The Legitimacy of Family Rights in Strasbourg Case Law

'Living Instrument' or Extinguished Sovereignty?

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The Right (Not) to Become a Parent: From Assisted Reproduction to Adoptive Filiation

I. INTRODUCTORY REMARKS

MARRIAGE AND PROCREATION have been traditionally envisaged as co-dependent notions in human rights law. The wording of Article 12 ECHR—'Men and women of marriageable age have *the right to marry and to found a family*, according to the national laws governing the exercise of *this right*' (emphasis added)—would indeed suggest that marriage and procreation constitute a single complex right under the Convention. In all analogous international provisions, the right to found a family is also incorporated within the provision guaranteeing the right to marry, indicating two facets of the same right.[1] Notwithstanding the strength of the literal interpretation, the scholarship has propended for the existence of two distinct, albeit interrelated, rights.[2] This was also the preferred approach of the drafters of the more modern Article 9 of the EU Charter; in fact, while reproducing Article 12 ECHR (its declared model) almost verbatim, the provision juxtaposes two separate rights: '*The right* to marry *and the right* to found a family shall be guaranteed in accordance with the national laws governing the exercise of *these rights*' (emphasis added).[3] Moreover, although there is no explicit reference to parenthood in the ECHR text, if Article 12 merely intended to protect conjugal life, the addition 'and to found a family' would have been redundant; the equivalent expression in Article 17 IACHR, 'to raise a family',

[1] See art 16 UDHR: 'Men and women of full age … have *the right to marry and to found a family*'; art 23 ICCPR: 'The *right* of men and women of marriageable age *to marry and to found a family* shall be recognized'; art 17(2) IACHR: 'The right of men and women of marriageable age *to marry and to raise a family* shall be recognized' (emphasis added).

[2] See L-E Pettiti, E Décaux and P-H Imbert, *La Convention européenne des droits de l'homme. Commentaire article par article* (Paris, Economica, 1995) 437–42; S Bartole, B Conforti and G Raimondi, *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali* (Padua, CEDAM, 2001) 374.

[3] According to the explanatory Note of the Presidium (19 October 2000, Charter 4473/1/00 REV 1, CONVENT 49), art 9 of the EU Charter is based on art 12 ECHR.

more clearly captures what in common parlance signifies begetting and rearing children.

To some extent the case law developed under Article 12 confirms the autonomy of the right to found a family, even though it also indicates that parenthood outside marriage does not come within the purview of this provision. According to the Commission in *X and Y v Switzerland*, 'Article 12 recognises in fact the right of man and woman … to found a family *i.e. to have children*' (emphasis added).[4] At the same time, *X v Belgium and The Netherlands* specified that Article 12 'does not guarantee the right to have children born out of wedlock'; in fact, it 'foresees the right to marry and to found a family as one simple right'.[5] Apparently, unlike all other ECHR provisions, this article does not confer an *individual* right; according to the Commission, to attract the application of Article 12: 'The existence of a couple is fundamental.'[6] The Court in *Rees v UK* also seemed to favour an inter-dependent reading of the two guarantees in this provision, finding that 'Article 12 … is mainly concerned to protect *marriage as the basis of the family*' (emphasis added).[7]

This is not to say, however, that the capacity to procreate is a pre-condition for exercising the right to marry or that procreation is the only purpose of marriage. These propositions were dismissed by the Commission in *Van Oosterwijck v Belgium* on the basis of common family law provisions in Europe, for instance, the observation that infertility is not usually a ground for annulment,[8] and that the certainty of irreparable infertility does not nullify a transsexual person's right to marry.[9] As Eriksson pointed out, another possible argument in the same direction is that persons of advanced age are permitted to enter marriage in all jurisdictions.[10]

It is also worth noting that, by contrast with the wide meaning of the notion of 'family life' in Article 8,[11] the 'family' referred to in Article 12 is limited to

[4] *X and Y v Switzerland*, App No 8166/78, ECmHR decision of 3 October 1978, 244. What follows would suggest, rather incongruously, that the right to found a family may simply refer to marital life: 'The applicants are married and have thus already founded a family. They consequently enjoy the right to respect of their family life as guaranteed by Article 8.' The case regarded the impossibility for a couple detained in separate facilities to enjoy conjugal privacy for the purposes of procreation; whereas clearly the right to marry exhausts its applicability once the couple has successfully inter-married, the fact of marriage should not be seen as absorbing the right to found a family when the married couple has faced impediments to producing offspring.

[5] *X v Belgium and The Netherlands*, App No 6482/74, ECmHR decision of 10 July 1975.

[6] ibid.

[7] *Rees v UK*, App No 9532/81, ECtHR judgment of 17 October 1986, para 49.

[8] See *Van Oosterwijck v Belgium*, App No 7654/76, ECmHR report of 1 March 1979, para 59: 'Si le mariage et la famille sont effectivement associés dans la Convention comme dans les droits nationaux, rien ne permet toutefois d'en déduire que la capacité de procréer serait une condition fondamentale du mariage, ni même que la procréation en soit une fin essentielle … si l'impuissance est parfois considérée comme une cause de nullité du mariage, il n'en va généralement pas de même pour la stérilité.'

[9] ibid, paras 59–61.

[10] See MK Eriksson, *The Right to Marry and to Found a Family: A World-Wide Human Right* (Uppsala, Iustus Förlag, 1990) 75.

[11] See Introduction, section IV.

parenthood, ie, the nuclear family based on parents and immediate descendants. In *Šijakova v Former Yugoslav Republic of Macedonia*, the Court thus rejected the allegation that the vow of celibacy requested of the applicants' children in order to join the monastic order of the Macedonian Orthodox Church prevented them from having grandchildren, and hence founding a larger family; it noted, in fact, that 'the right to have grandchildren or the right to procreation is not covered by Article 12 or any other Article of the Convention'.[12]

At the same time, the individual right to become a parent outside the matrimonial context, and even regardless of a co-parenting project as part of a couple, has been affirmed under the more extensive right to respect for family life in Article 8. In *Evans v UK*, the Court has thus established that a single individual's right to become a parent is also protected under the 'private life' limb of Article 8: '"private life", which is a broad term, encompassing, inter alia, aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world … incorporates the right to respect for both the decisions to become and not to become a parent.'[13] The relationship between respect for private and family life under Article 8 and the right to found a family in Article 12 remains unclear. Rather controversially, *X and Y v Switzerland* found that: 'An interference with family life which is justified under Article 8 cannot at the same time constitute a violation of Article 12.'[14] As van Dijk et al noted: 'The fact that Article 12 is incorporated in the Convention independently of Article 8 also applies to the second element: the right to found a family.'[15] This would suggest that an independent violation of Article 12 may occur even where the interference under Article 8 is justified, and therefore a separate analysis of ECHR-compatibility is required.

Whether protected by the Convention under Article 12 or as an expression of 'private and family life', the right to become a parent is not straightforward as regards the scope of obligations placed on States. Nor is the language of either provision sufficient to establish whether the family aspirations safeguarded are confined to natural offspring or include social filiation based on adoption. It is therefore necessary to turn to the case law for the purposes of determining whether the Convention guarantees a right to adopt a non-biological child in order to create a family. The ECHR text also leaves unsettled further aspects of this putative right: the scope of permissible restrictions on the eligibility to adopt, any rules

[12] *Margarita Šijakova and others v Former Yugoslav Republic of Macedonia*, App No 67914/01, ECtHR decision of 6 March 2003, para 3. It is not clear what purpose the addition 'or the right to procreation' serves; against the background of numerous rulings recognising the right to be a parent, it cannot be interpreted as a retraction of the 'right to have children'. The Court arguably contests only the existence of a wider right to perpetuation of one's genetic heritage beyond one's offspring.

[13] *Evans v UK*, App No 6339/05, ECtHR judgment of 10 April 2007 [GC], para 71.

[14] *X and Y v Switzerland* (n 4).

[15] P van Dijk, F van Hoof, A van Rijn and L Zwaak (eds), *Theory and Practice of the European Convention on Human Rights*, 4th edn (Antwerp, Intersentia, 2006) 861.

on the irreversibility of adoption orders and the recognition of adoptive relations created under the different rules of a foreign jurisdiction. A further interpretive dilemma is whether, in light of present-day conditions, the right to found a family can be said to embrace access to assisted reproduction techniques or the legal recognition of parenthood in respect of a child who is not genetically related to the aspiring parent (in case of recourse to donated gametes). The task of interpreting the Convention creatively so as to apply it to very novel questions, such as those arising under human fertilisation legislation, has fallen upon the Strasbourg authorities. The case law has also had to find answers to other matters of controversy left unresolved by the Convention's text, such as prisoners' right to found a family with their partners, either through conjugal visits in prison facilities or human fertilisation services. The following sections will focus on the interpretive potential of the Convention in the aforementioned areas and the Court's stance on these ongoing debates. Finally, the right not to become a parent will be assessed through the lens of the Strasbourg approach to the alleged right for women to terminate unwanted pregnancies, as well as to any rights of potential fathers seeking to veto their partners' decision to abort.

II. PROCREATIVE RIGHTS: NEGATIVE AND POSITIVE OBLIGATIONS FOR STATES

Respect for the right to found a family presupposes first and foremost a negative obligation on the part of States, which translates into the absence of constraints on family planning, such as the timing, number or spacing of children. This principle was expressly codified at the international level in the Declaration on Social Progress and Development proclaimed by the UN General Assembly in 1969, according to which: 'Parents have the exclusive right to determine freely and responsibly the number and spacing of their children.'[16] As Sanz Caballero suggested,[17] any demographic policy limiting the number of children a family may have would therefore be in manifest breach of the right to found a family, as would forced sterilisation, forced abortion and any coerced family planning methods.

A number of very recent judgments demonstrate that unlawful sterilisation is not entirely extraneous to the European continent. In *VC v Slovakia*, the Court found that the sterilisation of a Roma woman without her informed consent violated Articles 3 and 8 of the Convention.[18] In respect of Article 3, the Court thus

[16] Declaration on Social Progress and Development proclaimed by UN General Assembly Resolution 2542 (XXIV) of 11 December 1969, art 4.

[17] See S Sanz Caballero, *La familia en perspectiva internacional y europea* (Valencia, Tirant Lo Blanch, 2006) 53.

[18] *VC v Slovakia*, App No 18968/07, ECtHR judgment of 8 November 2011, paras 120, 155. The procedure had been carried out immediately after a Caesarean delivery on the basis of consent given while in labour.

held: 'sterilisation constitutes a major interference with a person's reproductive health status … it bears on manifold aspects of the individual's personal integrity including his or her physical and mental well-being and emotional, spiritual and family life … [imposition of such medical treatment without the consent of a mentally competent adult patient] is to be regarded as incompatible with the requirement of respect for human freedom and dignity.'[19] In addition to depriving a person of her reproductive capability and interfering with her autonomy as a patient, the sterilisation procedure has repercussions on her private and family life.[20] The Court also found that the reproductive health of Roma women was particularly at risk in Slovakia,[21] given a widespread practice of sterilisation of such women without informed consent;[22] consequently, the State had failed to comply with 'its positive obligation to secure to them a sufficient measure of protection enabling them to effectively enjoy their right to respect for their private and family life'.[23]

The Court has further elaborated on these concepts in *NB v Slovakia*, where it condemned as inconsistent with human dignity another severely flawed consent to sterilisation sought while the patient was in labour and under the influence of medication, as well as being obtained on the basis of erroneous information: 'such a way of proceeding, by removing one of the important capacities of the applicant and making her formally agree to such a serious medical procedure while she was in labour, when her cognitive abilities were affected by medication, and then wrongfully indicating that the procedure was indispensable for preserving her life, violated the applicant's physical integrity and was grossly disrespectful of her human dignity.'[24] The most extreme case of violation of these rights is *IG and others v Slovakia*, where the applicants, also women of Roma ethnic origin, had been sterilised during Caesarean delivery in a medical institution under the authority of the Ministry of Health without their consent or even knowledge.[25]

[19] ibid, paras 106–07.

[20] ibid, para 143.

[21] See also *KH and others v Slovakia*, App No 32881/04, ECtHR judgment of 28 April 2009. Several Slovak women of Roma origin, unable to conceive again after Caesarean deliveries and suspecting that they had been sterilised without their knowledge during the operations, sued the hospitals concerned. The Court found that the impossibility for the applicants to obtain photocopies of their medical records was in violation of arts 8 and 6 ECHR.

[22] Roma women were found to be particularly at risk, due to a number of shortcomings in domestic practice (see *VC v Slovakia* (n 18) paras 146–49 and 152–53). See also *IG v Slovakia*, App No 15966/04, ECtHR judgment of 13 November 2012, where the applicants referred to a number of publications pointing to a history of sterilisation of Roma women, which had originated under the communist regime in Czechoslovakia in the early 1970s and which they believed had influenced their own sterilisation (ibid, para 75).

[23] *VC v Slovakia* (n 18) paras 145, 154; *IG v Slovakia* (n 22) paras 150–51. In light of the finding under art 8, the Court considered it unnecessary to examine the complaint separately under art 12 (*VC v Slovakia* (n 18) paras 159–61; *IG v Slovakia* (n 22) paras 150-51).

[24] *NB v Slovakia*, App No 29518/10, ECtHR judgment of 12 June 2012, para 77.

[25] See *IG v Slovakia* (n 22) para 122: 'Her sterilisation was not a life-saving intervention, and neither the applicant's nor her legal guardians' informed consent had been obtained prior to it. The procedure

In addition to the preventative obligations outlined above, Article 8 also gives rise to reparatory obligations in cases of unlawful sterilisation. In *GB and RB v Moldova*, the Court has indicated that where an individual was a victim of unlawful sterilisation, failure to provide adequate compensation in civil proceedings against the hospital and the obstetrician guilty of medical negligence also amounts to a violation of Article 8.[26] Similarly, *Csoma v Romania* established that deficiencies in the investigation into the doctor's liability in cases of medical errors permanently impairing a woman's ability to bear children breach Article 8.[27]

Conversely, the Court has refused to uphold a positive obligation for States to protect the rights of pregnant women and their unborn children against involuntary abortion through criminal law. In *Vo v France*, a case regarding a termination of pregnancy caused by medical negligence, the Court has found that the respondent State was under no obligation to criminalise the unintentional homicide of the foetus.[28] Regrettably, the case only addressed the complaint from the viewpoint of foetal rights under Article 2 rather than examining the mother's rights under Article 8 or 12.[29] As Marshall aptly observed: 'The diversion of the Court along a definitional path of questions about when life begins and the nature and characteristics of her foetus led the court to lose sight of the relationship between the mother and her potential child, of the mother's reproductive freedom and autonomy.'[30] Marginalising the mother's rights in a technical analysis of whether 'everyone'/'toute personne' in Article 2 applies to the unborn child, the judgment appears out of line with an important jurisprudential tenet on positive obligations under Articles 3 and 8 (as articulated in *A v UK*, *X and Y v The Netherlands*, *Okkali v Turkey* etc),[31] namely that effective protection against third-party interference with a person's bodily integrity and self-determination requires the deterring effect of criminal law. Judge Ress, dissenting, had in fact highlighted that the obligation to protect unborn children 'can only be discharged if French law has effective procedures in place to prevent the recurrence of such acts'.[32] It would appear, however, that the Court remains reluctant to require criminalisation in

was therefore incompatible with the requirement of respect for her human freedom and dignity … The fact that the doctors had considered the procedure necessary because the first applicant's life and health would be seriously threatened in the event of a further pregnancy cannot affect the position.'

[26] *GB and RB v Moldova*, App No 16761/09, ECtHR judgment of 18 December 2012, paras 31–35. The ECtHR found the equivalent of €607 awarded by the domestic courts in respect of non-pecuniary damages to be considerably below the minimum level of compensation generally awarded by the Court in case of art 8 violations; the Court cited as an example *Codarcea v Romania*, App No 31675/04, ECtHR judgment of 2 June 2009, where the Court had awarded the applicant €20,000.

[27] *Csoma v Romania*, App No 8759/05, ECtHR judgment of 15 January 2013, paras 60–68.

[28] *Vo v France*, App No 53924/00, ECtHR judgment of 8 July 2004 [GC].

[29] ibid, paras 75–85.

[30] J Marshall, *Personal Freedom through Human Rights Law?* (Leiden, Martinus Nijhoff, 2009) 191.

[31] See *X and Y v The Netherlands*, App No 8978/80, ECtHR judgment of 26 March 1985; *A v UK*, App No 25599/94, ECtHR judgment of 23 September 1998; *Okkali v Turkey*, App No 52067/99, ECtHR judgment of 17 October 2006.

[32] *Vo v France* (n 28) dissenting opinion of Judge Ress, para 1.

respect of medical negligence as opposed to intentional harm (as already shown in *Calvelli and Ciglio v Italy*).[33] Arguably, the impact of the interference on the victims and the deterring focus of the law in gross negligence and intentional harm cases would suggest that the distinction should not be overrated; the presence or absence of mens rea should rather be taken into account for the purposes of sentencing limits, not liability. Moreover, in order for the Court to ascertain the existence of a positive obligation to prevent involuntary abortion, it was sufficient to acknowledge that some form of protection is guaranteed in all European legal systems.[34] As Judge Ress noted: 'Specific laws on voluntary abortion would not have been necessary if the foetus did not have a life to protect and was fully dependent till birth on the unrestricted wishes of the pregnant mother.'[35] Furthermore, as Judge Mularoni argued: 'The political community is engaged at both national and international level in trying to identify the most suitable means of protecting, even prenatally, human rights and the dignity of the human being against certain biological and medical applications.'[36] All this suggests that the Convention should be read as prescribing an obligation to take *effective* measures to pre-empt interferences with the life of the unborn child against the wishes of the expectant mother.

Another aspect of reproductive freedom claimed in Strasbourg proceedings is the choice of home birth. It was thus alleged before the Court that being denied the opportunity to give birth at home, due to the dissuasive effect of criminal legislation against such assistance by health professionals, violates the right to respect for private and family life. The claim was met with a mixed response. In *Ternovszky v Hungary*, the Court accepted that restrictions may be applied to the right to choice in matters of child delivery, in principle protected by Article 8, given the State's

[33] In *Calvelli and Ciglio v Italy*, App No 32967/96, ECtHR judgment of 17 January 2002, it held that the procedural obligation under art 2 requires 'an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable' (para 49; see also *Belenko v Russia*, App 25435/06, ECtHR judgment of 18 December 2014, para 76). However, it did not establish a right to have criminal proceedings instituted: 'if the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged' (*Calvelli*, para 51; see also *Gray v Germany*, App 49278/09, ECtHR judgment of 22 May 2014, para 81).

[34] See *Vo v France* (n 28) para 84: 'At European level, the Court observes that there is no consensus on the nature and status of the embryo and/or foetus … although *they are beginning to receive some protection* in the light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation. At best, *it may be regarded as common ground between States that the embryo/foetus belongs to the human race*' (emphasis added).

[35] *Vo v France* (n 28) dissenting opinion of Judge Ress, para 4.

[36] ibid, dissenting opinion of Judge Mularoni joined by Judge Strážnická.

wide margin of appreciation and the ongoing medical debate on whether home birth carries significantly higher risks than giving birth in hospital.[37] At the same time, it found that 'the matter of health professionals assisting home births is surrounded by legal uncertainty prone to arbitrariness',[38] in breach of the expectant mother's Article 8 right. Conversely, in *Dubská and Krejzová v Czech Republic*, the Court upheld the prohibition on midwives assisting home birth, primarily in light of the absence of European consensus on this matter of healthcare policy, involving decisions as to the allocation of resources between hospitals and an adequate emergency system for home births.[39] Significantly, while recognising the mother's autonomy as regards procreative choices, the judgment also stressed the State's responsibility towards vulnerable individuals such as newborns, referring to the risks arising from unexpected complications during home delivery.[40]

Abstention from interfering with the decision to become a parent can be analysed as including a more subtle obligation not to prevent a couple from living together. Article 12 has thus allowed the Court to read a right to cohabitation for spouses into Article 8 on the basis that starting a family requires the possibility to live together. It was in fact held in *Abdulaziz, Cabales and Balkandali v UK* (a case regarding the refusal to issue an entry visa to an alien intending to reunite with a resident spouse) that 'the expression "family life", in the case of a married couple, normally comprises cohabitation. The latter proposition is reinforced by the existence of Article 12 (art. 12), for it is scarcely conceivable that the right to found a family should not encompass the right to live together'.[41]

The exact scope of positive obligations in connection with the right to found a family remains, however, more controversial. Nor is the conceptual boundary between negative and positive obligations always clear-cut. Undoubtedly, to reduce the right to be a parent to self-determination in respect of biological procreation would be to ignore the institution of social filiation, defined as filiation established with public authorisation or support.[42] Moreover, the Convention cannot remain indifferent to modern developments in the field of human fertilisation and legal recognition of the assumption by individuals of a parental role in respect of children genetically unrelated to them.[43] Recent case law has cast light

[37] *Ternovszky v Hungary*, App No 67545/09, ECtHR judgment of 14 December 2010, para 24.

