more in cases of foreigners

analysis carried out in this work does not allow us to conclude definitively that resorting to the expulsion of an immigrant is easier for a State when the immigrant has built a family without getting married than when he has. It is true that the case law is rather erratic and lacks a clear approach to the subject, but one cannot affirm in a categorical way that Strasbourg organs give more weight to marriage than they do to a stable natural union. On the contrary, they do accord importance to two pieces of information: a) the moment when family life commences (since the ECourtHR systematically estimates that the State acts lawfully when the foreigner establishes family life after learning that he would be expelled from the country)²⁸ and b) the seriousness of the crime committed.²⁹

It seems that no difference exists in the ECourtHR case law concerning the treatment of unmarried and married couples with regard to the possibility of expulsion from European territory if a person transgresses the law.³⁰ In this sense, comparison of the September 1997 *Boujadi* and the January 1997 *Boulchekia* decisions, both against France, is informative. The former case dealt with a Moroccan man who cohabited with a French woman and their common son. In the second case, an Algerian married a French woman, and they had a son. In both cases, the ECourtHR estimated that the expulsion measure did not violate Article 8 EConvHR, although it clearly interfered with the right to enjoy family life. The EConvHR did not condemn the State in either case because of two primary reasons: first, because of the seriousness of the crimes, and second, because cohabitation and marriage, respectively, (as well as conception of the child), happened after the issuance of the expulsion order. It is clear in both disputes, which together comprise the two salient cases taken into account by the ECourtHR when considering expulsion of a person with family ties from European territory: a) the proportionality between the offense and the consequences of the expulsion and b) verification of the moment when family life begins (i.e. was it before or after the person knew that he was going to be expelled from the country?).³¹

who just arrived in the country and married – even in cases of marriages of a very short duration— than in cases of adult foreigners settled down in the country from childhood and whose parents and brothers live also in that country. Mock suggests that the European Court of Human Rights may be promoting arranged marriages with this attitude. *Id.* at 493. See, e.g., *Slimani v. France*, App. No. 33597/96, (1997) (concerning the simulation of a marriage between an immigrant delinquent with a disabled girl with the only purpose of obtaining a residence permit).

²⁸ This happens both if the immigrant marries or if he begins to cohabit once he is aware that an expulsion order weighs on him. In both cases, the expulsion order will not be stopped if the child is conceived once the foreigner is aware of his/her precarious situation in the country.

²⁹ This is known as the proportionality test, where a wide margin of appreciation is given to States, especially where violent crimes and drug trafficking are concerned.

³⁰ See, e.g., in *Amghar v. France*, App. No. 16990/90, (1992) The decision declared the case inadmissible. The body justified the expulsion from the country of an immigrant delinquent because he did not have any type of family life. The European Commission of Human Rights mentioned that he was neither married nor had he any stable couple life, and he did not have any children. In this way, the body makes it understood that any of these reasons could have given rise to a study on the justification and the necessity of the expulsion measure *ex article 8 and/or article 12* of the European Convention on Human Rights.

³¹ The Court provided an identical solution in *Boujilfa v. France*, 30 Eur. H.R. Rep. 419 (1997) (Court decision). In this case, the Court considered irrelevant for the purpose of Art. 8 the family that an 18-year-old delinquent resident in France could form with his parents and brothers. In the same way, the court did not consider relevant his coexistence with a French woman since cohabitation dated from a moment subsequent to the uprising of the deportation order. The European Commission of Human Rights gave the same result (legality of the measure of expulsion according to Art. 8 CEDH) to the case *Naceur v. France*, App. No. 25913/94, (1996) The case dealt with a married Algerian and father of three children who had established his family life in France long after he knew that this country had issued an expulsion order against him.

Nevertheless, the above analysis leads to the observation that there really is no discrimination between married foreigners, on the one hand, and unmarried ones, on the other, as far as deportation measures are concerned. But in order to complete the study of this question and to be able to extract some general conclusions, it would be extremely interesting to compare the case of two delinquent foreigners who are to be expelled from the country, when: a) one of them is married and had a child before the expulsion order was adopted and b) the second one has a similar family situation but is not married. In the first case, the ECourtHR relies on the March 1992 *Beljoudi/France* judgment, in which the ECourtHR ruled that the expulsion measure would affect the man's family life in such a way that it would amount to a violation of the right established in Article 8.³² Unfortunately, we do not have any ruling from the Court where the person who is about to be expelled cohabits with his child's mother prior to the adoption of the expulsion measure. Nevertheless, in accordance with its case law, the ECourtHR would not allow a different and unreasonable treatment between families that are based on marriage and those that are not. However, the European Commission of Human Rights once passed a decision, *Aghopian*, on the admissibility of a case where these requirements converged.³³ The European Commission on Human Rights concluded that despite the fact that the couple's relationship and the conception of the child predated the adoption by the State of the expulsion measure, it was a reasonable measure in view of the graveness of the crimes committed, for which he was given a ten year sentence. Comparing the rulings in *Beljoudi* and *Aghopian*, we can conclude that for the Strasbourg bodies there is a legitimate difference of treatment between married and unmarried couples.

