Universiteit Utrecht

EUROPEAN MASTER'S DEGREE
IN HUMAN RIGHTS AND DEMOCRATISATION

FAMILY TIES THAT BIND: SAME-SEX, SAME BEST INTERESTS

AN ANALYSIS OF THE EUROPEAN COURT OF HUMAN RIGHTS' APPROACH TO THE BEST INTERESTS OF THE CHILD IN GAY PARENTING CASES

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A.Y. 2012/2013

Acknowledgments

I would like to express my gratitude to some special people that, in their way, wrote this thesis with me.

Thank you, mãe. You are my role model, out of the role model.

Thank you, pai. For giving me the knowledge that only you have.

Thank you, Alexandre. For being the one that I know I can count on.

Thank you, Alain. For inspiring and supporting. This thesis is also about you.

Thank you, Marjolein Van den Brink, my supervisor. Without you, I wouldn't have made it. Thanks for teaching and guiding in a brilliant way.

Thank you, my friends. And remember… I'm usually far away, but I'm always with you.

Thank you, my E.MA friends. You were part of an incredible year of my life. I don't need to name you, because you know who you are.

Thank you, Angela Melchiorre. Thank you, Jenny Goldschmidt. For your support.

Table of cases

- *ABC v Ireland* (ECtHR, 2010), application No. 25579/05.
- *Atala Riffo and daughters v Chile*, (IACHR, 2012), application No. 1271-04.
- *B v Belgium* (ECtHR, 2012), application No. 4320/11.
- *Bajrami v Albania* (ECtHR, 2006), application No. 35853/04.
- *Bronda v Italy*, (ECtHR, 1996), application No. 22430/93.
- *Boeckel and Gessner v Germany*, (ECtHR, 2013), application No. 8017/11.
- *EB v France* (ECtHR, 2008), application No. 43546/02.
- *Emonet and others v Switzerland* (ECtHR 2007), application No. 39051/03.
- *Eskinazi and Chelouche v Turkey* (ECtHR, 2005), application No. 14600/05.
- *Evans v UK* (ECtHR, 2007), application No. 6339/05.
- *Fretté v France*, (ECtHR, 2002), application No. 36515/97.
- *Gas Dubois v France* (ECtHR, 2012), application No. 25951/07.
- *Godelli v Italy* (ECtHR, 2012), application No. 33783/09.
- *Handyside v UK* (ECtHR, 1976), application No. 5493/72.
- *Harroudj v France* (ECtHR, 2012), application No. 43631/09.
- *Hokkanen v Finland* (ECtHR, 1994), application No. 19823/92.
- *Ignaccolo-Zenide v Romania* (ECtHR, 2000), application No. 31679/96.
- *Kearns v France* (ECtHR, 2008), application No. 35991/04.
- *Keegan v Ireland* (ECtHR, 1994), application No. 16969/90.
- *Kerkhoven and Hinke v the Netherlands* (European Commission of Human Rights, 1992), application No. 15666/89.
- *Kopf and Liberda v Austria* (ECtHR, 2012), application No. 1598/06.
- *Kroon and others v the Netherlands* (ECtHR, 1994), application No. 18535/91.
- *Lawless v Ireland* (ECtHR, 1961), application No 332/57.
- *Maire v Portugal* (ECtHR, 2003), application No. 48206/99.
- *Maslov v Austria* (ECtHR, 2008), application No 1638/03.
- *Mazurek v France* (ECtHR, 2000), application No34407/97.
- *Maumousseau and Washington v France* (ECtHR, 2007), application No. 39388/05.
- *Morfis v France* (ECtHR, 2007), application No. 10978/04.