[38] ibid, para 26.

[39] *Dubská and Krejzová v Czech Republic*, App Nos 28859/11; 28473/12, ECtHR judgment of 11 December 2014, paras 93–101. The case was referred to the Grand Chamber on 1 June 2015.

[40] See ibid, paras 93–95 and 97.

[41] *Abdulaziz, Cabales and Balkandali v UK*, App Nos 9214/80; 9473/81; 9474/81, ECtHR judgment of 28 May 1985, para 62.

[42] Definition borrowed from P Morozzo Della Rocca, 'Riflessioni sul rapporto tra adozione e procreazione medicalmente assistita' (2005) 1 *Il diritto di famiglia e delle persone* 211.

[43] See P Murat, 'Filiation et vie familiale' in F Sudre (ed), *Le droit au respect de la vie familiale au sens de la Convention européenne des droits de l'homme* (Brussels, Nemesis-Bruylant, 2002) 161: 'la filiation est une donnée éminemment culturelle, impossible à ramener à l'enregistrement d'un facteur purement biologique, parce qu'il ne s'agit pas d'assurer de manière fiable une simple "traçabilité" de la reproduction humaine, mais plutôt d'instituer des individus dans un ordre social.'

on obligations arising for States under the Convention in both these areas; they are the subject of the following sections.

III. ACCESS TO ASSISTED REPRODUCTION SERVICES AND NON-GENETIC ATTRIBUTION OF PARENTHOOD

Even before the Strasbourg authorities had had an opportunity to pronounce on the matter, academic commentators inquired whether it is possible to derive a right to assisted reproduction services from Article 8 (the right to respect for private and family life) and/or Article 12 (the right to found a family).[44] That said, there was some scepticism as to a future re-interpretation of the Convention in the sense of placing a positive duty on States parties to provide human fertilisation treatment to infertile couples.[45] Clearly, such a right was not contemplated at the time that the ECHR was drafted; if, however, the vast majority of States provide such services, one cannot exclude that their availability might become mandatory in the future, although it is unlikely that they would have to be provided free of charge (in fact, the European Court remains reserved whenever rights involving economic resources are alleged). It is also questionable whether Convention requirements could extend to the regulation of rather specific aspects of the law, such as the techniques of assisted reproduction permitted, posthumous fatherhood following insemination after the death of the donor, or the possibility of two legal parents of the same sex.

What can be maintained as a matter of extant Convention law is that access to assisted procreation treatment falls under the application of Article 8. In *Dickson v UK*, the Court expressly found that 'the refusal of artificial insemination facilities concerned [the applicants'] private and family lives, which notions incorporate the right to respect for their decision to become genetic parents'.[46] *SH v Austria* further refined this position, confirming that not only do the new reproductive technologies engage Article 8, but that provision guarantees a right to access to such services; it thus indicated that 'the *right* of a couple to conceive a child and *to make use of medically assisted procreation* for that purpose is also protected by Article 8, as such a choice is an expression of private and family life' (emphasis added).[47] The location of the legal basis for procreative rights is not immaterial. As Mulligan notes: 'If they are protected by the right to respect for private life then

[44] See V Coussirat-Coustère, 'Famille et Convention Européenne des Droits de l'Homme' in P Mahoney et al (eds), *Protection des droits de l'homme: la perspective européenne. Mélanges à la mémoire de Rolv Ryssdl* (Cologne, Carl Heymanns Verlag KG, 2000) 281, 304.

[45] See D Harris, M O'Boyle and C Warbrick, *Law of the European Convention of Human Rights* (London, Butterworths, 1995) 441.

[46] *Dickson v UK*, App No 44362/04, ECtHR judgment of 4 December 2007 [GC], para 66.

[47] *SH and others v Austria*, App No 57813/00, ECtHR judgment of 3 November 2011 [GC], para 82.

they are enjoyed by all people, married, in a relationship or single.'[48] This obviates the problems raised by the Strasbourg emphasis, in the examination of Article 12 complaints, on marriage and on the existence of a couple as a pre-condition for founding a family.[49] The outstanding questions are whether an individual is entitled to exercise the aforementioned right of recourse to assisted reproduction at any time and whether they may avail themselves of any reproductive technologies scientifically available or only of those permitted under domestic legislation.

The Court has been rather reluctant to expand the scope of obligations in this connection and to interfere with the policy choices of ECHR States. Bioethics remains an area of particularly wide margin of appreciation; in fact, the Court has recognised the sensitive and controversial nature of legislative decisions in this field, as well as finding that the absence of European consensus justifies an important measure of judicial self-restraint. As recalled above, in *Vo v France*, the Grand Chamber held that, given the absence of a European consensus on the scientific and legal definition of when life begins, States retained a wide margin of appreciation in deciding whether the right to life applies to the foetus and thus if medical errors resulting in involuntary abortion are covered by homicide and manslaughter laws.[50] More specifically on human fertilisation laws, in *Evans v UK*, the Court held that 'since the use of IVF treatment gives rise to sensitive moral and ethical issues … and since the questions raised by the case touch on areas where there is no clear common ground amongst the member States, the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one'.[51] Consequently, the Strasbourg authorities have refrained from a prescriptive approach to the circumstances under which human fertilisation treatment ought to be made available.

One aspect on which the case law has remained conservative is the alleged right to assisted reproduction techniques involving donated gametes and the subsequent attribution of parental status to a person in relation to a child who is not genetically related to them. It is worth noting that this technique, known as heterologous fertilisation, has received a mixed treatment in the scholarly literature. It has indeed been suggested by some that it should be prohibited altogether, in so far as it affects the certainty of filiation and the identity of the child, or restricted to couples afflicted by certain forms of infertility or genetically transmissible diseases.[52] It could be argued, however, that any concerns regarding the child's identity arising out of non-biological parenthood are superseded by the widespread legal and social acceptance of the analogous phenomenon of adoption.

[48] A Mulligan, 'Reproductive Rights under Article 8: The Right to Respect for the Decision to Become or Not to Become a Parent' (2014) 4 *European Human Rights Law Review* 378, 385.

[49] On this difficulty, see also the context of adoption eligibility, discussed in the next section.

[50] *Vo v France* (n 28) para 82.

[51] *Evans v UK* (n 13) para 81.

[52] See Della Rocca (n 42) 217.

The Court was presented with this dilemma in *SH and others v Austria*, in which two infertile married couples complained about the prohibition on the use of donated gametes for the purposes of *in vitro* fertilisation (IVF) and the absolute prohibition of the donation of ovum cells.[53] They lamented the inability to conceive a child genetically related to one parent, in so far as the law only allowed homologous procreation techniques, using both male and female gametes from the spouses or cohabiting partners. For the Chamber initially seized with the application, the right of couples to procreate by availing themselves of assisted reproduction techniques fell within the ambit of Article 8 (rather than Article 12), as the decision to resort to such treatment constituted a form of exercise of the right to private and family life. The ruling found that the impugned law amounted to a violation of Article 14 taken in conjunction with Article 8, in so far as it discriminated between infertile couples and couples who were not reliant on donated gametes to procreate.[54]

The Grand Chamber judgment reversed that position, maintaining that the Austrian legislature had not exceeded its margin of appreciation in respect of third-party gamete donation for the purposes of artificial procreation. Although the restrictions complained of were seen as 'involving an interference with the applicants' right to avail themselves of techniques of artificial procreation',[55] the Court was not prepared to find them in breach of the Convention. This seems to be primarily due to two considerations. Firstly, artificial reproduction with the use of donated gametes goes beyond the couple (ie, their genetic contribution) and thus potentially requires a positive obligation to authorise third-party donation.[56] Secondly, the Court concentrated on the precautionary principle governing the dissociation between genetic and legal parenthood:

> the field of artificial procreation is developing particularly fast both from a scientific point of view and in terms of the development of a legal framework for its medical application … it is particularly difficult to establish a sound basis for assessing the necessity and appropriateness of legislative measures, the consequences of which might become apparent only after a considerable length of time. It is therefore understandable that the States find it necessary to act with particular caution in the field of artificial procreation.[57]

As Scherpe recalls, however, the dissociation between genetic and legal parenthood was already accommodated by the domestic legislation at stake, in the context of adoption and sperm donation for the purposes of *in vivo* fertilisation

[53] The unification of ovum and sperm outside of the woman's body was only permitted if they both proceeded from the intended parents, and ovum donation was always prohibited. See *SH and others v Austria*, App No 57813/00, ECtHR judgment of 1 April 2010 [Chamber], paras 28–31.

[54] ibid, paras 85 and 94.

[55] *SH v Austria* (n 47) para 88.

[56] See ibid, para 87: 'the legislation in question can be seen as raising an issue as to whether there exists a positive obligation on the State to permit certain forms of artificial procreation using either sperm or ova from a third party.'

[57] ibid, para 103.

(permitted by Austrian law in the event of male infertility in the couple).[58] Invoking, moreover, the complex underlying social and ethical questions on which no consensus had yet been reached, the judgment restored the wide margin of appreciation reserved to States in highly divisive and culturally dependent matters.[59] The Grand Chamber stated that although there was a 'clear trend in the legislation of Contracting States towards allowing gamete donation … which reflect[ed] an emerging European consensus', that consensus was not 'based on *settled and long-standing* principles' and thus did not 'decisively narrow the margin of appreciation' (emphasis added).[60] Unsurprisingly, this qualified threshold for consensus has been criticised by dissenters as 'potentially extending the States' margin of appreciation beyond limits'.[61] The introduction of a time factor into the 'consensus' equation (the requirement for it to be 'settled and long-standing') is particularly questionable with reference to aspects of Article 8 which have only recently emerged as a legal issue due to technological advances, and thus cannot be expected to have a long regulatory tradition.

Commentators have found the Grand Chamber judgment in *SH* disappointing on several other grounds. As Gallus appositely noted, the Court accepted that the restrictive nature of Austrian law was mitigated by the possibility for couples needing donated gametes to travel abroad in order to benefit from medically assisted procreation; this recommendation of 'procreative tourism' calls into question the importance of the ethical values purportedly underwriting the regulation of assisted reproduction.[62] Moreover, according to Harris et al, 'it is arguable that where a couple can procreate by whatever means, the state should not impose unreasonable restrictions on their possibility of doing so'.[63] Admittedly, an obligation under the ECHR to recognise the legal parenthood of the spouse who does not have a genetic contribution to the creation of the embryo is disputable. By contrast, the member of the couple who does possess the biological capacity to

[58] See JM Scherpe, 'Medically Assisted Procreation: This Margin Needs to Be Appreciated' (2012) 71(2) *Cambridge Law Journal* 276, 278. The justification for *in vivo* but not *in vitro* fertilisation (based on the fact that that technique had already been in use and impossible to prevent since it did not require a medical professional) does not convince. Indeed, the Chamber decision had found that 'the difference in treatment between [a couple] who, for fulfilling their wish for a child could only resort to sperm donation for in vitro fertilisation and a couple which lawfully may make use of sperm donation for in vivo fertilisation, had no objective and reasonable justification and was disproportionate' (*SH v Austria* (n 53) para 94).

[59] *SH v Austria* (n 47) paras 94–116. See also para 115: 'neither in respect of the prohibition of ovum donation for the purposes of artificial procreation nor in respect of the prohibition of sperm donation for in vitro fertilisation … had the Austrian legislature, at the relevant time, exceeded the margin of appreciation afforded to it.'

[60] ibid, para 96.

[61] *SH v Austria* (n 47) dissenting opinion of Judges Tulkens et al, para 8.

[62] See N Gallus, 'La procréation médicalement assistée et la jurisprudence de la Court européenne des droits de l'homme' in N Gallus (ed), *Droit des familles, genre et sexualité* (Limal, Anthemis, 2012) 203, 222.

[63] D Harris, M O'Boyle, E Bates and C Buckley (eds), *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, 3rd edn (Oxford, Oxford University Press, 2014) 762.

have a child genetically related to them should not be prevented from doing so by resorting to donated gametes; their spouse can establish a legal tie with the child thus born through subsequent adoption, which confers the same rights and obligations without distorting the biological truth.

The judgment has nevertheless signalled that this area of ECHR law is one in transition: '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.'[64] According to Mulligan: 'Though this decision exhibited a high level of deference to the national rules, the Court did take the time to warn the Austrian government that it was under a duty to ensure that its laws keep up to date with developments in this dynamic and evolving area of science.'[65]

It is worth noting, on the other hand, that the majority view in *SH* has also been criticised for going too far in recognising a right to benefit from advances in medical science for procreative purposes. The separate opinion of Judge De Gaetano is thus even more conservative than the majority, in that it suggests that assisted reproduction techniques are contrary to human dignity altogether and that 'the "desire" for a child cannot … become an absolute goal which overrides the dignity of every human life'.[66] It cannot be seen why the assistance of medical science (including regenerative medicine) is acceptable to improve any other functions of the human body, with a view to prolonging human life span and bettering the quality of life, but not the reproductive function. Gallus pointed out (correctly in my view) that human dignity is not incompatible with all procreation non-natural, and thus the objection should not be against assisted reproduction per se, but its commercial or eugenic abuses.[67]

The Strasbourg institutions have manifested the same deferential approach in respect of the regulation of parental rights for children conceived through artificial insemination with donor gametes (as allowed by domestic legislation). In *Kerkhoven and Hinke v The Netherlands*,[68] the Commission in fact refused to take a stand on the issue of attribution of parental rights to the lesbian partner of a woman having conceived a child through assisted reproduction, despite the fact that she had assumed a parental role since the child's birth.[69] Whilst agreeing that the impossibility of the non-biological carer establishing legal ties with the child could have practical consequences in the event of the death of the biological

[64] *SH v Austria* (n 53) para 118.
[65] Mulligan (n 48) 383.
[66] *SH v Austria* (n 47) separate opinion of Judge de Gaetano, para 2.
[67] See Gallus (n 62) 223.
[68] *Kerkhoven and Hinke v The Netherlands*, App No 15666/89, ECmHR decision of 19 May 1992.
[69] The impugned Dutch law vested unmarried parents with parental authority only to the extent that they had legal ties with the child, and the option to establish those ties by formally recognising a child (whether genetically related or not) was only available to men.

mother or the breakdown of the couple's relationship, the Commission found that the Convention placed no positive obligation on a State to recognise the parental authority of a woman other than the biological mother.[70] This position was further reinforced by the fact that the relationship between two same-sex partners was not, at the time, recognised as 'family life' within the meaning of Article 8.[71] In reference to the discrimination claim, when compared to heterosexual de facto couples, the Commission held that 'as regards parental authority over a child, a homosexual couple cannot be equated to a man and a woman living together'.[72] The decision is therefore largely decided on the basis of heteronormativity, rather than casting light on the circumstances under which a non-biological carer ought to be recognised as a parent in the eyes of the law.

This question returned before the Court in a case regarding the denial of legal parenthood in respect of a child (born through assisted reproduction with donor gametes) in favour of the mother's transsexual female-to-male partner who effectively acted as a father. In *X, Y and Z v UK*, the Court relied once again on the lack of consensus in Europe to refuse to read positive obligations into the Convention: 'The Court observes that there is no common European standard with regard to the granting of parental rights to transsexuals … [nor] with regard to the manner in which the social relationship between a child conceived by AID and the person who performs the role of father should be reflected in law … the respondent State must be afforded a wide margin of appreciation.'[73] It would seem that the partner's transsexuality was not a decisive factor; in fact, the Court referred to a more general absence of an obligation to recognise parental rights to 'the person who acts as a father'.[74] In addition to the wide discretion resulting from the lack of European consensus, the Court also relied on a precautionary approach: 'at the present time there is uncertainty with regard to how the interests of children in Z's position can best be protected … and the Court should not adopt or impose any single viewpoint.'[75]

Whilst no legal ties arise *as of right* between a child born through assisted reproduction and genetically unrelated de facto carers, the Strasbourg authorities have established that the mere biological tie between such a child and the sperm donor

[70] *Kerkhoven and Hinke v The Netherlands* (n 68) para 1.

[71] See further Ch 4. While denying the qualification as 'family life', in *Kerkhoven and Hinke*, the Commission somewhat inconsistently found that the applicable legislation 'does not prevent the three applicants from living together as a family'.

[72] *Kerkhoven and Hinke v The Netherlands* (n 68). The fact that the child had been born out of wedlock played no role in the analysis; indeed, the Commission referenced the earlier recognition in *Marckx v Belgium* that art 8 covered illegitimate families.

[73] *X, Y and Z v UK*, App No 21830/93, ECtHR judgment of 22 April 1997 [GC], para 44.

[74] See, however, the wider discussion in Ch 4 on the comparative position, under the relevant domestic legislation, of men and transsexual persons such as the applicant, whose legal gender was female.

[75] *X, Y and Z v UK* (n 73) para 51. See also para 47: 'the Court considers that the State may justifiably be cautious in changing the law, since it is possible that the amendment sought might have undesirable or unforeseen ramifications for children in Z's position.'

is an insufficient indicator of family life. In *JRM v The Netherlands*, the Commission held that 'the situation in which a person donates sperm only to enable a woman to become pregnant through artificial insemination does not of itself give the donor a right to respect for family life with the child'.[76] The applicant in those proceedings had accepted to act as a donor for a lesbian couple, with an understanding that the latter would have exclusive custody of the child. His claim to a right to maintain contact with the child failed on account of a number of factors: the initial agreement with the lesbian couple, the scarce contact between the donor and the baby during his first few months of life, and his lack of contribution to raising the child, financially or otherwise. Therefore, according to the Commission, the relationship between the sperm donor and the child did not qualify as 'family life' within the meaning of Article 8. The decision further clarified that the different treatment of a sperm donor as opposed to a natural father did not amount to discrimination in so far as their situations were not equivalent.[77]

This approach finds support in the scholarly literature. According to Coussirat-Coustère, a different legal treatment between natural or legitimate fathers and gamete donors is justified not only by the disparity of their circumstances, but also by the need to safeguard the best interests of the child conceived through assisted reproduction.[78] As discussed in the previous chapter, the case law suggests that, at least where no commitment corroborates the genetic link, the important test is whether or not there was ever a life project between the donor and the biological mother at the time of conception; in the context of natural procreation, where that was the case, the Court in fact found that there was family life between the child and the biological father, despite the breakdown of the relationship before the child's birth and the lack of opportunity to maintain contact with the child.[79] It would seem that where a man acts as a sperm donor with no intention of playing a part in the child's life, the protection of Article 8 will remain unavailable, save for a subsequent change in circumstances sufficient to indicate the father's commitment and support.

It has already been indicated that the Court refrains from close regulation of medically assisted procreation; however, in the presence of major incongruities within a domestic legal system, it appears willing to intervene. Thus, in *Costa and Pavan v Italy*, the Court was prepared to find that the prohibition of access to IVF and embryo pre-implantation genetic testing to couples seeking to avoid

[76] *JRM v The Netherlands*, App No 16944/90, ECmHR decision of 8 February 1993, para 1.

[77] ibid.

[78] See Coussirat-Coustère (n 44) 305: 'L'établissement de liens juridiques avec l'homme donneur de sperme se présente sans doute sous un jour différent, puisqu'il y a un rapport biologique avec l'enfant, quoique non constitutif à lui seul de vie familiale. On peut seulement présumer que l'Etat serait fondé à soumettre cet établissement à des conditions particulières, en vue de protéger les intérêts de l'enfant; et ces conditions imposées au seul donneur de sperme ne constitueraient pas une discrimination entre lui et un père naturel cohabitant, ou, moins encore, un père légitime, tant leurs situations apparaissent différentes.'