Uncertainty remains as to cases where there are no children. In one of its judgments the ECourtHR condemned a State because of the expulsion of a married criminal with no children whose marriage was contracted long before the administrative measure was taken against him.³⁴ In its statement, the ECourtHR condemned the deportation because it affected the family life that he had developed with his wife. A similar judgment, however, does not exist in the ECourtHR's case law for somebody who, having no children, cohabits with a national of the country before the expulsion order is issued. In contrast, we do find decisions about the admissibility of cases where these requirements are met by an unmarried couple with no children that cohabits before the State adopts the decision of expelling the foreigner due to his criminal activities in the country. The decision in the *Haddouche* case³⁵ could be cited in this respect. Nevertheless, doubt remains after reading and interpreting this decision about the treatment that both types of couples receive, since the European Commission

³² *Beljoudi v. France*, 234-A Eur. Ct. H.R. (ser. A) (1992). See also *Mehemi v. France*, 1997-VI Eur. Ct. H.R. 1959. *Mehemi* concerned an Algerian who had lived in France since he was a young child. He married an Italian and had two children. After he committed several crimes, the authorities decided on expulsion from France. He considered that the order affected his family life, both with respect to his parents and brothers, who resided in France, as well as with respect to his wife and children. The Court misestimated the reasons alleged by Mehemi as far as his parents and brothers were concerned because he had already reached the age of maturity. However, it determined that the family life with his wife and children was in need of protection. Effectively, the expulsion order had been made after Mehemi had found a family in France. Therefore, considering the strength of his ties to France, the Court understood that the measure was not proportional. The recent judgment in *Amrollahi v. Denmark*, App. No. 56811/00, (2002) can also be mentioned. Here the expulsion of an Iranian citizen, who was married to a Dutch national and was the father of two children, was declared in opposition to article 8 of the European Convention on Human Rights. *Id.* para. 37.

³³ *Aghopian v. France*, App. No. 23775/94, (1994).

³⁴ *Boultif v. Switzerland*, 2001-IX Eur. Ct. H.R. 119 (2001).

³⁵ *Haddouche v. France*, App. No. 32891/96, (1997).

of Human Rights did not consider that the expulsion measure violated Article 8 of the EConvHR. It is necessary to grant the benefit of the doubt to the European Commission of Human Rights, because it seems that the reason that weighed the most heavily for not condemning the State was the gravity of the crimes (physical aggression with premeditation) and not the fact that the relationship was one of matrimony or cohabitation (in fact, the European Commission of Human Rights did not dedicate a single line of its argument to this point). However, from the bare facts of the aforementioned cases, it is easy to extract the presumption that, with regard to the expulsion of foreigners, there is a certain preference in Strasbourg that favors the traditional family – that is, married couples – in detriment of free unions.

From the Strasbourg case law in this area it is difficult to infer a conductive and uniform line of reasoning. Nevertheless, we venture to claim that the basic criterion is the proportionality between the expulsion measure and the graveness of the crime.³⁶ This is the only conclusion one can extract in view of cases where the Court also considered that Article 8 did not violate the EConvHR. A good example lies in the dispute for the expulsion of a single father of Moroccan nationality, who did not cohabit with the mother of his child but did contribute financially to the child's upbringing; he was forced to leave French territory in spite of the fact that his paternity predated the adoption of the expulsion measure.³⁷ Another example involves a married Slovak who was expelled from Switzerland although the celebration of his marriage took place long before he had a criminal record.³⁸ Consider also a divorced Moroccan with children who was expelled from Germany in spite of the fact that his criminal activity began after the adoption of the expulsion measure.³⁹ In all of these cases, the argument consistently propounded by the Strasbourg organs to justify the State order is the graveness of the crime, leaving aside other considerations such as the marital status of the affected person, his links with the European country or the existence of children.

The ECourHR, however, has affirmed several times already that there are still differences among those who are married and those who are not. The first one assumes a commitment of life together, a common project through the marriage contract that is not always to be taken for granted in the second case. In cases that involve certain issues, such as taxes or pensions, the difference of treatment can be justified by a legitimate and reasonable objective, particularly in those cases where, despite the fact that the couple does not suffer any impediment forbidding marriage, the two prefer not to marry, especially if the legislation of the country permits divorce.⁴⁰ In spite of the fact that the

³⁶ See Paolo Pallaro, *Sviluppi recenti nella giurisprudenza della Corte di Strasburgo sui rapporti tra espulsioni e rispetto della vita privata e familiare*, 11 *Rivista internazionale dei diritti dell'uomo*, 453, 456, (1998). Pallaro defines the situation as a pure "equilibrium" of the European Court of Human Rights between two competing and opposed interests both of which are legitimate: the right to the respect of family life, on the one hand, and the defense of the public order and the prevention of crime, on the other.