- *M.R and L.R v Estonia* (ECtHR, 2012), application No.13420/12.
- *Negrepontis-Giannisis v Greece* (ECtHR, 2011), application No. 56759/08.
- *Neulinger and Shuruk v Switzerland* (ECtHR, 2010), application No. 41615/07.
- *Nielsen v Denmark* (ECtHR, 1988), application No. 10929/84.
- *Olsson v. Sweden* (ECtHR, 1992), application No. 13441/87.
- *P v Spain* (ECtHR, 2010), application No. 35159/09.
- *Pini and others v Romania* (ECtHR, 2004), application No. 78029/01 and 78030/01.
- *Rasmussen v Denmark* (ECtHR, 1984), application No 8777/79.
- *Roda and Bonfatti v Italy* (ECtHR, 2006), application No. 10427/02.
- *Sahin v. Germany* (ECtHR, 2003), application No. 30943/96.
- *Salgueiro da Silva Mouta v Portugal*, (ECtHR, 1999), application No. 33290/96.
- *Schalk and Kopf v Austria* (ECtHR, 2010), application No. 30141/04.
- *Sneersone and Kampanella v Italy*, (ECtHR, 2011), application No. 14737/09.
- *S.P., D.P and A.T v The UK* (ECtHR, 1996), application No. 23715/94.
- *Sutherland v UK*, (ECtHR, 1997), application No. 25186/94.
- *T v UK* (ECtHR, 1999), application No. 24724/94.
- *Tyrer v. UK* (ECtHR, 1978), application No. 5856/72.
- *Wallová and Walla v the Czech Republic* (ECtHR, 2006), application No. 23848/04.
- *Wagner and J.M.W.L v Luxembourg*, (ECtHR, 2007), application No. 76240/01.
- *X v Latvia* (ECtHR, 2011), application No. 27853/09.
- X *v UK* (ECtHR, 2012), application No 27853/09.
- *X and Others v Austria* (ECtHR, 2013), application No 19010/07.
- *X, Y and Z v The UK* (ECtHR, 1997), application No 21830/93.

Abbreviations

BIP	Best Interest Principle
CoE	Council of Europe
CRC	Convention on the Rights of the Child
EU	European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FRA	European Union Agency for Fundamental Rights
GC	General Comment
MoA	Margin of Appreciation
UN	United Nations

Abstract

Those who talk can be heard. Those who are allowed to talk may be listened to. This study is an attempt to give legal voice to those who cannot talk or are usually not listened to: children. This study is about the attention given to their interests, the best interests of the child. When these interests are immersed in a minority context, children may be overlooked for different reasons, including discriminatory attitudes or prejudice regarding their families. Law and its interpretation must be changed in order to include the difference. This study discusses the best interests of the child principle with special attention to its legal relevance in cases where lesbians, gays, bisexual and transgender (LGBT) are, or want to be, parents. The authoritative source for the interpretation of the principle is the United Nations (UN) Convention on the Rights of the Child (CRC). The analysis focuses on the European Court of Human Rights (ECtHR) and its case law. The study aims to explore the Court's approach to the best interest of the child and identify whether the principle is being consistently applied in cases involving LGBT families, given the fact that sexual orientation and gender identity are still sensitive issues in Europe. This is done by comparing these cases to cases lodged by applicants who were not identified as belonging to sexual minorities. The margin of appreciation doctrine and the lack of European consensus on sexual minorities' rights are confronted with the urgent paramount consideration that has to be given to children's best interests. The analysis explores whether there is room for detecting a possible Court's biased approach towards the concept of the best interests of the child. This study challenges the Court's decisions in the sense that the focus should not only be at the LGBT parents' rights to private and family life, but also at the interests of their daughters and sons. This is an attempt to call upon the ECtHR and all States not only to actively fight against LGBT discrimination, but, ultimately, to stop interpreting the concept of the best interests of the child in an arguably biased way, and to consider the principle's legal value in any decision, regardless of their parents' sexual orientation or any other distinction.