[79] See *Keegan v Ireland*, App No 16969/90, ECtHR judgment of 26 May 1994.

the transmission of genetic diseases to their descendants was incompatible with Article 8.[80] The applicants were healthy carriers of cystic fibrosis; the disease had been transmitted to their first child and they had terminated a subsequent pregnancy when the foetus was diagnosed with the same pathology. They wished to resort to IVF and pre-implantation diagnosis, which would have allowed for the genetic screening of the embryos; however, under the relevant legislation, IVF treatment was only available to infertile couples or couples in which the man had a sexually transmissible disease, whereas the selection of embryos for eugenic purposes was prohibited. Significantly, the Court found that 'the applicants' desire to conceive a child unaffected by the genetic disease of which they are healthy carriers and to use [assisted reproduction technology] and [preimplantation genetic diagnosis] to this end attracts the protection of Article 8, as this choice is a form of expression of their private and family life'.[81] The Court unanimously found that the law preventing healthy carriers of genetic diseases from resorting to IVF and embryo screening, whilst allowing medically-assisted abortion if the foetus showed symptoms of a genetic disease, was intrinsically inconsistent, and hence violated the couples' Article 8 rights.[82] In fact, the purported aim of protecting the health of the mother and the child and avoiding eugenic abuse was not properly served by prohibiting screening and yet permitting, on the exact same grounds, an abortion, which had a more detrimental impact. Since the means employed to achieve the aims pursued were not the least intrusive, the legislative measure was found to be disproportionate. The judgment further relied on a comparative analysis suggesting that embryo screening on medical grounds was either permitted or not subject to specific regulation in most States (with a very small minority banning it).[83]

It is not clear whether, in the absence of legislation permitting abortion on grounds of diagnosed genetic disease, the claimants would have been successful. The Court placed, in fact, great emphasis of this inconsistency: 'the applicants' complaint does not concern the question whether, taken alone, the ban … is compatible with Article 8 of the Convention. The applicants complain of a lack of proportionality of such a measure given that Italian law does allow them to abort the foetus if it is affected by the disease of which they are carriers.'[84] The Court was

[80] *Costa and Pavan v Italy*, App No 54270/10, ECtHR judgment of 28 August 2012.

[81] ibid, para 50.

[82] See ibid, para 57: 'The Court cannot but note that the Italian legislation lacks consistency in this area. On the one hand it bans implantation limited to those embryos unaffected by the disease of which the applicants are healthy carriers, while on the other hand it allows the applicants to abort a fœtus affected by the disease.'

[83] ibid, paras 30–32 and 63.

[84] ibid, para 53. See also para 55: '[The Court] 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 fœtus turns out to be affected by the disease, having regard in particular to the consequences of this both for the fœtus, which is clearly far further developed than an embryo, and for the parents, in particular the woman.'

also careful to dismiss the respondent government's submission that the couple alleged a 'right to a healthy child', adducing that the purpose was limited to detecting a specific disease of particular gravity rather than all possible disorders.[85] Arguably, the Court could have gone further and established a right to have a child free from foreseeable serious diseases, regardless of the availability of abortion. It should be recalled that the applicants did not seek a 'designer baby' with whimsically selected traits; they merely wished to ensure that their second child would not be afflicted by the life-threatening disease of their first child. It would be neither in the interests of the parents nor those of the resulting child to deny access to available pre-emptive medical solutions under the circumstances. Admittedly, the Court might be ill-equipped at this stage to address the wider bioethical questions associated with eugenic selection, and a narrow focus served to preserve the legitimacy of the ruling. In any event, after the caution manifested in *SH v Austria*, the *Costa and Pavan* judgment indicates that, while still reserved, the European scrutiny of human fertilisation legislation and practice is increasingly active,[86] and that the scope of the margin of appreciation in the field of bioethics is likely to be progressively reduced in the near future.

Another particularly controversial aspect of assisted fertilisation law regards consent to the use of one's genetic material and respect for the decision to become or not to become a parent. The difficult human rights ramifications of the regulation of human fertilisation are illustrated by the tragic facts in *Evans v UK*. Before undergoing cancer treatment that would have prevented her from producing ova in the future, the applicant had embarked upon IVF together with her then partner, so that the embryos created with both their gametes could be frozen and implanted at a later stage. Subsequently, however, the couple had separated and the former boyfriend had contacted the clinic to withdraw consent to the use of the embryos and request their destruction. According to the relevant domestic legislation, each of the parties retained the right to withdraw consent up to the moment of the implantation, and the English courts had strictly upheld that principle. Before the Strasbourg Court, the applicant claimed that depriving her of the only opportunity of having a child biologically related to her amounted to an infringement of her right to respect for private and family life under Article 8. She argued that her boyfriend had given her assurances that he would not revisit his decision and that, had she conceived naturally prior to the separation, he would not have been able to change his mind during the pregnancy. She further maintained that the fertilisation treatment was much more exacting for the female participant and therefore her wishes ought to prevail.

The Grand Chamber, like the Chamber rendering the initial judgment, accepted that private life encompasses a right to respect for one's decision to become or not

[85] ibid, paras 46–47.

[86] While acknowledging the sensitive nature of the ethical questions raised by pre-implantation genetic diagnosis, the Court noted that 'the solutions reached by the legislature are not beyond the scrutiny of the Court' (ibid, para 61).

to become a parent.[87] The State was therefore expected to balance the incompatible rights of the applicant and her former partner and, in doing so, it enjoyed a wide margin of appreciation, given the disparity of national approaches to the field of bioethics.[88] In particular, the Grand Chamber held that 'the absolute nature of the rule served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case-by-case basis, what the Court of Appeal described as "entirely incommensurable" interests'.[89] The ECtHR considered that the requirement in the English statute for continued consent until the implantation of the embryo could be validly applied even in the case of a woman who had no other chance of having a child biologically related to her; moreover, the situation allegedly disclosed no discrimination when compared with women who could conceive naturally 'because the reasons given for finding that there was no violation of Article 8 also afford a reasonable and objective justification under Article 14'.[90]

It is regrettable that the Court did not evaluate the rigid application of English law as inconsistent with the need to ensure a fair balance between competing rights, in light of the facts of each particular case. It could indeed be argued that blanket statutory frameworks are intrinsically disproportionate, in that they do not allow for a scrutiny of individual circumstances and the accommodation of exceptional situations. Regardless of where one might think the fair balance lay and what the substantive outcome in *Evans* should have been, it is undeniable that this was an exceptional case and English law, as expressed in the statute and as interpreted by the domestic courts, made no allowance for exceptional situations. Moreover, as Gallus observed, the emphasis on legal certainty leads to the preference of the general and abstract norm over the analysis of its application to the individual case, which would be closer to the quest for equity, and this approach is incompatible with the principle of effective protection of Article 8 rights.[91] A bright-line rule incapable of a case-specific analysis means that the question of whose interests should prevail under the circumstances and what each party has to lose could not form the object of ad hoc deliberation. By definition, this goes

[87] *Evans v UK*, App No 6339/05, ECtHR judgment of 7 March 2006 [Chamber], para 57; *Evans v UK* (n 13), para 71.

[88] *Evans v UK* (n 13), para 81. For a recent reiteration, see *Knecht v Romania*, App No 10048/10, ECtHR judgment of 2 October 2012, para 59: 'the Court's task is not to substitute itself for the competent national authorities in determining the most appropriate policy for regulating matters of artificial procreation … especially since the use of IVF treatment gave rise then and continues to give rise today to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments … the margin of appreciation to be afforded to the respondent State is a wide one'. This case was also concerned with the lack of access to embryos created with one's genetic material (seizure of the applicants' frozen embryos due to concerns about the clinic's credentials, difficulties in securing a transfer thereof to a specialised clinic for the purposes of an IVF procedure); no violation was found due to the fact that domestic courts had recognised the breach and authorised the transfer requested, which had been obtained in a relatively short time.

[89] *Evans v UK* (n 13) para 89.

[90] ibid, para 95.

[91] Gallus (n 62) 216.

against the notion of proportionality, as demonstrated by the consistent condemnation of inflexible blanket measures in Strasbourg proceedings; examples include irreducible life sentences, the prohibition on prisoners' right to vote and prisoners' lack of access to assisted reproduction facilities.

Thus, the Grand Chamber in *Vinter v UK* deemed the entirely unreviewable nature of life sentences incompatible with Article 3, as the protection of the public and the deterring effect of criminal legislation could not justify the complete lack of an opportunity for detainees to demonstrate, through a case-by-case review mechanism, that they no longer posed a risk to society.[92] In *Dickson v UK*, the lack of a proper case-by-case analysis of prisoners' requests for assisted reproduction services was incapable of assessing whether a restriction was proportionate in a specific situation and therefore the national authorities had not struck a fair balance.[93] Similarly, in *Hirst v UK (No 2)*, the Grand Chamber found that the automatic disenfranchisement of all convicted prisoners was disproportionate in so far as it disregarded the nature of the offence or the length of the sentence.[94] Another example is *Shofman v Russia*, where the Court condemned the rigidity of time bars on instituting proceedings for disavowal of paternity, which could not take into account the circumstances preventing the applicant to do so earlier.[95] Even in areas of great sensitivity such as euthanasia, the Court stressed the need for evaluation of individual cases; in *Pretty v UK*, the Court thus accepted that the prohibition on assisting a person to commit suicide was not disproportionate in so far as the requirement for the consent of the Director of Public Prosecutions to indict allowed for exceptions.[96]

A bright-line rule is also perforce discriminatory, in that it treats unlike cases alike, without the possibility of differentiating between someone in Ms Evans' position and a woman whose reproductive capacity was still intact and who could resort to fertilisation treatment again in the future. This incapacity of the impugned statutory regime to distinguish between radically different situations could have been analysed as reverse discrimination (according to the Court's approach in *Thlimmenos v Greece*).[97] Lind noted another possible objection against

[92] *Vinter v UK*, App Nos 66069/09; 130/10; 3896/10, ECtHR judgment of 9 July 2013 [GC], paras 111–12, 120–22.

[93] *Dickson v UK* (n 46) paras 82–85.

[94] *Hirst v UK (No 2)*, App No 74025/01, ECtHR judgment of 6 October 2005 [GC]. This view was reiterated in *Greens and MT v UK*, App Nos 60041/08; 60054/08, ECtHR judgment of 23 November 2010.

[95] *Shofman v Russia*, App No 74826/01, ECtHR judgment of 24 November 2005.

[96] See *Pretty v UK*, App No 2346/02, ECtHR judgment of 29 April 2002, para 76: 'It does not appear to be arbitrary to the Court for the law to reflect the importance of the right to life, by prohibiting assisted suicide while providing for a system of enforcement and adjudication which *allows due regard to be given in each particular case* to the public interest in bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence' (emphasis added).

[97] See *Thlimmenos v Greece*, App No 34369/97, ECtHR judgment of 6 April 2000, para 44: 'The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.'

the English human fertilisation regime: while it offers formal equality between men and women (in that both can withdraw consent before implantation), in practice it indirectly discriminates against women, because the mutual consent proviso can only ever apply to women; men can, in fact, store sperm and use it later unilaterally, whereas ova storage is less successful and thus women depend on the creation of embryos, which subjects them to the male veto.[98] Despite these various inequities in the statute under scrutiny, the Court abdicates from a control of proportionality on the basis that the dilemma before it is too sensitive and is thus better left to national authorities. This view is unsatisfactory and inconsistent with the Court's general stance that the domestic margin of discretion, albeit wide in matters of morality, is not unfettered and does not oust European supervision.

A balance of harms should always be possible notwithstanding the 'incommensurability' of the rights at stake. In fact, in most cases the competing rights will not be of the same nature (eg, privacy versus free speech), and this does not make the case unjusticiable or a 'political question'. Arguably, the Court's judgment glosses over the comparative individual sacrifice requested of each party and the relevant conduct of the parties. As to the former aspect, for Ms Evans, the right to become a genetic parent and the right to avail herself of assisted reproduction treatment began and ended with the embryos in dispute. Mr Johnston's right to become a parent or not was only affected in one specific instance, and the encroachment could have been mitigated; the law could have allowed Ms Evans to become a mother and treat Mr Johnson as an anonymous sperm donor, without imposing maintenance or other obligations. The psychological sacrifice required of him would thus have been less weighty. Moreover, insufficient consideration is given in the judgment to the fact that the applicant's own genetic material was being disposed of; as the dissenters rightly emphasised: 'The act of destroying an embryo also involves destroying the applicant's eggs.'[99] Indeed, Ms Evans was prevented from using her only surviving procreative material; to that extent, and contrary to the majority's view,[100] the controversy did not concern an alleged positive obligation but an active interference with the applicant's right to respect for her private and family life.

As regards conduct, the boyfriend's enduring right to choose whether to become a parent or not (up to the moment of the implantation) was arguably weakened by two critical factors: firstly, his awareness of the woman's special medical circumstances at the time that he encouraged her choice to have her eggs fertilised with

[98] C Lind, '*Evans v UK*—Judgments of Solomon: Power, Gender and Procreation' (2006) 18(4) *Child and Family Law Quarterly* 576, 587–88. See further 588: 'The de facto privileging of one gender is as unacceptable in law as is (unlawful) direct discrimination. On that basis it would have been easy for the European Court (and, indeed, the domestic courts) to hold that the English legislation offended Article 14 of the Convention.'

[99] *Evans v UK* (n 13) joint dissenting opinion of Judges Türmen, Tsatsa-Nikolovska, Spielmann and Ziemele, para 8.

[100] See *Evans v UK* (n 13), para 76.

his sperm rather than donor sperm, thus making her motherhood chances entirely and irreversibly dependent on his cooperation; and, secondly, his promise not to revisit his decision to consent to the use of the embryos, which could be construed as a verbal agreement to waive his statutory right to withdraw consent. The Court seemed to think that his legitimate expectation to rely on the statute to withdraw consent should be upheld, but not *her* legitimate expectation arising from the conduct of a private party; the common law recognition of estoppel (dismissed early on in the course of the domestic litigation) is precisely aimed at securing protection where a party relies on a promise to their great detriment. Having to choose between two equally important rights, the Court had the authority and moral obligation to express a preference for the less blameworthy party and the party on whom the consequences were more substantial.

The grounds for criticism of the *Evans* ruling possibly include further objections. Whereas *Evans* is an attempt to transplant the human rights discourse to new reproductive technologies, the equal treatment of the two competing rights discloses the Court's unease with bioethical analysis. Sándor noted in this respect: 'A competing view, that would follow from bioethics, would take into account and assess the difference in the burden of physical involvement in the procedure. Lengthy hormonal treatment and invasive extraction of the human eggs pose significantly more of a burden on women than is the case with sperm donation.'[101] Moreover, the emphasis on the equal worth of the right to become and not to become a parent *in abstracto* pays no attention to the fact that this was hardly a case of coerced parenthood. Mr Johnston had deliberately sought fertility treatment with Ms Evans for the purposes of procreating, there was a common project of parenthood, which is why she neither used donor sperm to produce embryos nor opted to have eggs frozen. The postponed fertilisation (allowing for his change of heart) was happenstance; indeed, the only reason why the implantation of embryos was deferred was Ms Evans' medical condition. Her argument that if intercourse had taken place, he could not have compelled her to terminate the pregnancy should thus not have been easily dismissed; the all-important timing of events should have been carefully analysed. The distinction between the right not to be coerced into parenthood and the right to retract on a planned parenthood is unfortunately not considered in the judgment.

More problematically, at a rhetorical level, the Court attached the same weight to the competing rights at stake; purportedly, 'it d[id] not consider that the applicant's right to respect for the decision to become a parent in the genetic sense should be accorded *greater* weight than J.'s right to respect for his decision not to have a genetically related child with her' (emphasis added).[102] The Court's analysis was, however, in no way neutral in practice or based on an equal worth

[101] J Sándor, 'Bioethics and Basic Rights: Persons, Humans, and Boundaries of Life' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford, Oxford University Press, 2012) 1142, 1149.

[102] *Evans v UK* (n 13) para 90.

approach; on the contrary, it accorded significantly greater weight to the right not to become a parent, since for the applicant this particular instance of denial meant the nullification of her right *tout court*.[103] As the dissenters convincingly held, 'the majority's approach resulted not simply in the applicant's decision to have a genetically related child being thwarted but in the effective eradication of any possibility of her having a genetically related child, thus rendering any such decision now or at any later time meaningless'.[104] Rather than a dilemma between incommensurable rights of equal importance, *Evans* can indeed be interpreted as a ruling in which 'the Court recognized that [in cases of *in vitro* treatment] the father's right not to become a parent should prevail over the woman's interest in becoming a mother'.[105]

The ethical and legal problems raised by the new procreative techniques are further illustrated by the issue of posthumous insemination. The existing authorities would seem to suggest that such a claim would be unsuccessful in Strasbourg proceedings. As recalled earlier, in *X v Belgium and The Netherlands*, the Commission confirmed the dependence of the right to found a family upon the existence of a couple, based on the merger of the right to marry and the right to found a family in a single provision.[106] In a case regarding posthumous marriage, the Commission insisted on the fact that Article 12 recognised rights only to 'men and women of marriageable age'.[107] The literature, however, proposes a more modern reading of the Convention in respect of the posthumous use of sperm by the deceased's widow, not on the basis of Article 12, but as an extension of the Article 8 right of the couple to defer the moment of procreation.[108] Naturally, this would presuppose the husband's unequivocal consent to the post mortem use of his sperm. However, since the aspiration to parenthood of the adults takes a back seat when examined against the background of the welfare of the children born in this manner, there is room for the Court to argue that the Convention does not require States to allow this practice and at best leaves it to the determination of each legislature.

Surrogacy is yet another example of bioethical controversy affecting the right to become a parent. In order to determine whether a State may prohibit surrogacy agreements or what effects, if any, ought to be recognised to a surrogacy agreement, one needs firstly to resolve important moral doubts as to whether surrogacy provides a legitimate alternative to aspiring parents who do not have other options

[103] See also J Bomhoff and L Zucca, 'The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights, Evans v the United Kingdom, Fourth Section Judgment of 7 March 2006, Application No 6339/05' (2006) 2(3) *European Constitutional Law Review* 424, 429: 'The dilemma should instead be resolved through careful analysis of the circumstances of the particular case, to avoid the unjust preservation of one person's right by negating the rights of the other.'

[104] *Evans v UK* (n 13), joint dissenting opinion of Judges Türmen, Tsatsa-Nikolovska, Spielmann and Ziemele, para 6.

[105] Sándor (n 101).

[106] *X v Belgium and the Netherlands* (n 5).

[107] *M v Federal Republic of Germany*, App No 10995/84, ECmHR decision of 13 December 1984.

[108] See Coussirat-Coustère (n 44) 306: 'on doit aussi avoir égard pour le droit au respect d'une vie familiale que les époux ont sciemment désiré différer et que la femme souhaite prolonger.'

or, conversely, whether it commodifies the woman's body, fosters exploitation of vulnerable women and places the welfare of children at risk.[109] Unsurprisingly, the Convention authorities were slow to take a clear stand on the matter. In *Lavisse v France* (*'Les Cigognes' Case*),[110] the Commission upheld the domestic authorities' decision to declare illegal an association facilitating the recourse of infertile couples to gestational mothers willing to 'rent their womb' so as to allow a form of 'procréation par substitution'. According to the Commission, the interference with the right to freedom of association guaranteed by Article 11 ECHR had pursued the legitimate aim of preventing the offence of inciting the abandonment of babies at birth. Given the wide margin of appreciation that States enjoyed in an under-regulated and controversial area, as well as the need to balance the collective and individual rights at stake, the Commission found the necessity criterion to be satisfied. The same rationale would have in all likelihood applied to a claim brought by potential beneficiaries of this service based on Article 8.

Notwithstanding the State's margin of appreciation in regulating surrogacy, *existing* family relationships resulting from surrogacy agreements lawfully entered into abroad have received robust judicial protection. In *Mennesson v France*, the Court found that the refusal to grant legal recognition in France to parent–child relationships that had been legally established overseas between children born as a result of surrogacy arrangements and the commissioning couples amounted to a violation of Article 8.[111] The authorities' refusal to attest the affiliation in the birth register had been motivated by the fact that recording such entries would have given effect to a surrogacy agreement that was null and void on public policy grounds under French legislation and that it did not prevent the children from living with their parents. The judgment focuses, as expected, on the lack of consensus in Europe on the lawfulness of surrogacy arrangements and on the legal recognition of the relationship between intended parents and children lawfully conceived abroad as a result of such arrangements, and confirms that this diversity of regulation, reflecting the difficult ethical issues raised, entails a wide margin of appreciation for States in making surrogacy-related decisions. However, the margin was narrowed *in casu* by a number of factors. Firstly, the children's best interests had to prevail. Secondly, parentage is a key aspect of an individual's identity; although no violation was found in respect of the parents' family life (the practical difficulties they faced not being of such gravity as to outweigh the public interests at stake), the judgment found a violation in respect of the children's right to private life. In fact, the failure to recognise them as children of the intended parents jeopardised their identity rights, acquisition of French nationality and inheritance

[109] The literature on the moral dilemmas and human rights issues raised by surrogacy remains divided. Interestingly, Stark has suggested that its legalisation may be seen as a way of ensuring gay couples' equal right to be a parent. See B Stark, 'Transnational Surrogacy and International Human Rights Law' (2011–12) 18 *ILSA Journal of International & Comparative Law* 369, 380.