³⁷ *T.F. v. France*, App. No. 24233/94, (1995); *Antate v. France*, App. No. 48211/99, (2002).

³⁸ *Z.A. v. Switzerland*, App. No. 25036/94 (1994) (Commission decision). Similar to this case is *Murati v. Switzerland*, App. No. 37285/97 (1998) (Commission decision) (where a man from Kosovo married a Spanish citizen who had a residence permit in Switzerland and whose children considered him as their father).

³⁹ *Aikar v. Germany*, App. No. 37891/97, (1998).

⁴⁰ "La Commission rappelle qu'au regard de l'article 14 (art. 14), une distinction est discriminatoire si elle 'manque de justification objective et raisonnable' c'est-à-dire si elle ne poursuit pas un 'but légitime' ou s'il n'y a pas de 'rapport raisonnable de proportionnalité entre les moyens employés et le but visé'... La Commission estime que les différences de traitement existant en matière de prestations de survivants entre conjoints et concubins poursuivent un but légitime et

ECourtHR case law is becoming more lax with respect to the differentiation between married and unmarried cohabiting couples, today the ECourtHR still understands that there are objective reasons that justify the difference in some fields,⁴¹ and we do not foresee that the ECourtHR will opt to make the rights of the two groups equivalent.⁴² The organs of Strasbourg have been very clear in stating that the protection of children born out of wedlock will be similar to the protection of children born of married parents. Apparently, however, some small differences seem impossible to eliminate. Whereas a matrimonial father will never be forced by law to recognize his child or to adopt him (because there is a presumption of paternity for the children born by his wife while they are married), a single father could be forced by national legislation to undergo a formal act of recognition or acceptance of paternity. Some have argued that this act would violate their right to privacy and family life. However, it has been justified by the ECourtHR as a reasonable and necessary interference in a democratic society that benefits the minor, since it establishes the paternity in a clear way. On the contrary, the existence in some States of the same formal act of recognition or acceptance in relation to single mothers has been considered by the ECourtHR as a breach of Article 8 EConvHR. The reason for this difference is that in the case of single parenthood, doubt does not exist about maternity, although there may be doubts with respect to paternity. In this sense, the ECourtHR applies the statement "*mater semper certa est*."⁴³

The different treatment of single fathers and single mothers becomes evident if we compare the result of the judgment in *Marckx/Belgium* of June 13th, 1979 with the decision in the case *M. and Others/Belgium*.⁴⁴ In the former, a single mother brought an action against her country because she considered that the State imposed obligation by which she had to recognize her daughter violated Article 8 EConvHR. Belgium defended its legislation, justifying the

s'appuient sur une justification objective et raisonnable, à savoir la protection de la famille traditionnelle." *G.A.B.* (where a divorced woman who had coexisted with a divorced man for more than fourteen years demands a pension of survival after the death of her partner). The State had granted an orphan's pension to the common children, in equal conditions to those of the children that the deceased had had in his previous marriage, but refused to grant a survival pension to the woman who had shared her life with the deceased for more than a decade. The Commission reached the conclusion that, due to the 1981 Spanish divorce law, it was fair and correct that the legislation of the country only accords a survival pension to the survivor whose companion died before 1981 but not to those that, although able to regularize their legal status after the entry into force of the law of divorce, chose not to. Especially remarkable is the decision of inadmissibility in *Quintana Zapata* 92 Eur. Comm'n H.R. Dec. & Rep. 139 where the European Commission of Human Rights understood that Spain had acted according to the Court when denying a widow's pension to a woman who had coexisted during 65 years with her partner and had had five children from that union. The long duration of the couple's relationship did not impress the Strasbourg body at all. The European Commission of Human Rights understood that from 1981 a law of divorce existed in Spain and therefore the couple had had enough time to formalize the relationship without the risk of the indissolubility of their marriage. If they did not want to marry, the survivor should not be entitled to obtain the same benefits that married couples enjoy.

⁴¹ Proportional and justified differences of treatment between married and unmarried couples are limited to certain fields. Thus, the Court has understood that a woman whose companion – and father of her children – died in strange circumstances during his police detention was entitled to ask for economic relief (but not a survival pension). *Velikova v. Bulgaria*, 2000-VI Eur. Ct. H.R. at 32-33, paras. 101-102 (2000).