TABLE OF CONTENTS

Introduction

New social and legal demands take time to have societal and legal recognition. Changes in family compositions have challenged societies' values and legislation based on traditional practices or on an ideal concept of family. Some policy-makers and researchers, for instance, promote the idea that parents should be offered incentives to get married and remain married in order to ensure that children are raised in two-parent families.[1] Not so long ago, children born outside of the wedlock were not granted any rights. Adopted children did not have same rights as their "normal" siblings.

Family compositions have always been changing, but the recognition of family ties has been subject of legal discussion and human rights activism.[2] Nowadays, rights for some of the non-traditional families have been recognised, such as for stepfamilies and unmarried couple. It is important to emphasise that, in the middle of family changes and challenges, the paramount consideration must never be disregarded: the best interests of the child.

A relatively new non-traditional family form that has raised legal and social discussion is that composed by lesbians, gays, bisexual or transgender (LGBT) parents. In the United States of America, up to 6 million children are being raised by homosexuals.[3] Thirty one percent of LGBT people in the European Union are parents or legal guardians of a child.[4] In countries where same-sex joint adoption is legalised, the number of parents is even higher.[5] In the Netherlands, for instance, sixty one percent have children or are legal guardians of a child. Thus, this number tends to grow once European countries start recognising LGBT rights.

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[1] Jaffee et al, 2003, p. 109.
[2] See for instance the Office of the High Commissioner for Human Rights' discourse on the "Role of the family in the promotion of the Rights of the Child", at http://www.ohchr.org/EN/HRBodies/CRC/Documents/Recommandations/family.pdf (consulted on 09 July 2013).
[3] Gates, 2013, p. 2. Available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf (consulted on 25 March 2013).
[4] In May 2013, the results of the biggest LGBT survey realised in the European Union, in which 93000 LGBT Europeans participated, was published on and can be found at http://fra.europa.eu/DVS/DVT/lgbt.php (consulted on 8 June 2013).
[5] Idem.

New reproductive techniques also seem to speed up gay parenting in Europe and elsewhere. In surrogacy cases, women give birth without any intention to raise the child. A child might have two moms and two dads in co-parenting. Two lesbians do not a need a man anymore to conceive a child if they can rely on a sperm clinic. Therefore, the traditional family, composed of a heterosexual married couple hoping to raise heterosexual children, has been definitely changed. However, how fast can law adapt and welcome the difference? What if the difference is barely heard or... not even born yet? This difference will be the focus of the present research.

This thesis is an attempt to give legal voice to children, especially those raised by LGBT parents. It will explore the best interests of the child principle and identify the European Court of Human Rights (ECtHR)' approach to it.

Since sexual orientation and gender identity issues are still very sensitive in Europe,[6] it is relevant to analyse the ECtHR's approach to the best interests of children raised by LGBT parents, given the fact that the Court relies on common European values to issue its decisions. The European Convention on Human Rights (ECHR) recognises the right of family and private life for everyone and the Court recognised that the Convention's "*interpretation should be made in the light of the present day conditions*", as a living instrument.[7]

The main question of this research is: does the ECtHR interpret and apply the best interest of the child in cases related to family law the same regardless of the sexual orientation (or sex) of the parents in those cases? Are there any indications suggesting a biased approach of the Court when referring to the best interests of the child in relation to the sexual preferences of the child's parents or guardians?

To answer these questions, the thesis is divided in three chapters. The first chapter is dedicated to the concept of the best interests of the child as a principle of international law. The starting point for the explanation are the United Nations (UN) Convention on the Rights of the Child (CRC), authoritative source to interpret the principle, and the General Comment (GC) No 14 that the Convention's monitoring body has issued on the

[6] For instance, out of the 47 member States in the CoE, only 9 have legalised joint same-sex adoption (The Netherlands, Denmark, Sweden, Norway, Iceland, Spain, UK, France and Belgium).
[7] *Tyrer v. UK (ECtHR, 1978),* paragraph 31.

concept in 2013. The latter gives significant clarification on the assessment and determination of the child's best interest and presents relevant procedural safeguards in order to implement the principle.