[110] *Lavisse v France*, App No 14223/88, ECmHR decision of 5 June 1991.

[111] *Mennesson v France*, App No 65192/11, ECtHR judgment of 26 June 2014. See analogously *Labassee v France*, App No 65941/11, ECtHR judgment of 26 June 2014.

entitlements; unlike the parents, who had chosen this path aware of the legal circumstances, the children were not responsible for that choice. Moreover, it also deprived them of recognition of parentage in respect of the biological parent, which could not be found to be in their best interests. The French authorities had consequently overstepped the boundaries of their margin of appreciation.

The Court's approach to surrogacy has further been tested in the recent case of *Paradiso and Campanelli v Italy* concerning the placement in social service care of a nine-month-old child who had been born in Russia following a gestational surrogacy contract entered into by a couple.[112] The judgment is particularly interesting in two respects. Firstly, neither of the commissioning parents had a biological link with the child (although the intention had been for the male partner's sperm to be used for the creation of the embryos implanted in the surrogate mother), and yet the parent–child relationship established abroad was found to engage Article 8 both in respect of private and family life.[113] Secondly, the judgment confirmed that, even in a highly controversial and unsettled area of law, a proportionality assessment can be carried out without the need for a European consensus analysis. The Court held that, regardless of the state of harmonisation in Europe, the domestic courts had acted disproportionately by removing the child and placing him with alternative carers; the applicants, who had previously been assessed as fit to adopt, 'were found to be incapable of bringing up and loving the child on the sole ground that they had circumvented the adoption legislation, without any expert report having been ordered by the courts'.[114] The impact on the child was also considered, namely the fact that 'he had had no official existence for more than two years';[115] the Court stressed the importance of ensuring that a child was not disadvantaged on account of being born to a surrogate mother with regard to crucial aspects such as citizenship or identity (as already established in *Mennesson v France*). Although the Court usually leaves to the respondent the choice of individual and general measures to be adopted in order to put an end to the violation, in this case it was rather prescriptive. It indicated that, given the emotional ties that the child had developed with the foster family, compliance with the judgment did not require the Italian authorities to return the child to the applicants.[116] The case law reviewed thus suggests that relationships already

[112] *Paradiso and Campanelli v Italy*, App No 25358/12, ECtHR judgment 27 January 2015. The case was referred to the GC on 1 June 2015; at the time of writing, the judgment has not yet been issued.

[113] See ibid, para 67: 'the existence or non-existence of family life is essentially a question of fact depending upon the real existence in practice of close personal ties'; and para 69: 'the applicants had acted as parents towards the child … there existed a de facto family life between the applicants and the child.'

[114] ibid, para 84.

[115] ibid, para 85.

[116] ibid, para 88. Two further cases are pending before the Court concerning the inability to obtain recognition in France of the parent–child relationship between the applicants and children born through a surrogate pregnancy abroad: *Laborie and others v France*, App No 44024/13; *Foulon v France*, App No 9063/14; and *Bouvet v France*, App No 10410/14.

formed between children and commissioning couples are entitled to protection, primarily on the basis of the child's best interests. A parallel can be drawn between this stream of cases and the jurisprudence developed in relation to the recognition of foreign adoption based on different eligibility rules, which is examined in the following section.

IV. ADOPTION AS SOCIAL PARENTHOOD

In sharp contrast with parenthood based on natural procreation, which does not need society's stamp of approval, the aspiration to gain parental status by means of adoption is subject to legal constraints.[117] Despite the enactment of legislation contemplating adoption orders in virtually all European legal systems, as well as the evolutive interpretation of the Convention 'in the light of present-day conditions',[118] the Strasbourg institutions have constantly refused to read a right to adopt into either Article 12 or Article 8. Nevertheless, they have gradually shown willingness to perform a control of legitimacy over national measures affecting the exercise of the domestic right to adopt, namely the rules on eligibility of adopters and adoptees, procedural aspects and the recognition of foreign adoptions. In practice, this has eventually brought the institution of adoption in its entirety within the material scope of the Convention, notwithstanding the lack of recognition of a 'right to adopt'.

A. The Alleged Right to Adopt

As regards the existence of the right itself, in *X v Belgium and The Netherlands*, the Commission pointed out that 'the right to adopt is not, as such, included among the rights guaranteed by the Convention. Nor does it appear in the International Covenant on Civil and Political Rights',[119] and therefore a State cannot be required under Article 12 to confer upon a foster carer a particular status in relation to a child they looked after. As recalled earlier in this chapter, the Commission argued that single would-be adopters could not find support in Article 12, in so far as that provision did not guarantee a right to become a parent separate from the right to marry, and in any event not independently from the existence of a couple. The indispensable association between coupledom and the right to found a family was reiterated in *Di Lazzaro v Italy*: 'Article 12 of the Convention, which recognises the right of man and woman at the age of consent to found a family,

[117] On this contrast, see Morozzo Della Rocca (n 42) 218.

[118] *Tyrer v UK*, App No 5856/72, ECtHR judgment of 25 April 1978, para 31; *Marckx v Belgium*, App No 6833/74, ECtHR judgment of 13 June 1979, para 41.

[119] *X v Belgium and The Netherlands* (n 5).

implies the existence of a couple and cannot be construed as including the right of an unmarried person to adopt.'[120] The claim in *Fretté v France* that the refusal to authorise a single homosexual applicant to adopt breached Article 14 taken in conjunction with Article 12 failed on the same consideration that Article 12 only guaranteed the right to marry and found a family to partners of marriageable age and different sex.[121]

At the same time, in respect of complaints lodged by couples rather than single unmarried applicants, the Commission proved equally unwilling to accept that Article 12 could be used to derive a right for would-be adopters, so that the above argument in *X v Belgium and The Netherlands*, *Di Lazzaro* and *Fretté* would seem to have been added *ad abundantiam*. Thus, in *X and Y v UK*, which alleged a right to adopt for infertile married couples, the Commission found that States' commitments under Article 12 did not encompass a positive obligation to guarantee that right.[122] According to the Commission, the right to found a family within the meaning of Article 12 merely protected a couple's right to procreate naturally: 'whilst it is implicit in Article 12 that it guarantees a right to procreate children, it does not as such guarantee a right to adopt or otherwise integrate into a family a child which is not the natural child of the couple concerned.'[123] The Commission seemed prepared to concede that adoption might be subsumed under the right to found a family: 'the adoption of a child and its integration into a family with a couple might, at least in some circumstances, be said to constitute the foundation of a family by that couple. It is quite conceivable that a "family" might be "founded" in such a way'.[124] It highlighted, however, that Article 12 left the regulation of any such right to the discretion of State parties.

The notion that a family may be founded on adoptive ties was also alluded to in an obiter dictum in the *Van Oosterwijck v Belgium* case, in the context of an examination of the procreative function of marriage.[125] The principle was more forcefully reiterated in *X v The Netherlands*, where the Commission stressed that founding a family under Article 12 does not exclusively refer to biological descent: 'the concept of family life in a great number of member States legitimates the view that the founding of a family, within the meaning of Article 12, does not only envisage natural children, but also adoptive children. As provided by the Article, the exercise of such a right is governed by the national laws.'[126]

Despite these concessions, the thesis according to which Article 12 requires States to ensure a right to adopt was consistently rejected. Since adoption, where

[120] *Di Lazzaro v Italy*, App No 31924/96, ECmHR decision of 10 July 1997, para 139.
[121] See *Fretté v France*, App No 36515/97, ECtHR decision of 12 June 2001, para 1.
[122] *X and Y v UK*, App No 7229/75, ECmHR decision of 15 December 1977.
[123] ibid, para 34.
[124] ibid.
[125] See *Van Oosterwijck v Belgium* (n 8), para 59: 'une famille peut toujours être fondée par l'adoption d'enfants.'
[126] *X v The Netherlands*, App No 8896/80, ECmHR decision of 10 March 1981.

available domestically, did not correspond to an obligation under the Convention, initially the Commission also found that 'it is left to national law to determine whether, or subject to what conditions, the exercise of the right in such a way should be permitted'.[127] As a result, for a long time, Strasbourg supervision of national decision-making in this area remained quite deferential, largely limited to ascertaining the existence of a legal basis for the impugned restrictive measure. In the above-mentioned *X v The Netherlands*, the complaint regarded the refusal of authorisation to adopt a particular child by a couple, on the basis that the eligibility criteria prescribed by national law were not met, namely the age difference between adopters and adoptee exceeded 40 years and the child had reached school age. The Commission found the decision of the Dutch authorities compatible with Article 12, 'since the relevant national provisions did not allow the exercise of the right in the way envisaged by the applicant and her husband'.[128] The Commission placed emphasis on the referral in Article 12 to national law for the regulation of the right to found a family, including by adoption, and did not concern itself with the specific circumstances of the case.

In the Strasbourg authorities' analysis, Article 8 has equally failed to support the putative right to adopt under the Convention. In *Fretté v France*, the Court stressed that Article 8 did not guarantee a right to adopt; in fact, 'the right to respect for family life presupposes the existence of a family and does not safeguard the mere desire to found a family'.[129] In some cases, however, a de facto family-like situation already existed and the applicants sought to secure their position as carers by acquiring legal rights. Thus, the applicant in the afore-mentioned *X v Belgium and The Netherlands* had been denied the possibility to adopt an abandoned child for whose care he had already been responsible for several years on the sole ground that he was unmarried. The Commission hastily dismissed the application of Article 8 relying on the absence of a right to adopt, failing to distinguish between an application for advance authorisation to adopt and an application in respect of a minor already looked after by the applicant. Surprisingly perhaps, the Commission did not attempt to establish whether the lengthy family-like relationship between the foster parent and the child amounted to 'family life' within the meaning of Article 8, nor did it consider whether the child's welfare would have been better protected by formalising the relationship with the de facto carer and providing him with a more secure home environment, as well as with a sense of belonging and patrimonial rights.

Nevertheless, more recent case law has demonstrated that patent anomalies in the domestic rules on adoption may be reviewable. An illustration of the Court's willingness to scrutinise conditions and procedures established by adoption

[127] ibid.

[128] ibid.

[129] *Fretté v France*, App No 36515/97, ECtHR judgment of 26 February 2002, para 32. See also *EB v France*, App No 43546/02, ECtHR judgment of 22 January 2008 [GC], para 41, where the Court reiterates that 'the provisions of Article 8 do not guarantee either the right to found a family or the right to adopt'.

legislation, notwithstanding its optional nature under the Convention, is the *Emonet v Switzerland* judgment[130] concerning the legal effects of adoption orders. It was held that national legislation resulting in the severing of a mother–daughter relationship following the adoption of the daughter by the mother's long-term cohabitee constituted an interference with the right to respect for family life. The Court stressed that the severance of the mother–daughter relationship was not in the best interests of the adoptee, a disabled adult in need of care and emotional support. By agreement between the three applicants, an adoption order had been sought so that they could all become a family in the eyes of the law. Although the adoptee was an adult, there were thus additional factors of dependence other than normal emotional ties that brought into play the guarantees of Article 8.[131] According to the Court,

> 'respect' for the applicants' family life required that biological and social reality be taken into account to avoid the blind, mechanical application of the provisions of the law to this very particular situation for which they were clearly not intended. Failure to take such considerations into account flew in the face of the wishes of the persons concerned, without actually benefiting anybody.[132]

Arguably, the Court's emphasis on the special circumstances of the case was unnecessary and unduly restrictive in its achievements; it is submitted that whenever a step-parent is allowed to consolidate their de facto relationship with a child through adoption only at the expense of the child's legal relationship with the biological parent, the child's position is debilitated without any higher pressing social need being served.[133] A law leading to an absurd result and jeopardising the child's rights and the unity of the family group cannot be deemed consistent with respect for family life, regardless of the age and circumstances of the parties.

Other anomalies complained of in Strasbourg proceedings concern allegedly discriminatory practices in respect of single homosexual applicants (*Fretté v France*, *EB v France*) or second-parent adoption in gay couples (*Gas and Dubois v France*,[134] *X v Austria*).[135] Since the Court's analysis in such cases is less concerned with the institution of adoption and primarily hinges on the limits of permissible discrimination on grounds of sexual orientation, this strand of case law will be discussed at length in the following chapter. What should be noted for the present purposes is that the fundamental distinction between assisted reproduction

[130] *Emonet v Switzerland*, App No 39051/03, ECtHR judgment of 13 December 2007.
[131] ibid, para 37.
[132] ibid, para 86.
[133] The reform of adoption law in England and Wales demonstrates that it is quite possible to reconcile the effects of adoption in general (severing all ties with the birth parents) with the specific circumstances of step-parent adoption. Before the Adoption and Children Act 2002, the natural parent had to adopt his or her own child in a joint application with the new spouse; after 30 December 2005, pursuant to the entry into force of the new statute, the step-parent can seek adoption as a sole applicant (s 51(2)) and the adoption order does not affect the parental status of the former's partner, while it does extinguish the parental status of the other natural parent.
[134] *Gas and Dubois v France*, App No 25951/07, ECtHR judgment of 15 March 2012.
[135] *X v Austria*, App No 19010/07, ECtHR judgment of 19 February 2013 [GC].

and adoption as methods of becoming a parent is that while assisted reproduction is adult-oriented (in that it exclusively accommodates the aspiration to become a parent), adoption aims primarily at placing an abandoned child with a family. Although the adults' wishes are also involved (in fact, this is not a mere charitable enterprise), adoption is not about giving a child to a family, but about giving a family to a child.[136] Consequently, adoption decisions must be governed by the paramountcy of the child's interests. Arguably, the Court's tendency to treat gay adoption applications as discrimination cases diverts the attention from the welfare of children to the interests of adults. Thus, *X v Austria* (concerning second-parent adoption in same-sex couples)[137] was largely decided on the basis that, under Article 14, the homosexual cohabitee was in a similar situation to a heterosexual cohabitee (albeit not a spouse) who wished to adopt a step-child.[138] Although the Court's decision focuses, rather sensibly, on the absolute nature of the prohibition of second-parent adoption in same-sex couples (as opposed to a case-by-case determination),[139] the welfare of the child remains secondary. It could certainly be argued that a case-by-case decision is precisely what allows a court to take into account the best interests of the child subject to the adoption application; however, it is regrettable that child-related concerns are not at the core of the ratio decidendi.

The case law in this area raises further methodological concerns. *EB v France* established that domestic legislation allowing adoption by single applicants cannot establish a bar on adoption for homosexual single applicants.[140] Determining specific eligibility criteria for the issuing of adoption orders might be considered to amount to policy-making,[141] unless supported by sufficient common European

[136] See Della Rocca (n 42) 218: 'l'adozione serve, invero, a dare una famiglia al bambino … pur se il desiderio di genitorialità è comunque alla base di un equilibrato approccio culturale all'adozione, che rifugge la motivazione puramente filantropica.'

[137] The applicant had been barred from adopting the son of a woman with whom she lived in a stable relationship; the domestic courts had refused to ratify the adoption agreement concluded between the two women on the basis that, according to Austrian law, a child should not have two mothers or two fathers (second-parent adoption was open to unmarried heterosexual couples).

[138] *X v Austria* (n 135) paras 151, 153.

[139] See ibid, para 146: 'the lack of evidence adduced by the Government in order to show that it would be detrimental to the child to be brought up by a same-sex couple or to have two mothers and two fathers … cast considerable doubt on the proportionality of the absolute prohibition on second-parent adoption in same-sex couples … the considerations adduced … would seem rather to weigh in favour of allowing the courts to carry out an examination of each individual case'.

[140] See A Bainham, 'Homosexual Adoption' (2008) 67(3) *Cambridge Law Journal* 479–80: 'It is crystal clear from this judgment that it is no longer lawful under the Convention for states to operate a blanket rule that they will not permit adoption by homosexuals. While sexual orientation can be relevant, along with all other circumstances, it cannot be a bar to eligibility.'

[141] The Court would engage in micro-management if it purported to decide the statutory age difference between adopters and adoptee or the length of the probationary placement of the child with prospective adopters. In principle, the aspiring adopters' sexual orientation may interest the Court to the extent that legislation using a suspect category requires strict scrutiny. However, in its examination of the respondent States' justification, the Court cannot ignore the limits placed on its interpretative jurisdiction by the VCLT when compared to domestic constitutional courts. See Introduction, section II.

ground. Certain aspects of adoption, in particular adoption by homosexuals, are still the subject of much disagreement in Europe,[142] and arguably do not justify 'legislative' rulings under the ECHR umbrella or the abandonment of the precautionary principle in matters regarding the welfare of children. Moreover, the *EB v France* decision in support of adoption by single homosexual applicants cannot be meaningfully reconciled with the recognition, in *Alekseyev v Russia*, that no consensus has been reached on the issue of authorising adoption by same-sex couples.[143]

B. Protection of Adoption-Based Families

The fact that Article 8 does not cover a right to integrate a child into the family does not mean that adoptive families are not entitled to protection under that provision. The Commission clarified early on in *X v Belgium and The Netherlands* that where adoption has been effected according to the relevant legislation, the relationship created between adopter and adoptee comes under the scope of Article 8 and any interferences require justification:

> The fact that the applicant cannot claim 'the right to found a family' does not mean, however, that the relationship between an adoptive parent and an adoptive child is not of the same nature as the family relations protected by Article 8 of the Convention … [A] State cannot separate two persons united by an adoption contract, or forbid them to meet, without engaging its responsibility under Article 8 of the Convention.[144]

This position was subsequently consolidated in *X v France*.[145] The applicant and his wife had adopted a six-year-old boy with the consent of the natural mother; following the death of the applicant's wife and his re-marriage, a conflictive situation had developed with the child, with the result that the applicant entrusted the child provisionally to his natural mother. Two years later, the mother refused to return the child and obtained a court decision withdrawing the applicant's parental authority and awarding child custody to her. The Commission recalled that 'although the right to adopt is not one of the rights specifically guaranteed under

[142] See J Tobin and R McNair, 'Public International Law and the Regulation of Private Spaces: Does the Convention on the Rights of the Child Impose an Obligation on States to Allow Gay and Lesbian Couples to Adopt?' (2009) 23(1) *International Journal of Law, Policy and the Family* 110, 128: 'The ability of same sex couples to adopt children remains limited to only a handful of states—the UK, Spain, France, South Africa, Israel, Guam, Andorra, the Netherlands, Denmark, Belgium, Iceland, and Sweden … Moreover in some of these jurisdictions, the scope of a gay or lesbian person's capacity to adopt is limited to "second parent" or "step parent" adoption, that is, the adoption by one partner of the biological or adopted child of the other partner … Thus the dominant position, in those states in which adoption is permitted, is that same sex couples should not be eligible to adopt children.'

[143] *Alekseyev v Russia*, App Nos 4916/07; 25924/08; 14599/09, ECtHR judgment of 21 October 2010, para 83.

[144] *X v Belgium and The Netherlands* (n 5).

[145] *X v France*, App No 9993/82, ECmHR decision of 5 October 1982.

the Convention, the relations between an adoptive parent and an adopted child are as a rule the same family relations protected by Article 8'.[146] The decision found, however, that domestic legislation did not discriminate between adoptive parents and biological parents in respect of the possibility of withdrawal of parental responsibility for lack of care; the proceedings leading to the judicial decision to withdraw parental authority had applied the same principles between the adoptive father and the natural mother that would have applied in a custody case between two divorced parents, the emphasis being placed on the child's physical and emotional well-being. The complaint was thus rejected in so far as the withdrawal of parental responsibility sought to secure the 'health' and 'protection of the rights' of the child within the meaning of Article 8(2).[147]

It is difficult to justify this ruling other than in light of the very specific facts of the case. If adoption is intended as severing all legal ties with the birth family and creating a new legal parent–child relationship for all intents and purposes, recognising an equal and competing standing to the former parent, who is no longer a parent in the eyes of the law, undermines the 'legal transplant' of the child into the adoptive parents' family sought by adoption orders; this has further policy implications, in that it may deter potential adopters. In the case at hand, however, the biological mother had acted as the child's carer for a consistent period of time with the consent of the adoptive father, which arguably revived her standing in relation to the child. It is also important to note that, whilst insufficiently emphasising the security and stability of adoption as objectives required by the child's welfare, the decision does not establish a presumption in favour of the biological parent in a dispute with the adoptive parent.