⁴² Stewart Leech & Rachael Young, *Marriage, Divorce and Ancillary Relief under the Human Rights Act 1998: An Introduction*, 3 Eur. H.R. L. Rev. 300, 310 (2001). See also Ian Karsten, *Atypical Families and the Human Rights Acts: The Rights of Unmarried Fathers, Same Sex Couples and Transsexuals*, 2 Eur. H.R. L. Rev. 195, (1999); Caroline Forder, *The Anti-discrimination Principle as an Instrument of Change in Family Law*, in 45 *Netherlands Int'l L. Rev.* 29 (1988).

⁴³ There is never any doubt about who the mother is.

⁴⁴ *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) (1979); *M. and Others v. Belgium*, App. No. 10961/84, 47 Eur. Comm'n H.R. Dec. & Rep. 204 (1986).

differential treatment of children born out of wedlock (non-matrimonial children) and those born by married parents. In the State's opinion, in the case of a legitimate child, both parents mutually take the responsibility of feeding, upbringing and educating the minor, while this is not necessarily true in the case of non-matrimonial children. Single parents may not have any interest at all in taking charge of their own children. For that reason, it was preferable to give the single mother the opportunity of deciding whether she wanted to assume the responsibility of caring for the child by means of a formal act.⁴⁵ The ECtHR did not agree with this approach. The Court concluded that the Belgian law should not favor traditional families in detriment of single-parent ones and that matrimonial children and children born out of wedlock should be treated equally by law. As far as the *M. and Others* case is concerned, the European Commission of Human Rights estimated, in the case of a stable, unmarried couple with a child that the father was forced to recognize, that the difference of treatment between single mother and single father was justified by virtue of the application of the principle *mater semper certa est*. The mere fact of being the mother's stable partner was not enough to solidify the affiliation. In this sense, the Commission affirmed that "*la démarche formelle de la reconnaissance volontaire exigée du père d'un enfant né hors mariage ou, à défaut d'une telle reconnaissance, la constatation judiciaire de la paternité constituent des exigences normales et raisonnables. En effet, l'absence de liens de mariage entre la mère célibataire et le père présumé nécessite une procédure formelle pour établir la paternité. . . Cette exigence étant à la fois objective et raisonnable, elle n'est non plus contraire à l'article 14.*"⁴⁶ Despite the logic behind this line of reasoning, we wonder whether this case law will not need to be modified in the future in view of technological advances made in the biomedical field. In short, what happens to the ruling *mater semper certa est* if and when the ECtHR faces a conflict between a woman acting as a "rent mother" and the biological mother of the embryo implanted in the former, if they both want to keep the baby?⁴⁷

On the other hand, the legal presumptions in favor of the child and in favor of family stability cannot contravene the rights of the biological father. For example, if a pregnant woman marries a man that is not her child's biological father, a legal presumption in favor of the husband's paternity exists.⁴⁸

⁴⁵ *Marckx*, 31 Eur. Ct. H.R. (ser. A) paras. 39-40.

⁴⁶ "It is reasonable and fair to compel a father of a son born out of wedlock to recognize his paternity formally on a voluntary basis. The facts that the single mother and the presumed father are not married makes it necessary to establish paternity by formal judiciary means. This cannot be seen as unreasonable or contrary to article 14." *M. and Others*, 47 Eur. Comm'n H.R. Dec. & Rep. para. 5 (author's translation).

⁴⁷ "C'est par le biais de la filiation que les biotechnologies touchent aux notions fondamentales de parenté et de famille qui sont à la base de toute organisation sociale." Marie-Thérèse Meulders-Klein, *Biologie, biomedicine et droit de la famille: une même éthique pour tous?*, 11 *Revue trimestrielle des droits de l'homme*, 429, 446 (2000).

⁴⁸ In such circumstances, the biological father is not entitled to the same benefits that the law grants to a married father. Neither can he force blood tests to establish biological paternity. The European Court of Human Rights, in such cases, gives priority to the family unit. Consequently, if the legal parents reject blood tests, the biological father will not be able to establish the biological connection. It should be added that, in any case, when there is a legal father, the establishment of biological paternity for another man by means of a blood test does not entitle the latter any right over the minor. It is not that the Court only protects the family life already established and refuses to protect the relationship that could possibly be developed between a son and his biological father, it is simply that national courts grant more weight to the interests of the boy and the family in which the child is integrated than to those of a plaintiff seeking the recognition of a biological fact. For the boy, knowledge of his biological father's identity is not that important when he has a legal father who acts as such. For that reason the Court established that:

Likewise, when cohabitation ends, granting the guardianship of the child exclusively to the single mother does not violate Article 8 of the EConvHR, especially since disagreement between the parents normally arises after the couple's separation. In these circumstances, it is not at all desirable that both share the paternal authority.⁴⁹ It is also perfectly compatible with the EConvHR to allow a husband to adopt his wife's child when the biological father never showed any interest in establishing any contact with the child, even if this is done against the wishes of the biological father.⁵⁰ The rights granted by the Convention would also not be violated by a decision of a single mother to give up for adoption a son conceived in a sporadic relationship when the single father

Concerning the right of the child's mother to prevent him from establishing his paternity, the Court recalls that the child's mother had this right to the fact that the child was born after her marriage to R. Furthermore, her husband had the same right. The court finds that, though in some fields the *de facto* relationship of cohabitants is recognised, there still exist differences in legal status and legal effects. Marriage continues to be characterised by a corpus of rights and obligations that differentiate it markedly from the situation of a man and woman who cohabit. Having regard to the circumstances of the case, the Court finds that the applicant was not in a situation analogous to that of the child's mother within the meaning of Article 14 of the Convention. In so far as they can be considered to have been in such a situation at the time of their cohabitation, the Court finds that the national courts' approach pursued the legitimate aim of securing or reconciling the rights of the child and its family and that the means employed toward this end were not disproportionate. *Nylund*, 1999-VI Eur. Ct. H.R. at 378.

S. v. Germany, App. No. 12473/86, (1988) has similar facts. The European Commission of Human Rights accepted as proportionate the decision of the German State denying visit rights to a biological father whose ex-partner married another man who adopted the child. The Commission did not miss the opportunity of declaring that the measure was provided by law, was necessary in a democratic society and benefited the rights of the minor as well as those of the adoptive father. One can wonder whether in the future this case law will change in the light of the admissibility decision in the proceeding of *Lück v. Germany*, App. No. 58364/00, (2000). Here the Court understood that the situation of a biological father deserves a more thorough study as far as visitation rights are concerned when the mother conceived the child from another man while she was married and therefore the child can be linked to an adulterous relationship. *Lück* complained that his situation was not compatible with article 8 in relation to article 14 since if the woman had not been married, the visitation rights of the biological father would have been granted at once.

⁴⁹ See *N. v. Denmark*, App. No. 13557/88, 63 Eur. Comm'n H.R. Dec. & Rep. 167 (1989) (where the European Commission of Human Rights justifies the measure because it was taken in the minor's benefit). The European Commission of Human Rights reacted in the same manner in a case concerning a single father who was unable to see his son because the mother refused him access after marrying another man. The relationship between father and son varies from very close relationships, approximating the bond generated in the conventional family unit, to having no relationship at all. Therefore, the difference between married parents and unmarried ones as far as the automatic acquisition of parental rights is concerned, is justified for the European Commission of Human Rights. *Smallwood v. United Kingdom*, App. No. 29779/96, (1998). Arguing in a similar manner, the Commission declared that this rule did not apply to the case *Dazin v. France*, App. No. 28655/95, (1996). In this case, the Strasbourg court affirmed that, if during the years of common life the single father never showed any interest in declaring before a judge (as it is possible to do according to French law) his desire to share his son's guardianship with the mother, it would be nonsense to offer him this possibility once cohabitation has ended between the parents. In this situation, sharing the child's guardianship would not be a good idea, for it is quite predictable that disagreements will arise between the mother and the father. See also *McMichael*, where the European Court of Human Rights stated:

[T]he aim of the relevant legislation, which was enacted in 1986, is to provide a mechanism for identifying "meritorious" fathers who might be accorded parental rights, thereby protecting the interests of the child and the mother. In the Court's view, this aim is legitimate and the conditions imposed on natural fathers for obtaining recognition of their parental role respect the principle of proportionality. The Court therefore agrees with the Commission that there was an objective and reasonable justification for the difference of treatment complained of.

McMichael v. United Kingdom, 307-B Eur. Ct. H.R. (ser. A) 58-59, para 98.

⁵⁰ These facts are the basis of *Söderbäck v. Sweden*, 1998-VII Eur. Ct. H.R. 3086 (where the European Court of Human Rights understood that allowing a man who had served as the *de facto* father of a child since his earliest years to become the adoptive father did not violate article 8 of the European Convention of Human Rights – despite the biological father's reluctance).

did not show any interest either for the pregnancy or for the child until he learned of the mother's intention of giving the son up.⁵¹ This situation substantially differs from that where a single father and mother maintain during pregnancy a stable, serious relationship and a common life that leads them to decide to have the child.⁵² It seems, therefore, that the simple blood relationship, without the existence of other ties between the single father and child, does not *ipso facto* create family life as established in Article 8 EConvHR. A wide margin of appreciation is left to the State whenever the decisions in relation to the biological father move between two extremes: a) that the eventual ban on the establishment of paternity violates the right of the single father's family life and b) that the single father's family life with his child is so clearly established and solid that it forces the State to create a juridical tie from the child's birth.⁵³