The Court's judgment in the *Pini and Bertani* case[148] reaffirms the Commission's earlier approach to adoptive families as being covered by Article 8 even in extreme cases, where the relationship between adopters and adoptees is merely a legal one. The applicants, two Italian couples, had obtained adoption orders in respect of two nine-year-old Romanian girls living in a private care centre. However, the care centre had refused to transfer custody to the applicants, who complained that the Romanian authorities had not taken the necessary steps to enforce the orders. Even though the children concerned had never lived with their adoptive families, the Court found that there was a bond between the applicants and their adopted children that benefited from Article 8 guarantees: 'although the right to adopt is not, as such, included among the rights guaranteed by the Convention, the relations between an adoptive parent and an adopted child are as a rule of the

[146] ibid.

[147] The Court acknowledged that a 'judicial decision separating two persons united by the bond of adoption may amount to an interference with the right to respect for the adopting parent's and/or the adopted child's family life within the meaning of Article 8(l) of the Convention'.

[148] *Pini and Bertani & Manera and Atripaldi v Romania*, App Nos 78028/01; 78030/01, ECtHR judgment of 22 June 2004.

same nature as the family relations protected by Article 8 of the Convention.'[149] Thus, a relationship created by a lawful final adoption order, conferring parental status upon the applicants, even in the absence of any close de facto ties, was sufficient to trigger the protection of Article 8.

A parallel can be drawn with Strasbourg case law establishing that the mere biological bond between parent and child gives rise to 'family life' within the meaning of Article 8 even before they have had a chance to develop a family life together,[150] and that Article 8 may even extend to the potential relationship between a child born out of wedlock and the putative father seeking to challenge the presumption of paternity in favour of his former fiancée's husband.[151] Significantly, the judicial recognition that the mere legal bond between adoptive parents and children triggers the application of Article 8, protecting the *potential* relationship they may develop, indicates an acknowledgement of the equal value of adoption-based descent and biological descent.

The case law nevertheless reveals minor disparities in relation to the otherwise equal standing of biological and adoptive families under Article 8. In fact, in adoption cases, the balancing exercise undertaken by the Court to weigh the competing interests of parents and children is more heavily oriented towards children's rights. The Court thus stated in the above-mentioned *Pini and Bertani* case that 'it is *even more important* that the child's interests should prevail over those of the parents in the case of a relationship based on adoption', in so far as 'adoption means "providing a child with a family, not a family with a child"' (emphasis added).[152] Adoptive parents are therefore in a more precarious position when compared to biological parents, as the courts are entitled to treat the children's welfare as a trumping consideration rather than seeking to achieve a fair balance between concurring rights. In *Pini and Bertani* itself, greater weight was placed on the children's wishes not to be removed to a foreign country and live with persons they perceived as strangers,[153] and on their unlikely harmonious integration into the new families.[154] Thus, 'the applicants' right to develop ties with their adopted children was circumscribed by the children's interests, notwithstanding the applicants' legitimate aspirations to found a family';[155] as a result, the authorities' decision not to further seek to enforce the adoption orders had not breached Article 8.[156]

[149] ibid, para 140.

[150] See *MB v UK*, App No 22920/93, ECmHR decision of 6 April 1994, para 2; *Keegan v Ireland* (n 79) para 44; *Kearns v France*, App No 35991/04, ECtHR judgment of 10 January 2008, para 72.

[151] *Nylund v Finland*, App No 27110/95, ECtHR decision of 29 June 1999, para 2.

[152] *Pini and Bertani & Manera and Atripaldi v Romania* (n 148) para 156.

[153] See ibid, para 153: 'at issue here are the competing interests of the applicants and of the adopted children. There are unquestionably no grounds, from the children's perspective, for creating emotional ties against their will between them and people to whom they are not biologically related and whom they view as strangers'.

[154] See ibid, para 164: 'Their conscious opposition to adoption would make their harmonious integration into their new adoptive family unlikely.'

[155] ibid, para 165.

[156] ibid, para 166.

The decision does not appear unfair on the facts of the case, considering that at issue was the adoption of older children, sufficiently mature for their wishes to be critical, and that the adoptive parents had never actually fulfilled a parental role. Nonetheless, the general principle allowing for a difference in treatment between an adoptive parent and a natural parent may appear less justified in cases where the adoptive parent has cared for the child for a long period of time.

The principle of *Pini and Bertani* is undoubtedly in opposition with the approach to reconciling children's and parents' rights in natural affiliation cases. In *Johansen v Norway*, the Court thus rejected the respondent government's claim that in case of contrast between parents' and children's interests, the latter were paramount, and insisted that 'a fair balance has to be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child'.[157] The Court further stated that: 'In carrying out this balancing exercise, the Court will attach particular importance to the best interests of the child, which, depending on their nature and seriousness, *may* override those of the parent … in particular … the parent cannot be entitled under Article 8 … to have such measures taken as would harm the child's health and development' (emphasis added).[158] The conclusion seems to be that children's interests are paramount in case of conflict with the interests of adoptive parents, whereas in case of conflict with the biological parents' rights, anything falling short of physical or emotional (risk of) harm may not reach the threshold required for interference. Against the background of the recognition of the adoptive family as a 'family' for all intents and purposes under Article 8, this is an important distinction in the level of protection afforded to adoptive parents as opposed to natural parents.

Another difference between biological and adoptive families in light of the case law is that the legal ties created by adoption are not necessarily irreversible. That said, a decision revoking an adoption order is a very serious interference and needs to be justified by compelling reasons under the second paragraph of Article 8. In *Kurochkin v Ukraine*, the Court found that the annulment of an adoption was a disproportionate interference with the adoptive father's family life, in so far as insufficient reasons had been adduced to demonstrate its necessity in a democratic society.[159] The applicant's former wife had sought an annulment of the adoption order in respect an 11-year-old child, who had developed a negative relationship with her, including aggressive behaviour. Although the relationship with the father was a positive one and the couple were divorced at the time of the annulment

[157] *Johansen v Norway*, App No 17383/90, ECtHR judgment of 7 August 1996, para 78.

[158] ibid. See, however, *Yousef v The Netherlands*, App No 33711/96, ECtHR judgment of 5 November 2002, para 73 for a decision where the child's welfare was considered 'paramount' when competing with the natural parent's interests. Nonetheless, it should be pointed out that the contested measure (the impossibility of legally recognising the child) did not prevent the applicant's access to the child.

[159] *Kurochkin v Ukraine*, App No 42276/08, ECtHR judgment of 20 May 2010, paras 53–59. See also *Ageyevy v Russia*, App No 7075/10, ECtHR judgment of 18 April 2013, where the revocation of adoption while criminal proceedings for suspected child abuse were still pending was found to amount to a violation of the right to respect for family life.

proceedings, the annulment was ordered in respect of both parents. The child continued to live with the applicant, who was appointed his legal guardian, which suggested to the Court that the annulment had not been 'necessary'; in fact, that legal arrangement disproved the authorities' claim that the applicant lacked authority over the child and was unable to ensure his proper upbringing. It would therefore appear that the ECHR does not impose a principle of irrevocability of adoption orders; however, any revocation must respond to a pressing need.

Conversely, Strasbourg case law indicates that a difference in treatment between biological children and adoptive children, for instance, in respect of inheritance rights, is not legitimate under the Convention. In *Pla and Puncernau v Andorra*, the Court considered whether a testamentary disposition drafted in 1939 and executed in 1995 could be interpreted as excluding adoptive grandchildren. The testatrix intended to leave certain assets to a son or grandson of a lawful canonical marriage, and two great-grandchildren had brought civil proceedings on the basis that the adopted child of the deceased's son could not inherit under this will. The domestic courts had reasoned that adoption was unheard of in Andorra during the first half of the twentieth century and therefore the intention of the testatrix could not have been to include an adoptive child.[160] The European Court disagreed and found that the interpretation of the notion of 'son' as covering only biological children was in blatant disregard for the prohibition of discrimination, therefore breaching Article 14 when read in conjunction with Article 8.[161] That distinction in the judicial interpretation of the will by domestic courts was found to pursue no legitimate aim and to have no objective and reasonable justification; an adopted child was in the same legal position as a biological child of their parents in all respects.[162] The Court also stressed that since the Convention is a dynamic instrument, domestic courts could not ignore new realities: even though the will had been made in 1939, the testatrix could not be presumed to have meant that adoptive children were not considered 'children' for succession purposes.[163]

C. Recognition of Foreign Adoptions

A final observation on adoptive families regards the wide, albeit not unlimited, margin of appreciation afforded to States in relation to the recognition of foreign adoptions. As the Commission indicated in *X and Y v UK*, States are under no obligation to permit international adoptions, to recognise legal effects to adoptions occurred in other States or to allow the entry of foreign minors into their territory with a view to adoption proceedings. The Commission found consistent with the Convention the UK's decision not to recognise the adoption in India of an Indian

[160] *Pla and Puncernau v Andorra*, App No 69498/01, ECtHR judgment of 13 July 2004, paras 47–52.
[161] ibid, paras 58–59.
[162] ibid, para 61.
[163] ibid, para 62.

child by the uncle, a British citizen of Indian origins, and consequently not to allow the child to enter the UK in order to live with the adoptive father. According to the Commission, as long as the State does not interfere with a person's right to procreate, the refusal to grant the individual a right to found a family according to a particular procedure sought by them does not breach Article 12.[164]

Exceptionally, however, non-recognition of a lawful foreign adoption may amount to a violation where it interferes with de facto family life within the jurisdiction. In *Wagner and JMWL v Luxembourg*, the claimant, who had adopted a three-year-old girl in Peru as a sole applicant, wished to have the Peruvian adoption decision declared enforceable in Luxembourg, with a view to securing, amongst other things, the acquisition of Luxembourg nationality by her daughter.[165] The domestic courts had dismissed her application on the basis that under domestic law, unmarried persons were not eligible to adopt. Having found that there had been an interference with Mrs Wagner's and her daughter's right to respect for family life,[166] and that the interference pursued the legitimate aim of protecting 'health or morals' and the 'rights and freedoms' of the child,[167] the Strasbourg Court undertook to examine whether the measure was 'necessary in a democratic society'. It thus observed that a broad consensus existed in Europe in favour of adoption by unmarried persons[168] and that the denial of recognition failed to take account of the actual social reality of the case; as a result of the authorities' refusal to fully recognise the adoption, the claimants encountered obstacles in their day-to-day lives (including the need to regularly apply for a resident permit and a visa to travel to certain countries).[169] The national decision therefore did not promote the best interests of the child.[170] This also amounted, for the Court, to unlawful discrimination, in so far as the Peruvian girl had been penalised on account of her status as an adoptive child of an unmarried mother whose family ties were based on a foreign adoption order.[171]

It may certainly be argued that a person can circumvent national legislation on adoption by seeking an adoption order abroad under a more permissive legislation and then presenting the national authorities with a fait accompli. Nonetheless, the Court's argument concerning the importance of protecting the social

[164] See *X and Y v UK* (n 122) para 35: 'Whilst the first applicant may have been prevented from exercising his right to "found a family" in the particular way in which he desired, the Commission does not therefore consider that this was inconsistent with Article 12, since the relevant national laws did not allow for the exercise of the right in such a way. There is no question of the right of the first applicant and his wife to procreate children having been interfered with.' Also, since, despite the adoption, the child had continued to live with the birth family, and between him and the uncle/adoptive father there had never been effective family life, the Commission held that art 8 was not applicable.

[165] *Wagner and JMWL v Luxembourg*, App No 76240/01, ECtHR judgment of 28 June 2007.

[166] ibid, paras 118–23.

[167] ibid, paras 125–26.

[168] ibid, para 129.

[169] ibid, para 132.

[170] ibid, para 133.

[171] ibid, paras 155–59.

reality and prioritising the welfare of the child remains compelling. As long as there are no public policy reasons against recognition, no one's interests are served by placing legal obstacles in the path of the development of a normal family life by those concerned.

At the same time, it should be noted that the Court's approach to the recognition of foreign acts has gone beyond the protection of minor children caught in international adoption dynamics. In *Négrépontis-Giannisis v Greece*, the Court also found that the refusal to recognise the adoption of a young adult by his uncle (a monk), which lawfully occurred in the US, breached Article 8 ECHR.[172] The reasoning in this case focuses on the fact that the recognition had been successfully reversed, in proceedings brought by the uncle's heirs after his death, largely on the basis of obsolete ecclesiastic rules prohibiting adoption by a monk. The grounds for non recognition did not therefore respond to a pressing social need.

The examination of the Strasbourg jurisprudence on adoption shows that while a 'right to adopt' has never been recognised under the Convention, the regulation of this institution, where States choose to introduce it, is not free from international judicial supervision. After some initial hesitation, the Court was willing to accept that adoption-related matters fall within the general ambit of Article 8, and hence even though States have no obligation to introduce adoption legislation, complaints regarding adoption proceedings will be admissible, which is tantamount to saying that the *exercise* of the right to adopt is reviewable in Strasbourg litigation. It is undisputed, in light of the case law, that Article 8 guarantees the equal protection of adoptive families lawfully constituted, although there is still room for different treatment in case of conflicting parent–child interests, irrevocability and recognition of foreign adoptions.

V. THE RIGHT OF PRISONERS TO FOUND A FAMILY: A NON-EXERCISABLE RIGHT?

One of the seemingly inevitable consequences of deprivation of liberty is the disruption of matrimonial cohabitation, with the ensuing loss of opportunity to procreate. The compatibility of such restrictions with the Convention has nevertheless been disputed in Strasbourg proceedings. Litigants have thus claimed that States have an obligation to facilitate the enjoyment of Article 12 rights either by allowing conjugal visits in prison or providing access to assisted insemination treatment.

Initially, the case law accepted that practical impediments to the exercise of the right to found a family are inherent in the circumstances of deprivation of liberty. The Commission established in *X v UK* that the delay in exercising the right to become a parent by a detainee, as a result of objective circumstances, is

[172] *Négrépontis-Giannisis v Greece*, App No 56759/08, ECtHR judgment of 3 May 2011.

not imputable to the authorities and therefore not incompatible with Article 12: 'Although the right to found a family is an absolute right in the sense that no restrictions similar to those in para. (2) of Art. 8 of the Convention are expressly provided for, *it does not mean that a person must at all times be given the actual possibility to procreate* his descendants' (emphasis added).[173] The decision also relied on the detainee's own responsibility for his limitative circumstances: 'It would seem that the situation of a lawfully convicted person detained in prison in which the applicant finds himself falls under his own responsibility, and that his right to found a family has not otherwise been infringed.'[174] The reference to the applicant's culpability was criticised by the scholarship; according to van Dijk, 'the remark about the blameworthiness … even if tenable according to modern doctrines of criminology and forensic psychiatry, may nevertheless not be used as a justification of restrictions which are not justified otherwise'.[175] Moreover, the Commission glosses over justifications which, albeit not indefensible, would have required a more extensive and compelling analysis. The first one, emphasising the mere deferral of the opportunity to procreate, needs to take into account the length of the remaining detention period and discuss at what point the temporary restriction might become significant enough to impair the essence of the right. The second one, regarding the blameworthy conduct of the detainee, would require an examination of legitimate penological aims and a position on whether the commission of *all* crimes should result in forfeiting some fundamental rights and, if so, which. The case law had indeed already suggested that the right of access to a court (*Golder v UK*)[176] is not automatically forfeited by virtue of being detained; subsequently, the same was held to be true of the right to vote (*Hirst v UK (No 2)*). By contrast, the *X v UK* decision fails to explain why the right to found a family should be inescapably forfeited as a result of detention.

A right under Article 8 to preserve conjugal life per se, not necessarily connected with procreative purposes, was rejected in *X and Y v Switzerland*.[177] In that case, two spouses detained in the same prison complained of the refusal of prison authorities to allow them the possibility of unsupervised contacts in order to maintain conjugal relations. The Commission focused on the risks of unsupervised contact in prison as the rationale for the interference, absorbed by the second paragraph of Article 8:

> it is generally considered to be justified for the prevention of disorder in prison not to allow sexual relations of married couples in prison … the security and good order in prison would be seriously endangered if all married prisoners were allowed to keep up their conjugal life in the prison … Uncontrolled visits or contacts could, inter alia,

[173] *X v UK*, App No 6564/74, ECmHR decision of 21 May 1975.
[174] ibid.
[175] Van Dijk et al (n 15) 860.
[176] *Golder v UK*, App No 4451/70, ECtHR judgment of 21 February 1975.
[177] *X and Y v Switzerland* (n 4).

> facilitate the exchange of secret messages, the smuggling in of goods such as drugs or even of arms. Especially with regard to prisoners on remand, who may be detained if there is danger that they might abscond and/or destroy evidence if they were released, the purpose of their detention requires a strict supervision of their contacts with visitors or co-accused.[178]

A request for procreation-oriented conjugal visits was, conversely, at the core of *G and RS v UK*, where the Commission, although noting with favour the tendency in various domestic legal systems to introduce such visits in prison, reiterated that the practice did not (yet) respond to an obligation under the Convention: 'whilst noting with sympathy the reform movements in several European countries to improve prison conditions facilitating such visits, nevertheless *for the present time* the refusal, although constituting an interference with the Article 8 (Art. 8) right, is justified for the prevention of disorder or crime within the meaning of the second paragraph of Article 8' (emphasis added).[179]

While the language of the decisions has gradually placed greater emphasis on the importance for a detainee to preserve family bonds with a view to their subsequent re-integration into society, the outcome of the applications has largely remained unchanged. Before reiterating the position in *G and RS* almost verbatim, the Commission's decision in *ELH and PBH v UK* recalled that 'it is particularly important for prisoners to keep and develop family ties in order to be able better to cope with life in prison and prepare for their return to the community'.[180] The Commission's analysis did not allow for a sufficiently nuanced scrutiny of personal circumstances. In particular, in *ELH and PBH*, the applicants claimed that their possibilities of conception were greatly reduced by the need for the procreative efforts to take place within a specific window after the wife's medical surgery and that artificial insemination went against their religious views. As van Dijk et al argued, the Commission 'should have at least left open the possibility that the evaluation of that justification may have a different outcome, when considered in conjunction with Articles 12 and 9'.[181]

The position of the Court in more recent cases has shown limited willingness to depart from the principles established by the Commission. In *Aliev v Ukraine*, the Court recalled that, in spite of the limitations on the enjoyment of family life entailed by detention, ensuring effective contact with close family members comes within the obligation to respect family life: 'The Court considers that

[178] The fact that both spouses were in prison and there was no contact with the outside world was not considered decisive. See further ibid: 'The fact that the applicants were kept in the same prison cannot be seen as changing the general situation. Other prisoners would consider the position of the applicants as privileged if this fact were to give them additional rights. The arguments which are valid for prisoners in general do, therefore, apply to the applicants as well.'

[179] *G and RS v UK*, App No 17142/90, ECmHR decision of 10 July 1991, para 1. See further ibid: 'An interference with family life which is justified under Article 8 para. 2 (Art. 8-2) of the Convention cannot at the same time constitute a violation of Article 12 (Art. 12).' As discussed at the beginning of this chapter, this proposition would have required a demonstration.

[180] *ELH and PBH v UK*, App Nos 32094/96; 32568/96, ECmHR decision of 22 October 1997, para 2.