Until now we have only dealt with the question of the status of heterosexual unions before the Strasbourg organs, but it would be naive to think that we have already exhausted the topic. In fact, one of the most active communities before the ECourtHR in this matter has always been that of transsexuals, that is to say, people that although born with a certain anatomical sex feel that they belong to the opposite one. Many of them eventually undergo hormonal treatment and surgery in order to change their sex and match their physical appearance with the way they feel. However, transsexuals often complain about State legislation that allows them to carry out these physical changes but afterwards forbids them from changing the personal data of their identification documents (identity card, passport, social security documentation, etc.). Additional complaints target the fact that the legislation of some States does not permit them to marry somebody of the sex they had at birth, to build a family by adopting children or to be registered as father of their partner's child (this sometimes happens in the case of a transsexual that functions as a male in spite of the fact that he was born a woman).⁵⁴

With regard to this issue, the judgments of the ECourtHR *Goodwin*⁵⁵ and *I.*,⁵⁶ adopted unanimously by the Grand Chamber on July 11th, 2002, mark a milestone in the fight of transsexuals for the recognition of their rights.⁵⁷ Leaving aside ethical points of view, one can say that we face a historical moment. Whereas until that date the ECourtHR (and also the European Commission of Human Rights when it existed, although less so) had been a bit

⁵¹ *Bellis v. Greece*, App. No. 24848/94, (1995).

⁵² If in such circumstances the father ceases to cohabit with his child but remains in contact, visits the mother in the hospital and contributes to the expense of raising the child, the decision of the mother, accepted by the State, to give the child up for adoption against the father's wishes absolutely contravenes the potential relationship the father could otherwise have developed with his son. *Keegan*, 290 Eur. Ct. H.R. (ser. A) (1994).

⁵³ *Coussirat-Coustère*, supra note 5, at 293.

⁵⁴ For the European Court of Human Rights' historical treatment of transsexuality, see Michelagela Scalabrino, *La protection de la vie privée et familiale et l'évolution médicale sous la Convention européenne des droits de l'homme*, 23 *Affari sociali internazionali* 85, 90 (1995); Clare Ovey, *The Margin of Appreciation and Article 8 of the Convention*, 19 *Human Rights Law Journal* 10, 11 (1998); Gérard Niveau, *Human Rights Aspects of Transsexualism*, 4 *Health and Human Rights* 135 (1998); Jacques Massip, *Où l'on trouve les transsexuels*, *Petites affiches*, 1998, at 17; Martin Scheinin, *Sexual Rights as Human Rights: Protected under Existing Rights Treaties?*, 67 *Nordic J. Int'l L.* 17, 29 (1998); Pascal Boucaud, *Le droit de se marier*, 3 *Revue trimestrielle des droits de l'homme*, 1, 16 (1992); Simone Wijte, *Post-Operative Transsexuals and the European Court of Human Rights*, in *SIM Special*, 1998, at 501.

⁵⁵ *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R.

⁵⁶ *I. v. United Kingdom*, 36 Eur. H.R. Rep. 53 (2002).

⁵⁷ On these two judgments, see Susana Sanz Caballero, *A Propósito de las sentencias Goodwin e I o el debate sobre: el matrimonio de transexuales ante el TEDH*, 55 *Revista española de derecho internacional* 307 (2003).

unwilling to take the step of affirming that transsexuals were entitled to found a family with partners of the same sex they had at the moment of birth and that denying them this right would be a violation of the right to the respect of family life. With these new judgments, however, the ECtHR has understood that the ECHR must be interpreted in light of current conditions.⁵⁸ In this sense, European countries have undertaken in recent years legislative steps that seemingly may lead to a change of mentalities in the matter.⁵⁹ Article 8, therefore, would be violated if a State allowed a transsexual to undergo a sex change operation while denying him the juridical possibility of changing the information on his official documents.⁶⁰ Likewise, Article 12 of the ECHR would be violated if the State only considered the person's chromosomal sex when determining who the person can marry.⁶¹ Consequently, the Court of Justice of the European Union, a tribunal that often finds its inspiration from the ECHR in cases concerning human rights, has also changed its position concerning transsexuals, as evidenced by its judgment of January 7th, 2004, C-117/01 *KB/National Health Service Pensions Agency*.⁶²

It is necessary to mention that the reason why, up until July 2002, the ECtHR had given a more traditional answer to this matter, was because it was aware that this was not a peaceful topic among the State parties to the Convention. In light of the lack of consensus as well as the scientific impossibility of ascertaining whether the operated transsexual acquires all the characteristics of the sex to which he thinks he belongs, the ECtHR offered a wide margin of appreciation to the States. Before that date, the Court had estimated only once that there had been a violation of Article 8 in transsexual cases. In this issue, the ECtHR condemned France for two reasons: a) the rigidity of the French legal system that put excessive impediments on the change of names and b) the reference to the person's sex that was always made in official documents delivered by French authorities, which has often served as a source of embarrassment for transsexuals whose physical appearance does not match the official data offered by the identification document.⁶³ On the contrary, the European Commission of Human Rights traditionally had been more sensitive to the problem of transsexuals, long before the ECtHR altered its stance. In two occasions the European Commission of Human Rights sent cases to the ECtHR indicating its conviction that there had been a violation of the ECHR with regards to transsexuals – a violation that the ECtHR finally did not recognize. What is certain, however, is that the ECtHR seemed to want to evolve and adapt its case law to the new times, in which, from a scientific point of view, it has been settled that beside the chromosomal, gonadal and genital sex, there is also a brain sex – one that tells the person about the sex he belongs to. This brain sex is the consequence of the person's conscience about himself and the sex he believes to belong to. These new

⁵⁸ This is why Morenilla thinks that the European Court of Human Rights case-law is dynamic, finalist and fast evolving. José María Morenilla Rodríguez, *El derecho al respeto de la esfera privada en la jurisprudencia del Tribunal Europeo de Derechos Humanos*, in *La jurisprudencia del Tribunal Europeo de Derechos Humanos* 289, 331 (Consejo General del Poder Judicial ed., 1993).

⁵⁹ *Goodwin*, 2002-VI Eur. Ct. H.R. 29 para. 84; *I*, 36 Eur. H.R. Rep. 53 para. 54

⁶⁰ *Goodwin*, 2002-VI Eur. Ct. H.R. 29 para. 96; *I*, 36 Eur. H.R. Rep. 53 para. 71.

⁶¹ Jacqueline Pousson-Petit argues that for years the problem was that the European Court of Human Rights never focused on the truly determining element of sexual personality; that is, each person's own sexual identity. Jacqueline Pousson-Petit, *Une illustration: le cas du transsexualisme*, in *De la bioéthique au bio-droit* 133, 141 (Claire Neirinck ed., 1994).

⁶² *K.B. v National Health Service Pensions Agency*, Case C-117/01, 2004 E.C.R.

⁶³ *B. v. France*, 232-C Eur. Ct. H.R. (ser. A) 33 (1992).

scientific theories were mentioned by the Court in its judgment in the *Sheffield*⁶⁴ case, but the Court still did not dare to use this information to change its case law, because, in its opinion, these theories neither were completely definitive nor irrefutable. Not in vain, transsexuality involves complex problems from a juridical, social, moral and scientific point of view. But, in one of its judgments concerning the problem of filiation for a female-to-male transsexual who wished to be legally registered as father of his partner's son (case *XYZ/United Kingdom*),⁶⁵ the ECtHR, although finally stating that the refusal to register the transsexual as father fell inside the State's margin of appreciation, nevertheless began to move away from its rigid previous case law. The ECtHR affirmed that a couple that apparently does not look different from a traditional family (a female-to-male transsexual, his female partner and the partner's child) can in certain circumstances constitute "family life" in the sense of Article 8 ECHR. In other words, the ECtHR in this judgment distinguished the social reality from the juridical one. With regard to the former, the organ agreed with X, Y and Z and showed its most liberal side, insisting on the need to adapt to the societal reality. Thus, the Court asserted that nothing prevented X from acting as social father of the child, as well as giving him emotional and financial support. Moreover, nothing prevented him from giving the child his last name.⁶⁶ This way, the ECtHR accepted that what apparently looked like a family was socially accepted as such. But this social recognition does not force the United Kingdom to change its legislation so as to accept the registration as father of a transsexual who has undergone a sex change operation. For that reason, in *XYZ* it seems that the Court did only half the work. It satisfied in part the applicants' claims, but in the end it joined the State's arguments and did not condemn the United Kingdom because it estimated that there had been no breach of the ECHR.⁶⁷

In 2002, in the *Goodwin* and *I.* cases, the ECtHR finally found a much more favorable atmosphere in Europe for the debated subject. Thus, it strayed from its previous case law and estimated that transsexuals' claims were fair.⁶⁸ In this way, the Court settled the existing debate in the sense that it allowed the States to finance sex change operations but afterwards it also allowed incoherent actions on the part of those States by not condemning some of the States that: a) prevented transsexuals from founding a family with a person of the opposite sex from the transsexual's new sex and b) prevented them from recording the new sexual orientation of these people in their official documentation. In *Rigaux's* opinion, the ECtHR unknowingly encouraged the creation of ambiguous human beings who, from the marriage point of view, were neither men nor

⁶⁴ *Sheffield and Horsham v. United Kingdom*, 1998-V Eur. Ct. H.R. 2011.