[181] Van Dijk et al (n 15) 862.

while detention is by its very nature a limitation on private and family life, it is an essential part of a prisoner's right to respect for family life that prison authorities assist in maintaining effective contact with his or her close family members.'[182] Nevertheless, it was accepted that 'some measure of control of prisoners' contacts with the outside world is called for and is not of itself incompatible with the Convention',[183] and that in particular the refusal of conjugal visits in prison with a view to procreating constitutes a proportionate interference aiming to secure order and to prevent crime.[184]

The alternative option for prisoners aspiring to found a family, namely recourse to assisted reproduction facilities, which does not raise security issues in so far as it does not presuppose unsupervised contact, has been subject to a stricter proportionality test. In *Dickson v UK*, the Grand Chamber was willing to find that opposing a refusal on policy grounds to requests of artificial insemination support by detainees and their spouses (save for exceptional circumstances) did not achieve a fair balance between the individual rights at stake and the rights of the community. The Court held that, despite the margin of appreciation still reserved to States as regards the entitlement to conjugal visits,[185] the lack of a case-by-case determination of whether assisted reproduction treatment should be made available did not observe the proportionality criterion. The respondent government submitted that allowing prisoners guilty of serious offences to conceive children would undermine public confidence in the prison system by circumventing the punitive and deterrent elements of the sentence, and that the long-term absence of a parent would have a negative impact on any child conceived and therefore on society as a whole.[186] Whilst accepting the legitimacy of those aims, the Court found that the policy did not allow for any real weighing of the competing public and individual interests, preventing an adequate assessment of whether the restriction was proportionate in a particular case; by failing to strike a fair balance between the interests involved, the UK had gone beyond any acceptable margin of appreciation and had violated its Article 8 obligations.[187]

Contrasting *Dickson* with *Evans*, two cases involving the right to become a genetic parent and blanket restrictions, Mulligan noted that the different outcome—paradoxically, the acceptance of the more inflexible bar in the latter case—can be explained on account of 'the equal importance of the rights to and not to become a genetic parent' as opposed to the circumstance in which 'the right is balanced against general public interest concern'.[188] It is questionable whether this

[182] *Aliev v Ukraine*, App No 41220/98, ECtHR judgment of 29 April 2003, para 187.
[183] ibid.
[184] ibid, para 189.
[185] *Dickson v UK* (n 46) para 81.
[186] ibid, paras 75–76.
[187] ibid, paras 82–85.
[188] Mulligan (n 48) 381.

is necessarily the case. In *Shofman*, the blanket bar was found to be in breach of the applicant's rights despite the competition with the rights of others (children subject to paternity challenges). There is also no presumption that the community interests in Article 8(2) carry less weight than the 'rights of others', nor can the two be kept entirely distinct conceptually; the rights of the public in *Vinter* can be viewed as a sum of individual rights to protection under Article 2 against third-party violence.

Sudre et al proposed interpreting the *Dickson* judgment as a possible recognition of the right to become a genetic parent.[189] This assessment might be over-optimistic; in fact, the judgment is limited to a more modest finding that an *indiscriminate* refusal to allow a detainee and his wife to resort to artificial insemination constitutes a disproportionate interference. Restrictions other than blanket policies are quite likely to be found to be compatible with the Convention. As Gallus noted, the judgment leaves unanswered an important question featuring in a dissenting opinion attached to the Chamber judgment on the frontier between negative and positive obligations: are assisted insemination requests only occasionally entitled to accommodation, in light of special circumstances, or is the default position that a right of access to assisted reproduction is covered by Article 8, and any restrictions constitute the exception from the rule?[190] In other words, it remains unclear whether Article 8 encompasses a negative obligation to refrain from denying access to this option, save in circumstances listed in Article 8(2), or whether the burden is on the individual to prove that a positive obligation existed *in casu*.

VI. UNWANTED PARENTHOOD AND CONFLICTS OF RIGHTS

A. The Potential Father's Right to Veto a Termination of Pregnancy

While family planning affects the most private sphere of the life of men and women to the same degree, any equality discourse needs to concede that mothers and fathers have a different contribution to the gestational process due to irreducible biological distinctions. The continuation of a pregnancy and the act of giving birth have a different impact on mothers and fathers. This raises issues in the event of incompatible wishes between the potential parents as to creating or extending a family.

Unsurprisingly, the case law has clearly and consistently established that the biological father of the unborn child cannot veto the pregnant woman's decision to undergo abortion. In principle, the exclusion of the father from the decision-making process regarding the foetus may be analysed as an interference with his

[189] According to F Sudre et al, *Les grands arrêts de la Court Européenne des Droits de l'Homme* (Paris, Presses Universitaires de France, 2011) 556, the *Dickson* judgment 'peut s'analyser comme la reconnaissance du droit de devenir parent génétique'.

[190] Gallus (n 62) 217.

right to respect for family life or to become a parent. However, the case law shows that permitting abortion without the father's consent is an interference justified by the need to protect the rights of the woman, even where the pregnancy does not pose a threat to the woman's life or health. Thus, in *WP v UK*, the prospective father had unsuccessfully attempted to prevent his wife's planned termination of pregnancy, and he alleged before the Strasbourg organs that the unavailability of an injunction against abortion amounted to a denial of the right to life of the foetus, as well as of his own right to respect for family life.[191] The Commission relied on textual and holistic interpretation to reject these claims, in particular on the general usage of the term 'everyone' ('toute personne') and the context in which it is employed in Article 2 (none of the exceptions in paragraph 2 being capable of prenatal application), which would indicate that the beneficiaries of the right to life under the Convention do not include the unborn.[192] It further found support in a comparison between Article 2 and Article 4(1) of the Inter-American Convention on Human Rights, which expressly protects life 'from the moment of conception',[193] and in the 'wide divergence of thinking on the question of where life begins', ie, whether at the time the embryo is formed, upon the point that the foetus becomes viable, or upon birth.[194] Moreover, it deemed an interpretation of an absolute right to life of the foetus to be incompatible with the object and purpose of the treaty, read in light of European abortion laws at the time of its adoption (allowing abortion at least when the mother's life was at stake and revealing a tendency towards liberalisation).[195] The conflict between the mother's and father's interests was only briefly addressed. The Commission held that in so far as the abortion interfered with the applicant's right to respect for family life, it was justified under Article 8(2) as being necessary for the protection of the rights of the mother, in particular 'to avert the risk of injury to her physical or mental health'.[196]

Whereas in *WP* the main focus of the analysis was on the lack of recognition of the foetus as a 'person' entitled to rights under Article 2, the Commission's decision in *RH v Norway* examined more closely the potential father's rights under Articles 8 and 9. The decision clearly established the priority of the mother's rights over the legitimate parenthood aspirations of the father, regardless of whether her decision was dictated by medical necessity or social concerns, because she is directly affected by the consequences of either continued pregnancy or abortion.[197]

[191] See *WP v UK*, App No 8416/78, ECmHR decision of 13 May 1980.
[192] ibid, paras 6–9.
[193] ibid, para 11.
[194] ibid, para 12.
[195] ibid, paras 18–20.
[196] ibid, para 26.
[197] See *RH v Norway*, App No 17004/90, ECmHR decision of 19 May 1992, para 4: 'any interpretation of the potential father's right under [arts 8 and 9] in connection with an abortion which the mother intends to have performed on her, must first of all take into account her rights, she being the person primarily concerned by the pregnancy and its continuation or termination.'

Harris et al noted that this decision goes beyond the *WP* case, 'in that the abortion was later in time and for social, rather than health, reasons'.[198]

Consistently with the early case law of the Commission, in *Boso v Italy*, the Court confirmed that Article 2 does not protect unborn life, which is a matter within State discretion and that although the potential father is recognised the status of 'victim' under the Convention, he cannot successfully challenge the wife's decision to have an abortion.[199] The Strasbourg position on this matter has been rather uncontroversial. According to van Dijk et al, in cases regarding abortion, 'consultation of both partners should be prescribed, but ultimately the rights and interests of the woman should have priority over those of the man' in so far as 'her body is most directly concerned and possibly her health and even her life may be at stake'.[200]

A recent element of novelty in the area of family disagreement over a planned abortion is the recognition in the *P and S v Poland* judgment of minors' rights to self-determination in respect of procreative choices, notwithstanding the impact of the decision on the life of their parents.[201] According to Westeson, 'the Court appears to suggest that, in cases of conflict between an underage girl and a parent in the context of abortion, the adolescent's wishes should prevail'.[202] She further notes that the Court's stance is in line with international trends, in particular the recommendation of the Committee on the Rights of the Child in a number of concluding observations on country reports that parental consent to reproductive health services should be abolished.[203]

B. The Expectant Mother's Reproductive Freedom

The truly vexed question regarding unwanted parenthood remains the woman's right to choose. At present, the case law unequivocally indicates that there is no

[198] Harris et al (n 63) 219.

[199] *Boso v Italy*, App No 50490/99, ECtHR decision of 5 September 2002. Contrast this with the position of a member of the public opposing an abortion law in general without having a personal interest/being directly affected, who has no standing. See *X v Austria*, App No 7045/75, ECmHR decision of 10 December 1976.

[200] Van Dijk et al (n 15) 854.

[201] See *P and S v Poland*, App No 57375/08, ECtHR judgment of 30 October 2012, para 109: 'legal guardianship cannot be considered to automatically confer on the parents of a minor the right to take decisions concerning the minor's reproductive choices, because proper regard must be had to the minor's personal autonomy in this sphere. This consideration applies also in a situation where abortion is envisaged as a possible option. However, it cannot be overlooked that the interests and life prospects of the mother of a pregnant minor girl are also involved in the decision whether to carry the pregnancy to term or not.'

[202] J Westeson, 'Reproductive Health Information and Abortion Services: Standards Developed by the European Court of Human Rights' (2013) 122 *International Journal of Gynecology and Obstetrics* 173, 175.

[203] ibid.

right to terminate a pregnancy under the ECHR, even on medical grounds, such as a threat to the expectant mother's physical or psychological health. The Strasbourg authorities found early on that the voluntary interruption of pregnancy was not an exclusive matter of the gestational mother's private life and therefore strict regulation and even bans are considered to represent a legitimate interference with Article 8 rights.

In *Brüggemann and Scheuten v Federal Republic of Germany*,[204] a case decided in the late 1970s, the applicants claimed that, as a result of the restrictive rules on abortion (criminalisation if performed later than 12 weeks after conception, save for medical reasons), they either had to renounce sexual intercourse or to apply methods of contraception or, indeed, to carry out a pregnancy against their will. The Commission's report found that 'legislation regulating the interruption of pregnancy touches upon the sphere of private life', which includes 'the possibility of establishing relationships of various kinds, including sexual, with other persons'.[205] At the same time, it held that further interests are also at play: 'pregnancy cannot be said to pertain uniquely to the sphere of private life. Whenever a woman is pregnant her private life becomes closely connected with the developing foetus.'[206] As a result, the Commission found that there is a public interest in regulating abortion, whether or not the foetus has rights under Article 8 or is covered by the 'rights of others' exception in Article 8(2).[207] The Commission also relied on evidence derived from another instrument widely ratified by Council of Europe States, namely Article 6(5) of the UN Covenant on Civil and Political Rights, which prohibits the execution of death sentences on pregnant women.[208] Although that proviso has no correspondence in Article 2, this cross-reference can be explained under the VCLT as reliance on the practice of the signatories in relation to the subject-matter of the Convention and hence casting light on the obligations enshrined therein. Admittedly, although it does not establish specific rights for the foetus, and even less so rights capable of trumping the mother's rights, it is indeed indicative of States' view that unborn life is entitled to some protection. Having ascertained the plural interests involved in a pregnancy and the State's legitimation to regulate abortion, the *Brüggemann and Scheuten* decision proceeded to an assessment of the reasonableness of the German regulations. The main interpretive tools employed to uphold the impugned measures were the comparative review method and an intentionalist reading. On the one hand, the Commission pointed out that all Contracting parties had set up legal

[204] *Brüggemann and Scheuten v Federal Republic of Germany*, App No 6959/75, ECmHR report of 12 July 1977.

[205] ibid, paras 54–55.

[206] ibid, para 59.

[207] See ibid, para 60: 'The Commission does not find it necessary to decide, in this context, whether the unborn child is to be considered as "life" in the sense of Art. 2 of the Convention, or whether it could be regarded as an entity which under Art.8(2) could justify an interference "for the protection of others". There can be no doubt that certain interests relating to pregnancy are legally protected.'

[208] ibid.

limitations in respect of abortion rights.[209] On the other hand, the restrictiveness of abortion laws at the time that the Convention was adopted and the continuing debate in many countries could not suggest that the drafters intended to establish a right to abort.[210]

Until recently, the Court managed to avoid the abortion controversy, which was indirectly before it in *Open Door Counselling and Dublin Well Woman v Ireland* (injunction to refrain from imparting information on abortions services abroad) and *Tokarczyk v Poland* (imprisonment for having aided and abetted abortion by driving women to Ukraine),[211] by concentrating on Article 10 (freedom of expression). As Dembour wrote: '[Such] a focus conveniently made it possible for it to ignore debates on the meaning of abortion.'[212] The Court was, however, frontally faced with the question—and given an opportunity for an evolutive interpretation in light of present-day conditions—in the *A, B and C v Ireland* case in 2010.[213] Under Irish law, abortion was permitted only when the pregnancy posed a risk to the life of the expectant mother; the Court was thus called upon to uphold a limited right to the termination of pregnancy sought for reasons of health or well-being. While accepting that abortion legislation was an area governed by wide State discretion, the Court inquired, according to its traditional methodology, 'whether this wide margin of appreciation is narrowed by the existence of a relevant consensus'.[214] The Court took note of the 'consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law' (abortion being legally available on demand in some 40 European countries, and on health and well-being grounds in 35).[215] Nevertheless, the Court concluded that it 'does not consider that this consensus decisively narrows the broad margin of appreciation of the State',[216] largely on account of the acutely sensitive nature of this area.[217]

[209] ibid, para 61.

[210] See ibid, para 63: 'when the European Convention of Human Rights entered into force, the law on abortion in all Member States was at least as restrictive as the one now complained of by the applicants. In many European countries, the problem of abortion is or has been the subject of heated debates on legal reform since. There is no evidence that it was the intention of the Parties to the Convention to bind themselves in favour of any particular solution.'

[211] *Open Door Counselling and Dublin Well Woman v Ireland,* App Nos 14234/88; 14235/88, ECtHR judgment of 29 October 1992; *Tokarczyk v Poland*, App No 51792/99, ECtHR decision of 31 January 2002.

[212] M-B Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge, Cambridge University Press, 2006) 209.

[213] *A, B and C v Ireland*, App No 25579/05, ECtHR judgment of 16 December 2010 [GC].

[214] ibid, para 234.

[215] ibid, para 235. Only three States (Andorra, Malta and San Marino) had more restrictive access to abortion than Ireland; they prohibited abortion regardless of the risk to the woman's life.

[216] *A, B and C v Ireland* (n 213) para 236.

[217] Paragraph 237 provides a circular restatement rather than a justification: 'even if it appears from the national laws referred to that most Contracting Parties may in their legislation have resolved those conflicting rights and interests in favour of greater legal access to abortion, this consensus cannot be a decisive factor in the Court's examination of whether the impugned prohibition on abortion in Ireland for health and well-being reasons struck a fair balance between the conflicting rights and interests, notwithstanding an evolutive interpretation of the Convention.'

The analysis of whether the authorities remained within that wide margin and observed the requirements of proportionality are all unconvincing.

Firstly, the Court found that a prohibition of abortion sought on health and well-being grounds amounted to an interference with the right to respect for private life;[218] it considered, however, that the interference pursued the legitimate aim of 'protection of morals', which in Ireland was said to include the right to life of the unborn.[219] The only argument provided to support this view was previous case law (in particular, *Vo v France*) to the effect that the decision as to where life begins and the extent to which unborn life is covered by Article 2 are matters falling within States' discretion.[220] The Court did not address the already established pre-eminence of the expectant mother's right to self-determination under Article 8 over the possible competing rights of the foetus according to its earlier jurisprudence in *WP v UK* and *Boso v Italy*. There was no discussion of either of those cases or the balancing exercise involved, resolved by most countries in favour of the mother (at least under certain circumstances). The Court thus essentially conflated the discretion afforded to States on the issue of determining if the foetus enjoys a right to life and the correct balancing between the mother's and the foetus' respective rights. The latter question can be addressed without providing a definitive answer to the former. As Zwart suggested: 'The fact that 43 States recognise a woman's right to an abortion means that in those States the right of the woman is deemed more important than the interests of the foetus, whenever life begins.'[221] Analogously, it can be maintained that the overwhelming majority of European States have decided that the individual rights of the expectant woman prevail over the moral views of the community regarding the foetus' right to life. Consequently, however one defines the incompatible interests lying in the balance, whether as 'rights of others' or 'protection of morals', the individual right of the mother is indisputably given priority throughout Europe. Some scholarly commentators have taken the view that 'the Court avoids having to determine if the primacy afforded to the protection of foetal life over the rights of the mother breaches Convention standards'.[222]

The dissenters suggested that the Court essentially misread the question before it:

> Let us make clear from the outset that the Court was not called upon in this case to answer the difficult question of 'when life begins'. This was not the issue before the Court,

[218] ibid, para 216.
[219] ibid, para 222.
[220] ibid, para 237.
[221] T Zwart, 'More Human Rights than Court: Why the Legitimacy of the European Court of Human Rights is in Need of Repair and How it Can Be Done' in S Flogaitis, T Zwart and J Fraser (eds), *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (Cheltenham, Edward Elgar, 2013) 71, 92.
[222] C Ryan, 'The Margin of Appreciation in *A, B and C v Ireland*: A Disproportionate Response to the Violation of Women's Reproductive Freedom' (2014) 3(1) *UCL Journal of Law and Jurisprudence*

> and undoubtedly the Court is not well equipped to deal effectively with it. The issue before the Court was whether, regardless of when life begins—before birth or not—the right to life of the foetus can be balanced against the right to life of the mother, or her right to personal autonomy and development, and possibly found to weigh less than the latter rights or interests. And the answer seems to be clear: there is an undeniably strong consensus among European States … to the effect that, regardless of the answer to be given to the scientific, religious or philosophical question of the beginning of life, the right to life of the mother, and, in most countries' legislation, her well-being and health, are considered more valuable than the right to life of the foetus.[223]

What further weakens the Court's analysis is the unconvincing emphasis on the deeply rooted moral values protected by the impugned restriction. The Irish government's reliance on the accessibility of information about, and legality of travelling abroad for, an abortion raises doubts as to the absolute belief in unmitigated prenatal life protection and hence the pressing need to prohibit abortion in all circumstances. Surprisingly, however, the Court considered that this option supported the government's claim that the domestic prohibition was proportionate,[224] whereas arguably all it achieved was to discriminate against individuals who cannot afford to travel abroad. This compounds an already existent socio-economic problem, since, as Ryan pointed out, 'unintended pregnancy disproportionately affects low-income women and minorities'.[225] Palmer further notes that '[i]t is vulnerable populations within the state that face barriers to travel'; moreover: 'Later abortions pose greater risks to the health of the woman.'[226]

Not only was this a case of clear-cut consensus, but the Court could have relied for corroboration on Council of Europe soft law evidencing the position of ECHR parties on the matter, in particular the Parliamentary Assembly Resolution 1607 on access to safe and legal abortion in Europe. This resolution notes that a 'ban on abortions does not result in fewer abortions but mainly leads to clandestine abortions, which are more traumatic and increase maternal mortality and/or lead to abortion "tourism" which is costly, and delays the timing of an abortion and results in social inequities'.[227] The document further recognises that 'the ultimate decision on whether or not to have an abortion should be a matter for the woman concerned, who should have the means of exercising this right in an effective way' and calls upon States to 'decriminalise abortion within reasonable gestational limits' and guarantee women an accessible right to safe abortion.[228]

237, 251. See also S Palmer, 'Abortion and Human Rights' (2014) 6 *European Human Rights Law Review* 596, 603: 'The European Court has been careful to avoid taking a clear stance on the balance between foetal and women's rights.'

[223] *A, B and C v Ireland* (n 213) joint partly dissenting opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi, para 2.

[224] *A, B and C v Ireland* (n 213) para 241.

[225] Ryan (n 222) 249.

[226] Palmer (n 222) 604.

[227] Parliamentary Assembly Resolution 1607 on access to safe and legal abortion in Europe, 16 April 2008, para 4.

[228] ibid, para 7.

Wildhaber et al comment that the Court's reasons 'resemble a de facto "political question"-doctrine and the notion of the "persistent objector"'.[229] Ziemele also suggested that one possible way of reading the judgment 'would be to say that Ireland has always objected to the development of such wide availability of abortion and can thus be regarded as a persistent objector'.[230] It is doubtful whether, in situations engaging human rights, for which Strasbourg monitoring was devised in the first place, the concession of 'political questions' is consistent with the Court's mandate. It is also questionable whether in an increasingly harmonised regional system of human rights protection, individual persistent objection—already contested under classic international law—can occupy the place it might claim in a completely non-institutionalised context. As de Londras and Dzehtsiarou argued: 'To allow the alleged values of a particular State to be exempted from the general minimum standard … is clearly out of step with the development of a European public order.'[231] If we understand consensus as a 'rebuttable presumption in favour of the rule or practice adopted by the majority',[232] then in cases of quasi-unanimity, rebuttal should succeed only if based on evaluative demonstrations other than local preferences. The acceptance of a rebuttal simply adducing exceptionalism and national opinion renders the entire exercise of supranational supervision futile.