⁶⁵ *X, Y and Z v. United Kingdom*, 1997-II Eur. Ct. H.R. 619.

⁶⁶ *X, Y, Z*, 1997-II, Eur. Ct. H.R. 619 para. 50.

⁶⁷ For criticism of this judgment see, e.g., Michel Levinet, *La revendication transsexuelle et la Convention européenne des droits de l'homme*, 10 *Revue trimestrielle des droits de l'homme* 646, 663 (1999). In this work, the author questions whether the European Court of Human Rights will be involuntarily encouraging States to practice a certain duplicity when it makes a distinction between social and legal gender. Evain speaks about the ambiguity and weakness of the judgment. Stéphanie Evain, *Le juge européen, le transsexualisme et les droits de l'homme*, 71 *La semaine juridique* 523 (1997). An abstract of the judgment can be found in *Cour Européenne des droits de l'homme*, 22 avril 1997. *X, Y et Z contre Royaume Uni. Observations*, 5(40) *Journal des tribunaux. droit européen*, 142 (1997).

⁶⁸ To achieve this liberal result, the European Court of Human Rights has referred to the atmosphere of greater social tolerance observed in Europe in relation to this group, but also to the legislative changes that have been taking place in several States in order to grant rights to transsexuals. *Goodwin*, 2002-VI Eur. Ct. H.R. paras. 20-57; *I.*, 36 Eur. H.R. Rep. paras. 64-65.

women.⁶⁹ In any case, the questions that the *Goodwin* and *I.* cases open are not few. For example, it is necessary to consider first, whether the ECtHR will be as generous in eventual judicial actions brought by transsexuals that have not undergone a sex-change operation, who wish to get married but physically look like members of the sex they refuse, and second, what will happen from now on in cases of adoption of children by transsexuals.

Having considered the ECtHR's opinion with regard to the transsexual community, it is interesting to turn now to the Court's treatment of the homosexual community. What opinion do homosexual unions deserve from the ECtHR? Does the Court consider that Articles 8 and 12 ECHR apply? Not at all. The ECtHR has shown its toughest and most inflexible face ever. The ECtHR has always differentiated between: a) people who, while being biologically of one sex, feel that they belong to the other one and therefore want to be recognized as such by law and by society. They even want to be able to marry a person of the opposite sex to the one they feel is their own (that is to say, they want to be treated in all spheres as individuals of the opposite sex to the one they had at birth and to build a "normal" family with a person of the sex opposite to the one they believe is their own) and b) on the other hand, people who have no doubts about their sex and are aware of belonging to the sex they had at birth but simply are sexually attracted to people of the same sex (that is to say, their sexual orientation is for people of their own sex).

The ECtHR has concluded that, in discussing this second community, it would be preferable not use the term family life but rather that of private life.⁷⁰ For the ECtHR, homosexuality would be a perfectly respectable option, although the protection it affords to homosexuals is limited to the protections that attach to the private life of people. In this sense, asked about whether there was family life in the cohabitation of a father, his daughter and the father's male sentimental partner, the ECtHR refused to qualify this coexistence as such and only studied the family life played by the (homosexual) father and his daughter.⁷¹ Similarly, the Court rejected the claim of a homosexual who wished to adopt a child because, for the ECtHR, Article 8 of the ECHR protects only existing family life, which does not encompass the case where a person is seeking to adopt.⁷² Again in 2003, the Court avoided the use of the expression "family life" in addressing the situation of a homosexual who had lived with his partner for years in the latter's flat. After the death of his partner, he wanted to stay in the apartment against the wishes of his partner's parents. The ECtHR, once again, preferred to discuss the homosexual's right to private life instead of referring to the family life he had developed with his partner up until the latter's death.⁷³ In short: the ECtHR is still not willing or able to extend the same protection of family life to homosexuals as it did with respect to transsexuals.

⁶⁹ François Rigaux, *Les transsexuels devant la Cour européenne des droits de l'homme: une suite d'occasions manquées*, 9 *Revue trimestrielle des droits de l'homme* 130, 133 (1998).

⁷⁰ On the different treatment that transsexuality and homosexuality receive in Strasbourg, see Paolo Pallaro, *I Diritti degli omosessuali nella Convenzione europea per i diritti umani e nel diritto comunitario*, 13 *Rivista internazionale dei diritti dell'uomo* 104, 121 (2000).

⁷¹ *Salgueiro Da Silva Mouta v. Portugal*, 1999-IX Eur. Ct. H.R. 309.

⁷² *Fretté v. France*, 2002-I Eur. Ct. H.R. 345, 364.

⁷³ *Karner v. Austria*, App. No. 40016/98, (2003).