This treatment of European consensus, as potentially superseded by domestic consensus, is particularly problematic for the Court's interpretive methodology. A joint partly dissenting opinion argued:

> it is the first time that the Court has disregarded the existence of a European consensus on the basis of "profound moral views". Even assuming that these profound moral views are still well embedded in the conscience of the majority of Irish people, to consider that this can override the European consensus, which tends in a completely different direction, is a real and dangerous new departure in the Court's case-law. A case-law which to date has not distinguished between moral and other beliefs when determining the margin of appreciation which can be afforded to States in situations where a European consensus is at hand'.[233]

As Dzehtsiarou argues, 'a justification based on internal consensus … can lead to negative consequences for the substantive legitimacy of the rulings of the ECtHR … Trumping internal consensus has the potential to undermine the positive impact

[229] L Wildhaber, A Hjartarson and S Donnelly, 'No Consensus on Consensus? The Practice of the European Court of Human Rights' (2013) 33 *Human Rights Law Journal* 248, 259.

[230] See I Ziemele, 'Customary International Law in the Case Law of the European Court of Human Rights—The Method' (2013) 12 *Law and Practice of International Courts and Tribunals* 243, 250.

[231] F de Londras and K Dzehtsiarou, 'Grand Chamber of the European Court of Human Rights, *A, B and C v Ireland*, Decision of 17 December 2010' (2013) 62(1) *International and Comparative Law Quarterly* 250, 252.

[232] K Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge, Cambridge University Press, 2015) 208.

[233] *A, B and C v Ireland* (n 213) joint partly dissenting opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi, para 9.

on legitimacy that European consensus might have'.[234] Wildhaber et al further remark that in this case, the Court 'did not add that the issue should be kept under review—unlike the earlier transsexualism cases and *SH v Austria*'.[235]

Furthermore, commentators have disputed the accuracy of the domestic consensus ascertained by the Court. De Londras and Dzehtsiarou thus argued: 'Rather than standing for the proposition that the Irish people have a deeply held or profound moral position that supports the *status quo,* as claimed by the Court, these referenda simply stand for the proposition that the Irish people have not been willing to support the amendments to the Constitution *as presented to them* in these referenda' (emphasis in original).[236] According to Wildhaber et al, the evidence indicated 'rather conclusive figures showing changes of societal values in Ireland'.[237] Ciervo similarly points out that, according to the 2003 government-promoted survey considered by the Court, '86% believed that pregnancy could be terminated in the event of a psycho-physical health risk for the woman, while in 1986 only 46% of the respondents approved of this proposition'.[238] This would suggest that the only argument in favour of deference was itself too controversial to outweigh the consensus argument and the need for a balancing of rights.

The scholarship has also highlighted the gender-specific restriction on abortion; Dembour has referred to abortion case law as 'illustrating the way in which human rights law at Strasbourg fails to address women's predicament in a male-dominated society'.[239] Palmer likewise noted that 'the court gave short shrift to the applicants' claim of discrimination under art. 14 [and] refused to acknowledge that it is uniquely women, who, as a consequence of their gender, are required to deal with the burden of living in a state with a restrictive abortion regime'.[240]

Moreover, the Court's position on abortion rights has been aptly criticised by Londono as 'out of step with other human rights bodies',[241] in particular the HRC's General Comment No 28,[242] the CEDAW Committee's General Recommendation No 24,[243] and the findings of the Special Rapporteur on Violence

[234] Dzehtsiarou (n 232) 61–62.

[235] Wildhaber, Hjartarson and Donnelly (n 229) 259.

[236] De Londras and Dzehtsiarou (n 231) 261.

[237] Wildhaber, Hjartarson and Donnelly (n 229).

[238] A Ciervo, 'The Unbearable Lightness of the Margin of Appreciation: ECHR and "Bio-Law"' in G Repetto (ed), *The Constitutional Relevance of the ECHR in Domestic and European Law: an Italian Perspective* (Cambridge, Intersentia, 2013) 159, 166.

[239] Dembour (n 212) 206.

[240] Palmer (n 222) 602.

[241] P Londono, 'Redrafting Abortion Rights under the Convention: *A, B and C v Ireland*' in E Brems (ed), *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (Cambridge, Cambridge University Press, 2013) 95, 96.

[242] See HRC General Comment No 28: *Article 3 (Equality of Rights between Men and Women)*, 29 March 2000, para 10: 'States parties should give information on any measures taken by the State to help women prevent unwanted pregnancies, and to ensure that they do not have to undertake life-threatening clandestine abortions.'

[243] CEDAW Committee General Recommendation No 24: *Article 12 of the Convention (Women and Health)* (1999), para 31: 'States parties should also, in particular … (c) Prioritize the prevention

against Women.[244] A comprehensive study by Zampas and Gher demonstrates that these and other UN treaty bodies (the Committee on the Rights of the Child and the Committee on Economic and Social Rights), in their general comments, concluding observations on country reports or views on individual communications, have repeatedly acknowledged the risks to life and health associated with clandestine abortion (particularly the impact of punitive legislation on maternal mortality rates), the special threat to adolescent expectant mothers, and the repercussions of denial of reproductive freedom on women's well-being and enjoyment of other rights, such as education or economic empowerment.[245] On the specific case of Irish abortion legislation, the HRC has repeatedly expressed concerns in its concluding observations on periodic country reports, noting inter alia 'the discriminatory impact … on women who are unable to travel abroad to seek abortions' and the severe mental suffering caused by the denial of abortion services to women seeking abortions due to rape, incest, fatal foetal abnormality or serious risks to health'.[246] In the recent case of *Mellet v Ireland*, the HRC required Ireland to change its current legislation in order to ensure that women who choose to terminate a non-viable pregnancy are not left outside the public health care system, compelled to incur the financial, psychological and physical strains of securing an abortion abroad, denied post-termination medical care and bereavement counselling, and stigmatised by the criminalisation of abortion of a fatally ill foetus.[247] By contrast, the Court's approach is strikingly deferential in its lack of consideration of proportionality, in that it allows a blanket ban rather than restrictions relating to gestational limits or the grounds for requesting an abortion.

Despite this rigid position on the right to decide an interruption of pregnancy, the Court has indicated that, where States permit therapeutic abortion, the law must be sufficiently clear so as to allow pregnant women to avail themselves of that option and to avoid the chilling effect of criminal legislation on doctors. The *Tysiąc v Poland* judgment found that the doctors' refusal to perform a therapeutic

of unwanted pregnancy through family planning and sex education and reduce maternal mortality rates through safe motherhood services and prenatal assistance. When possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion.'

[244] See Londono (n 241) 97–98.

[245] See C Zampas and J Gher, 'Abortion as a Human Right—International and Regional Standards' (2008) 8(2) *Human Rights Law Review* 249, 253–61, 269–75.

[246] See HRC, Concluding observations on the fourth periodic report of Ireland, 19 August 2014, para 9(d) and (f). See also HRC, Concluding observations on the third periodic report of Ireland, 30 July 2008, para 13: 'The State party should bring its abortion laws into line with the Covenant. It should take measures to help women avoid unwanted pregnancies so that they do not have to resort to illegal or unsafe abortions that could put their lives at risk (article 6) or to abortions abroad (articles 26 and 6).'

[247] *Amanda Jane Mellet v Ireland*, Comm No 2324/2013, HRC views of 31 March 2016, paras 7.2-9. The author of the communication had been advised by the doctors that the foetus presented congenital defects and would die in utero or shortly after birth. However, under the Protection of Life During Pregnancy Act 2013, adopted after the *A, B and C v Ireland* judgment, a termination of pregnancy was only permitted in cases of a threat to the life of the woman.

abortion (to prevent a serious deterioration of the mother's eyesight), under the pressure of unclear statutory limitations and thus potential criminal sanctions, violated Article 8.[248] The Court considered that the applicable provisions had to be formulated in such a way as to ensure clarity of the pregnant woman's legal position and to alleviate the chilling effect which the legal prohibition on abortion and the risk of criminal responsibility could have on doctors. According to the Court, once a legislature has decided to allow abortion, it must avoid a legal framework that limits its use in practice. The *Tysiąc* judgment adds very little to the debate on the availability of abortion. As Ryan noted: 'The Court will uphold Article 8 claims only when they encroach on procedural aspects of the right rather than on the crux of self-determination or autonomy in reproductive decisions.'[249]

Similarly, delays in the procedures surrounding the exercise of the right to abort will amount to a violation of Article 8. In *RR v Poland*,[250] a woman's prolonged lack of access to the prenatal genetic tests prescribed by domestic legislation, resulting in her inability to have an abortion on the grounds of foetal abnormality in due course, was found to constitute a violation of Articles 3 and 8. In the latter respect, the Court stressed that the law provided no effective mechanisms enabling a pregnant woman to obtain a diagnostic service, which was critical to the exercise of the right to make an informed decision on whether to seek an abortion according to the law. Given the discrepancy between the legal option to abort and the actual avenues available, the authorities had failed to comply with their positive obligations to secure respect for private life. Although the judgment does not further the discussion on the mother's right to choose, it is nevertheless important; in fact: 'For the first time, the Court determined that denial of services critical for deciding whether to seek an abortion can violate the right to be free from inhuman and degrading treatment.'[251]

To some extent, the *RR v Poland* case alludes to the debate on whether aspiring parents have a 'right to a healthy baby', a question raised by the respondent in *Costa and Pavan*. The subsequent *AK v Latvia* concerned the denial of an adequate and timely antenatal screening test (as required by the relevant law for the medical care of patients in the applicant's age group), which would have indicated the risk of a foetus having a genetic disorder and allowed the mother to choose whether to continue the pregnancy.[252] The judgment found that the 'domestic courts did

[248] *Tysiąc v Poland*, App No 5410/03, ECtHR judgment of 20 March 2007. Domestic law only permitted abortion if two medical practitioners certified that the pregnancy posed a threat to the mother's life or health, and a doctor who terminated a pregnancy in breach of the conditions specified in the legislation was guilty of a criminal offence punishable by up to three years' imprisonment.

[249] Ryan (n 222) 254.

[250] *RR v Poland*, App No 27617/04, ECtHR judgment of 26 May 2011. Several doctors had repeatedly refused to refer the applicant for a genetic examination permitting to diagnose a possible foetal malformation, and by the time she underwent the examination and received the results, it was too late for her to have an abortion on the grounds of foetal abnormality, as under Polish law this was permitted only during the first 24 weeks of pregnancy.

[251] Westeson (n 202) 174.

[252] *AK v Latvia*, App No 33011/08, ECtHR judgment of 24 June 2014.

not properly examine the applicant's claim that she had not received medical care and information in accordance with domestic law in a manner sufficient to ensure the protection of her interests', which amounted to a violation of the procedural aspect of Article 8.[253] Read together, the cases on prenatal medical tests and embryo screening might seem to pave the way towards a right to a healthy baby. On the other hand, in *RR*, the emphasis was on the gap between legally available and practically obtainable support to secure a healthy baby; in *Costa and Pavan*, the ratio decidendi was the irrationality of offering parents the choice through a much more traumatic abortion, but not through embryo selection; finally, *AK* concerned the failure to obtain redress for breaches of existing domestic law. It is unclear to what extent the Court might be willing to require States to adopt legislation guaranteeing prenatal diagnosis as part of their positive obligations under Article 8.

The outcome of *P and S v Poland* is another reflection of the Court's narrow function in the area of abortion rights, essentially limited to supervising the correct implementation of *existing* domestic legislation.[254] The complaint regarded the failure of medical authorities to provide timely and unhindered access to lawful abortion to a minor who had become pregnant as a result of rape. The judgment therefore revolved around the notion that 'effective access to reliable information on the conditions for the availability of a lawful abortion, and the relevant procedures to be followed, is directly relevant for the exercise of personal autonomy'.[255] Although the Court reiterated that the notion of private life in Article 8 applied both to decisions to become and not to become a parent,[256] it did not add new contents to the procreative rights protected, but merely condemned the discrepancy between the theoretically available right to a lawful abortion and the drawbacks of its practical implementation. In fact, Ryan commented that 'the Court reiterated a deferential approach', in that it 'confined [its] assessment to the positive obligations that the state was already under' (emphasis in original).[257]

The emphasis in these cases on the practical inaccessibility of therapeutic abortion legally available in the respondent States can be contrasted with the HRC's approach in *KL v Peru*.[258] The Committee found a breach of the ICCPR in the denial of access to therapeutic abortion in circumstances where severe foetal impairment predictably led to the child's death shortly after birth, resulting in depression and emotional distress for the mother. As Zampas and Gher note, the

[253] ibid, para 94.

[254] *P and S v Poland* (n 201). The applicants, a mother and daughter, had not benefited from impartial medical counselling and had received contradictory information on the procedure to follow, as well as being pressurised by the hospital staff, who had enlisted the assistance of a priest and the press, into not carrying out the abortion. One of the doctors also refused to perform the abortion on grounds of conscience, without accompanying the refusal by referral to another doctor, as required by law. See ibid, paras 102–08.

[255] ibid, para 111.

[256] ibid.

[257] Ryan (n 222) 253.

[258] *KL v Peru,* Comm No 1153/2003, HRC views of 24 October 2005.

finding of violation of Article 7 (cruel treatment) 'did *not* depend on the lawfulness of the procedure, which thus opened the possibility for both the legal and practically [*sic*] inaccessibility of a therapeutic abortion' (emphasis in original).[259]

The European system is thus lagging behind the level of protection of reproductive rights guaranteed on the international plane, as well as within other regional systems. In fact, under the Protocol on the Rights of Women in Africa, States are firmly required to 'take all appropriate measures to … protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus'.[260] Paradoxically, although Europe is 'the region with historically the most liberal abortion laws',[261] human rights protection on the continent seems to ignore, and remain apart from, the global trend towards giving priority to women's reproductive rights in the debate over abortion laws.

VII. THE RIGHT TO PARENTAL LEAVE ALLOWANCE

Admittedly, specific economic measures in support of parents' endeavours to discharge child care responsibilities are outside the scope of a treaty almost exclusively concerned with civil and political rights. Unsurprisingly, in *Andersson v Sweden*, the Commission rejected the suggestion that respect for family life entailed a positive obligation to provide financial assistance to parents who preferred to stay at home and look after their children rather than seek gainful employment and use public child care facilities.[262] As Warbrick observed, this case confirms 'an unwillingness to discern economic and social rights as being even within the ambit of the existing Convention framework'.[263]

Nonetheless, as with other social rights linked with family life,[264] the issue of parental leave entitlements has been repeatedly before the Court within the context of applications lamenting gender-based or nationality-based discrimination. The Court has recognised in *Petrovic v Austria* that parental leave comes within the

[259] Zampas and Gher (n 245) 270.

[260] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the Assembly of the African Union at Maputo on 11 July 2003, art 14(2)(c).

[261] Zampas and Gher (n 245) 294. See also the reference in Marshall (n 30) 188 to 'the liberalisation of abortion laws in almost all of Europe in the late 1970s'.

[262] *Andersson v Sweden*, App No 11776/85, ECmHR decision of 4 March 1986. The applicants were entitled under the domestic legislation to support as a low-income family and they had been offered child care assistance in the form of day home places, which would have allowed the mother to work and contribute to the household income.

[263] C Warbrick, 'Economic and Social Interests and the European Convention on Human Rights' in M Baderin and R McCorquodale (eds), *Economic, Social, and Cultural Rights in Action* (Oxford, Oxford University Press, 2007) 241, 246.

[264] See, eg, access to social benefits by cohabitees (discussed in Ch 2) or same-sex partners (discussed in Ch 4), or the level of financial support for children after divorce (see also Ch 4).

scope of Article 8 and that Article 14 (taken together with Article 8) is therefore applicable: 'By granting parental leave allowance States are able to demonstrate their respect for family life within the meaning of Article 8 of the Convention; the allowance therefore comes within the scope of that provision.'[265] Like adoption, parental leave is an optional right, but is within the material sphere of Article 8. As explained in *Petrovic*: 'Article 14 comes into play whenever "the subject-matter of the disadvantage … constitutes one of the modalities of the exercise of a right guaranteed" … or the measures complained of are "linked to the exercise of a right guaranteed"'.[266] In particular, although 'Article 8 does not impose any positive obligation on States to provide the financial assistance in question', 'this allowance paid by the State is intended to promote family life and necessarily affects the way in which the latter is organised as, in conjunction with parental leave, it enables one of the parents to stay at home to look after the children'.[267] As a result, Article 8 is engaged and therefore the domestic right, albeit not mandatory under the Convention, cannot be granted on a discriminatory basis.

Nonetheless, initially the Court took a rather conservative approach to the assessment of domestic decisions on the beneficiaries of parental leave. In *Petrovic*, it agreed that the different treatment of mothers and fathers in respect of parental leave was compatible with ECHR obligations given the lack of European consensus.[268] Although it conceded that mothers and fathers were similarly placed as regards child rearing and that the measure therefore engaged a distinction based on sex, it found that the majority of Contracting States had not provided for parental leave allowances to be paid to fathers, and thus the refusal of the authorities to grant the applicant a parental leave allowance had not exceeded the margin of appreciation allowed to them. The width of the margin of appreciation afforded may, perhaps, be explained by the nature of the right at stake. According to Mowbray, the *Petrovic* judgment is in fact 'another demonstration of the Court's historical reluctance to find that the positive obligations inherent in Article 8 mandate the provision of social welfare benefits to particular individuals'.[269] Nevertheless, it is not entirely clear why, having found Article 8 engaged, the Court placed this weight on consensus, which is, in principle, only one factor, influencing the margin of appreciation but not ousting the control of proportionality.[270] Judges Bernhardt and Spielmann, dissenting, convincingly argued that a sexually discriminatory social welfare distribution 'perpetuates th[e] traditional distribution of roles and can also have negative consequences for the mother; if she continues

[265] *Petrovic v Austria*, App No 20458/92, ECtHR judgment of 27 March 1998, para 29.
[266] ibid, para 28.
[267] ibid, paras 26–27.
[268] ibid, paras 38–43.
[269] A Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford, Hart Publishing, 2004) 181.
[270] See R St J Macdonald, 'The Margin of Appreciation' in R St J Macdonald, F Matscher and H Petzold, *The European System for the Protection of Human Rights* (Dordrecht, Martinus Nijhoff, 1993) 83, 84.

her professional activity and agrees that the father stay at home, the family loses the parental leave allowance to which it would be entitled if she stayed at home'.[271]

The *Petrovic* approach was definitely abandoned in *Weller v Hungary*, where the Court found that the exclusion of natural fathers from the entitlement to receive parental allowance—whereas mothers, adoptive parents and guardians were entitled to it—amounted to discrimination on the grounds of parental status.[272] In particular, the Court rightly observed that 'this wide range of entitled persons proves that the allowance is aimed at supporting newborn children and the whole family raising them, and not only at reducing the hardship of giving birth sustained by the mother'.[273] The approach to European consensus also changes here; the Court found that 'the lack of a common standard does not absolve those States which adopt family allowance schemes from making such grants without discrimination'.[274] Whereas arguably the absence of consensus may persuade the Court that a certain justification meets the criteria of Article 14, the respondent State's position will be indefensible if, as in *Weller*, it does not put forward 'any objective and reasonable ground to justify the general exclusion of natural fathers from a benefit aimed at supporting all those who are raising newborn children'.[275] *Weller* further deemed discriminatory a legislative scheme excluding foreign mothers and Hungarian fathers from maternity benefits granted to families in which the nationality of the parents was reversed.[276] Other distinctions were also sanctioned by the Court as incompatible with Article 8 read in conjunction with Article 14. In *Okpisz v Germany* and *Niedzwiecki v Germany*, the Court … found that a difference in treatment in respect of parental leave allowance based on the residence status of the alien parent was unjustified.[277]

In recent judgments, the Strasbourg authorities have further increased the prescriptiveness of Convention requirements in this area. In *Konstantin Markin v Russia*, the Grand Chamber ruled on a narrower aspect, namely the legitimacy of legislation excluding servicemen from the enjoyment of parental leave on the same basis as civilians and servicewomen.[278] According to the Court, 'contemporary

[271] *Petrovic v Austria* (n 265) dissenting opinion of Judges Bernhardt and Spielmann.
[272] See *Weller v Hungary*, App No 44399/05, ECtHR judgment of 31 March 2009, paras 29, 30–35.
[273] ibid, para 31.
[274] ibid, para 34.
[275] ibid, para 35.
[276] ibid, paras 37–38.
[277] See *Okpisz v Germany*, App No 59140/00, ECtHR judgment of 25 October 2005, para 34: 'the Court does not discern sufficient reasons justifying the different treatment with regard to child benefits of aliens who were in possession of a stable residence permit on one hand and those who were not, on the other.' See, analogously, *Niedzwiecki v Germany*, App No 58453/00, ECtHR judgment of 25 October 2005, para 33.
[278] *Konstantin Markin v Russia*, App No 30078/06, ECtHR judgment of 22 March 2012 [GC] (confirming the Chamber decision of 7 October 2010). The applicant, the sole carer of his children after divorce, did not have the unconditional entitlement to three years' parental leave recognised to servicewomen and civilian men and women; according to the law, a serviceman could at most claim three months' leave if his wife was dead or incapable of taking care of the child.

European societies have moved towards a more equal sharing between men and women of responsibility for the upbringing of their children and ... men's caring role has gained recognition'.[279] The Court's demonstration that a substantial majority of European States have equalised the position of spouses in respect of parental leave is questionable;[280] however, the Court's analysis on the terrain of discrimination and its forceful rebuttal of the respondent government's arguments in favour of a difference in treatment are compelling. In particular, the Court found that the difference in treatment complained of 'has the effect of perpetuating gender stereotypes and is disadvantageous both to women's careers and to men's family life'.[281] Moreover, the national security defence invoked by the respondent government was based on an unsubstantiated speculative scenario in which numerous servicemen of childbearing age decided to avail themselves of the option to take parental leave at the same time, with devastating effects for national security.[282] In addition, the impugned law did not allow for a case-by-case determination of the entitlement to paternal leave so as to accommodate exceptional circumstances like the plaintiff's.[283] An inflexible norm such as the blanket exclusion of servicemen from parental leave should arguably be destined to fail as disproportionate in the absence of undeniable evidence to support the need for an absolute rule. From the viewpoint of interpretive methodology, by contrast with *Markin v Russia*, the earlier *Petrovic v Austria* case seems almost exclusively focused on European consensus (the lack of which was detrimental to the applicant) at the expense of an examination of the rule at stake from the angle of proportionality.

VIII. CONCLUDING REMARKS

To disregard an individual's reproductive choices means, as Marshall expressed it, to 'undermine their ability to control one of the most intimate spheres of their life'.[284] Predictably, the protection afforded by the Convention in this respect has undergone a notable expansion in Strasbourg interpretation. Although the sole

[279] ibid, para 140.

[280] See ibid, para 74 (based on a survey of 33 States only).

[281] ibid, para 141. See also para 143: 'The Court agrees with the Chamber that gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners, cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation.'

[282] According to the Court, the statistical evidence provided by the respondent 'does not help to establish, even approximately, the percentage of servicemen that would be eligible to take parental leave at any given time. Nor is it possible, in the absence of any survey of servicemen's willingness to take parental leave or any statistical information on the take-up rates among the civilian population, to make an assessment of how many servicemen would actually make use of the entitlement to parental leave' (ibid, para 144).

[283] See ibid, para 146: 'the Government did not submit convincing evidence to show that the exception to which they referred operated in practice or to prove that a case-by-case assessment was indeed possible and that servicemen were granted parental leave when their particular situation so required.'

[284] Marshall (n 30) 197.

textual basis for procreative rights is the reference in Article 12 to the 'right to found a family', paradoxically that provision seldom features in rulings concerning filiation; indeed, the Convention organs have hesitated to recognise the free-standing purview of the second prong of Article 12. Moreover, Article 12 would appear to apply as *lex specialis* when contrasted with the generic 'family life' reference in Article 8; the case law does not, however, confirm this expectation, even when the applicants are (married) couples (eg, in *Dickson v UK* and *SH v Austria*). As Harris et al noted, although the right protected by Article 12 is closely related to the notions of private and family life in Article 8, which have been interpreted 'imaginatively', the Strasbourg organs have not been receptive to the development of this provision; as a result: 'This has had a particularly inhibiting effect on the right to found a family.'[285] Conversely, Article 8 guarantees have provided the legal space for the affirmation of a (qualified) right to access to human fertilisation technology, as well as of rights in connection with adoption eligibility and protection of adoptive ties. Despite the inter-dependence between the right to marry and the right to procreate in the text of Article 12 and early case law, at present the protection of parenthood aspirations under the Convention has been entirely disconnected from marriage, and an individual right to become a parent is well-established as an expression of private and family life.

The vaster potential of Article 8 has driven the right to become a parent far beyond the mere right to reproduce. Indeed, the 'concept of "parenthood" is much broader than the concept of "procreation"', and hence it is applicable to 'assisted reproduction using gamete donors and surrogates, where the commissioning parent does not engage in biological reproduction'.[286] At the same time, the different dimensions of parenthood seem to attract different levels of protection. The 'wish for a child', albeit a 'particularly important facet of an individual's existence or identity' under Article 8,[287] enjoys less protection than the 'right to found a family' understood as natural procreation under Article 12. According to Mulligan, 'the right to become a parent applies equally to artificial and natural reproduction. The Court has drawn no distinction between the decision to procreate by natural means and the decision to become a parent using artificial means'.[288] This proposition nevertheless requires qualification. Artificial reproduction presupposes the participation of the State both at a normative level (eg establishing what techniques are lawful and on what basis access should be granted) and at a practical level (by setting up the institutions to provide such facilities); therefore, unlike natural reproduction, it is not entirely within the individual's autonomy and it engages public decision-making processes. Consequently, although a right to respect for a couple's decision to become genetic parents through recourse to

[285] Harris et al (n 63) 754.
[286] Mulligan (n 48) 384–85.
[287] *SH v Austria* (n 53) para 93.
[288] Mulligan (n 48) 384.

artificial insemination was upheld as an expression of private and family life, the Court still allows wide domestic regulatory power in this area. The protection of the right to natural procreation and that of the right to artificial procreation thus remain qualitatively different. In some cases (see, eg, *Evans*), the margin of appreciation absorbs the entire judicial analysis, with State-favourable results. As Ciervo observed, in the field of bioethics, 'an enhancement of the right of appreciation risks leading to a relativistic drift on the content of fundamental rights, and to an abdication by the Court of its role as guardian of the common European standard of protection'.[289]

Commentators have also emphasised the inconsistencies in the approach to non-biological filiation, in particular the contrast between the notion that a family may also be founded by adopting a child, and the position (expressed in *X and Y v UK*) that Article 12 does not guarantee a right to integrate into the family a child who is not the natural child of the couple. Van Dijk noted: 'The two views would seem to contradict one another. In fact, if it is recognised that there are different ways of founding a family, why should only one of those ways form part of the right conferred in Article 12, even in those cases where for the person(s) in question the other way is in fact the only possible way to found a family?'[290] Indeed, there is no proper justification for finding that Article 12 does not protect the only means for infertile couples to found a family or the formalisation of pre-existing family-like arrangements. A better approach would seem to be that Article 12 applies, but the restrictions complained of in a particular case might be reasonable (especially since child welfare considerations prevail over the wishes of adults).

There are yet further hesitations in the Court's approach to founding a family. Whilst the Court has, in adoption cases, insisted that Article 8 protects *existing* family life, not the *plans* to create a family, the cases regarding assisted reproduction have treated this same right as a form of decisional autonomy subsumed within the right to privacy (although there are also secondary references to family life). A detainee's mere plans to procreate are thus protected by Article 8, although the case law confirms that States are not compelled to guarantee the concrete possibility to procreate naturally at the exact time an individual chooses to.

It could also be argued that under Article 8, the Court has proceeded to what may effectively be perceived as an expansion of jurisdiction. According to the Court, domestic law going beyond ECHR obligations, but establishing a right within the substantive range of a Convention article is reviewable. Therefore, although the Convention does not guarantee a right to adopt, it allows for supranational scrutiny of adoption regulation, in so far as adoption may be seen as a right 'attached' to the right to respect for family life.[291] The supranational supervision of

[289] Ciervo (n 238) 160.

[290] Van Dijk et al (n 15) 855.

[291] See M Melchior, 'Rights Not Covered by the Convention' in R St J Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Dordrecht,

the (non-compulsory under the Convention) right to parental leave and maternity benefits is another such example of 'attached' rights. Moreover, despite the discretionary provision of assisted reproduction facilities, in line with the regulatory freedom under the Convention in the field of bioethics, if the law does not reflect a coherent value system in its management of rights and restrictions, the Court reserves the right to sanction it (the *Costa and Pavan* case). Discriminatory access to reproductive or adoption services provided under national law will also require justification (the *EB v France* case).

Arguably, central to all the debates surrounding the right to found a family should be the priority of the well-being of any children resulting from the use of assisted reproduction techniques, adopted by persons unrelated to them or born to parents deprived of liberty. Nevertheless, the notion of 'best interests of the child' plays a rather capricious role in the case law, both in the adoption and the assisted reproduction contexts. Often judgments are excessively focused on the rights of adults rather than the welfare of the children; examples include *EB v France* and *X v Austria*, which revolved around the adults' right to protection against discrimination. There are, furthermore, two risks involved in applying vague and subjective notions such as the 'best interests' of the child. On the one hand, too much deference to the assessment of national authorities may allow for arbitrariness; as Tobin and McNair pointed out: 'The danger of such an approach is that the best interests principle becomes an essentially meaningless concept which can be invoked as a self-serving principle by decision makers to garner legitimacy for their decisions.'[292] On the other hand, it is questionable whether the

Martinus Nijhoff, 1993) 593, 595: 'When dealing with [a right] which the State is not obliged to afford directly by virtue of the Convention but which it regulates on a discretionary basis *for the purposes of giving effect to the Convention*, the safeguard of Article 14 comes into play and there can be no discrimination in the exercise of this right, albeit a right not *implied* by a given Convention provision but rather one which is *attached* to that provision' (emphasis added). It should not be necessarily assumed that the conferral of the right in domestic law is accompanied by the belief that it responds to ECHR obligations. This proposition requires a demonstration which has not been adequately provided either by the case law or by the scholarship. Nor should art 14 be seen as a vehicle for bringing all domestic measures within the material scope of the Convention—the adoption of Protocol 12 (general principle of non-discrimination in the enjoyment of all domestic rights) clearly indicates that this was never the intention of the parties, and the case law should not be inconsistent with treaty amendment initiatives. Nevertheless, it can be argued that any legislative measure engaging human rights speaks to the belief system of that country, and where a common trend is noticeable in Europe, those values become the 'common heritage' of ECHR States on which the Court can legitimately draw for interpretation. This is an important link in justifying why an area of legislative activity comes under international scrutiny despite the absence of a specific treaty basis and why it becomes 'State practice', notwithstanding the questionable evidence of *opinio juris*.

[292] Tobin and McNair (n 142) 114. Starting from examining the debate on the extension of eligibility for same-sex couples to adopt underlying the approval of the Adoption and Children Act 2002 (conferring a right to adopt to same-sex couples even before the Civil Partnership Act 2004 was adopted), the authors challenge three main assumptions raised against the Act: the need for a male role model and a female role model actively involved in his or her life; the risk of harm for children's development with respect to their cognitive and emotional development, gender identity and sexual orientation; and the likelihood of experiencing social stigma and discrimination and reduced ability to develop effective social relationships. See ibid 119.

Strasbourg Court is better placed to determine where the interests of the child lie than national legislatures, and there may not be a single answer to this question for all European societies, given the diversity of cultural and legal traditions. Initially reserved as regards adoption rules and ostensibly aware of the ethical and social implications embedded in the relevant policy choices,[293] the Strasbourg Court has started to restrict the margin of appreciation in this area even where it could not rely on European consensus. It is arguable that an international court should be slow to monopolise the understanding of 'best interests of the child' and seek greater support in State practice before judicially imposing policy choices.

A principle connected with the best interests of the child is the precautionary principle, which affords wider discretion in encroaching upon adults' interests in light of the uncertainties surrounding the long-term effects of legal fictions of parenthood upon children or the attribution of parental authority to non-parents. Nonetheless, the Court has been hesitant on the application of this principle. In *X, Y and Z v UK*, acknowledging the primacy of the children's interests over those of the adults, the Court had found that 'at the present time there is uncertainty with regard to how the interests of children in Z's position can best be protected … and the Court should not adopt or impose any single viewpoint'.[294] Similarly, in *Fretté v France*, the Court recognised that there are no conclusive empirical studies on the welfare of children brought up by same-sex parents.[295] Conversely, *EB v France* abandoned the precautionary approach without referring to evidence of evolution in this field, and simplified the anthropological issues before it by moving the discussion on to the adult-oriented terrain of discrimination.

The lack of recognition of parental status for non-biological de facto caregivers is another theme cutting across the different areas of parenthood claims; it affects the aspiration of single individuals or couples to be acknowledged as adoptive parents of children they have already cared for (*X and Y v UK*) and the wishes of couples for one of the partners to assume a formal role in respect of the other's child, born through assisted reproduction or the fruit of a previous failed relationship (*Gas and Dubois*, *X v Austria*). The main difficulty stems from the fact that, for the Convention authorities, the family is essentially founded on blood ties (although these are not sufficient per se—in fact, the sperm donor is not automatically entitled to parental authority if biology is not corroborated by other factors such as contact or financial support). As Gallus suggested, there is still a fundamental distinction between cases where there is no dissociation between genetic and affective

[293] Coussirat-Coustère (n 44) 303–04 described Strasbourg bodies as 'pas réservés par principe à l'égard des nouvelles parentalités mais dans l'attente d'une suffisante convergence des conceptions nationales'. On the gradual shift in jurisprudence in adoption matters see also C Draghici, 'Adoption and the European Court of Human Rights: from Laissez-faire to Judicial Law-Making' in L Panella and E Spatafora (eds), *Scritti in Onore di Claudio Zanghì* (Milan, Giuffrè Editore, 2011) 255.

[294] *X, Y and Z v UK* (n 73) para 51.

[295] See *Fretté v France* (n 129) para 42: 'the scientific community—particularly experts on childhood, psychiatrists and psychologists—is divided over the possible consequences of a child being adopted by one or more homosexual parents.'

planned parenthood (*Dickson*, *Evans*) and cases where donated gametes are necessary to enable parenthood (*SH v Austria*).[296]

The Court's traditionalist assumptions of the family also transpire in another aspect of the case law on legal recognition of social parenthood. It seems that the Strasbourg institutions privilege either biological truth or at least biological plausibility; the partner incapable of having participated in reproduction—the lesbian companion or the female-to-male transsexual partner—tends not to be assimilated into the 'second parent' figure. The more favourable recent position on step-parent adoption in gay couple remains, in fact, distinct from fictitious legal parenthood (in respect of children born through insemination with donor gametes). To be sure, the lack of a common understanding in Europe on the best way to regulate novel family-like structures, made possible by recent medical advances, does not recommend Strasbourg policy-making. Difficult decisions affecting a child's identity and welfare still await the crystallisation of a common trend (eg, on the registration as a father on the birth certificate of the non-biological transsexual companion of the mother, the conferral of parental authority to the lesbian partner of the mother, the rights of the sperm donor etc).[297]

Finally, the right *not* to become a parent has emerged from the case law as the other facet of a person's right to make decisions regarding their family life. However, unwanted parenthood, just like the aspiration to become a parent, was met with some resistance in the Strasbourg proceedings. Willing to support that right in the context of the use of genetic material for procreative purposes (the *Evans* case), the Court continues to recognise wide discretion to national authorities in restricting abortion, notwithstanding the overwhelmingly generalised availability of abortion in Europe (*A, B and C v Ireland*). It is also worth noting that the approach to conflicts of rights under Article 8 depends on whether the case involves pregnancy or assisted reproduction. In the former situation, the woman's wishes invariably prevail over the rights of the man, who cannot oppose either the continuance or the termination of the pregnancy (*WP v UK*, *RH v Norway*, *Boso v Italy*), whereas the power to decide over a project of life conceived outside the woman's body is equally shared by the prospective parents (*Evans*). According to Ford: 'The obvious assumption would seem to be that … to give effect to the father's rights where a woman is pregnant would represent too great an interference with the right of self-determination over her own body.'[298] It is merely the location of the embryo or foetus inside the woman's body that precludes the father's interests from being treated as legal rights.[299] Undoubtedly, the indissoluble relationship between the

[296] See Gallus (n 62) 218.

[297] See Coussirat-Coustère (n 44) 307: 'La jurisprudence européenne ne bouleverse pas les mentalités mais elle doit les suivre.'

[298] M Ford, '*Evans v UK*: What Implications for the Jurisprudence of Pregnancy?' (2008) 8(1) *Human Rights Law Review* 171, 180.

[299] See ibid 181.

existence of the foetus and the mother's right to control over her body makes any coercion, however motivated, as intolerable as the well-meaning interference with a patient's right to refuse life-prolonging medical treatment.[300] However, as noted above, gender-specific differences between the position of mothers and fathers involved in technology-assisted procreation (and the impact on their respective rights) have arguably been too easily dismissed in *Evans*. As will be discussed in Chapter 5, unwanted parenthood, in particular the right not to be treated as a legal parent when genetic links with a child are absent, has also received ambiguous treatment in the case law on paternity challenges.

Another peculiar feature of the case law on the right to become and not to become a parent is the reliance on alternatives outside the jurisdiction of the respondent State as part of the control of Convention conformity. Thus, for the Court, in *A, B and C*, the lawfulness of securing an abortion abroad preserved the proportionality of the restrictive abortion regime. As Ryan emphasised, the consequence is that the 'misplaced margin of appreciation resulted in the Court condoning the Irish solution of sending women abroad to access their human rights'.[301] Similarly, in *SH v Austria*, the Court suggested that the applicants had the option of going abroad to receive the fertilisation treatment sought, as domestic law recognised the affiliation thus created.[302] As the dissenting judges pointed out, this solution (which in any event ignores the practical difficulties and costs) fails to justify the absolute prohibition complained of under Article 8(2) and raises doubts on the concerns for the child's best interests and the mother's health, which 'disappear as a result of crossing the border'.[303] Outsourcing abroad, but endorsing domestically, practices the majority is morally uncomfortable with (prospectively through dissemination of information and retrospectively through lack of sanction/recognition of legal effects), reveals a fundamental inconsistency in the belief system adduced as a justification for the interference. Moreover, as Scherpe observed in examining the *SH* judgment, 'it also is nonsensical to hold that a right is protected because it can be exercised elsewhere'.[304]

Finally, despite the sensitive nature of this area of law, accrediting the idea that firm domestic views (such as the anti-abortionist position of Irish society) override European consensus has wider systemic implications, in that it magnifies the substantive reach of the Convention's subsidiary character. De Londras and Dzehtsiarou pointed out that such a decision may indeed fuel support for requests of greater State authority: 'the notion that European consensus might be subordinate to internal consensus within a particular State might bolster arguments that

[300] On the inadmissibility of coerced treatment for the benefit of the patient, see *Pretty v UK* (n 96) para 63.

[301] Ryan (n 222) 258.

[302] *SH v Austria* (n 47) para 114.

[303] *SH v Austria* (n 47) joint dissenting opinions of Judges Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria, paras 12–13.

[304] Scherpe (n 58) 279.

the Convention ought to be subordinate to decisions taken at the national level'.[305] The refusal, motivated by deference to strong conservative public opinion in one State, to engage in a balancing of rights debilitates the constitutionalist project of the ECHR.[306] It also leads to another inconsistency, namely the contrast between the acceptance of unfettered State discretion in the pro-life/pro-choice debate, even where there are risks to the mother's health (*A, B and C v Ireland*) and the emphasis on the individual right not to become a parent (in cases where abortion is legally available but practically inaccessible, eg *P and S v Poland*).

The analysis of the interpretive difficulties surrounding the application of human rights standards to the recognition of coupledom and filiation has so far deliberately left aside a further compounding challenge: the reconceptualisation of these rights when sexual orientation and gender migration are at play. It is this challenge that the following chapter sets out to address.

[305] De Londras and Dzehtsiarou (n 231) 259.

[306] De Londras and Dzehtsiarou refer critically to the 'counter-constitutionalist notion of trumping internal consensus' (ibid 262).