As for the consideration that States should give to the best interests of the child, the distinction made in the first chapter between paramountcy and primacy is discussed. The universal validity of the principle will be also explored through the references made in international human rights instruments other than the Convention on the Rights of the Child and the attention paid to international jurisprudence used throughout the thesis.

The second chapter zooms in on the European Court of Human Rights' approach to and the interpretation of the best interests of the child. Has the ECtHR recognised the CRC as an interpretative source to apply the best interests of the child in European human rights cases? In fact, is the Court considering the child's welfare as a relevant element in its decisions? This chapter explores the Court's case law and identifies when and how the Strasbourg Court has invoked the best interest principle.

In order to better assess the importance attached to children's best interests by the ECtHR, analyses of two situations where the best interests of the child shall have paramount consideration, namely child abduction and adoption, will be presented.[8] The case law listed in the ECtHR "parental rights factsheet" will be analysed. This factsheet is regularly updated by the Court and lists seven child abduction cases, lodged by the abducting parent, and eight adoption cases.[9]

The third chapter reaches the core of the thesis. The consistency of ECtHR's approach to the best interest of the child will be analysed by comparing cases involving LGBT parents with cases involving heterosexual parents (or not identified as homosexuals). This chapter is therefore dedicated to examine the Court's attention to the best interests of the child when confronted with cases involving homosexual applicants. First, the notions of European consensus and margin of appreciation will be discussed. How sovereign can European States be on deciding sexual orientation issues even if the

[8] The paramountcy is based on the CRC, art. 21 and the Hague Convention 1980, Preamble.
[9] The factsheets are regularly provided and aims to compile the ECtHR's case law and divided it according to the themes, available at http://www.echr.coe.int/Documents/FS_Parental_ENG.pdf (consulted on 1 July 2013).

child's welfare is at stake? Would sexual orientation take the place of the best interest of the child as the focus of dispute?

To answer the aforementioned questions, all relevant ECtHR case law will be analysed, that means all cases where the applicants are LGBT people and the rights of children are at stake. The research for case law is based on the Human Rights Documentation (HUDOC), online database of the ECtHR case law run by the Court, the "Parental Rights" and "Sexual Orientation" factsheets, published by the Court, and doctrine.[10] The main focus will be adoption cases since four out of the eight complaints in the Court were pledged by gays or lesbians.[11]

The comparison between the cases of heterosexual and of homosexual applicants is made to assess the Court's consistency in the application of the best interest of the child. The four adoption cases lodged by homosexuals will be analysed in two groups according to their similarities: single adoption cases and second-parent adoption cases. The analyses of dissenting opinions will be of valuable contribution to the research. Finally, the cases involving children other than regarding adoption will be discussed.

Regarding the limits of the thesis, it is possible that one or more child abduction cases, lodged by the abducting parent, and adoption cases, lodged by heterosexual applicants, exist since the analysed cases taken from the non-exhaustive factsheet provided by the Court. However, the same factsheet was used as source to take the adoption cases lodged by homosexual applicants. Therefore, all cases compared come from the same official document provided by the Court.

Furthermore, the number of cases analysed in the research is limited. One could argue that the conclusions derived from the comparison, based on a limited number of cases and a specific group, do not fully reflect the Court's approach to the best interest of the child. Nevertheless, it is important to highlight that all existed cases involving LGBT

[10] More information about HUDOC can be found at http://www.echr.coe.int/Pages/home.aspx?p=caselaw/HUDOC/FAQ (consulted on 8 July 2013) The factsheets are available at http://www.echr.coe.int/Documents/FS_Parental_ENG.pdf (consulted on 1 July 2013) and http://www.echr.coe.int/Documents/FS_Sexual_Orientation_ENG.pdf (consulted on 1 July 2013). For doctrine, see Johnson, Paul, July 2013 (collection with all cases since the first petition related to homosexuality in 1955).

[11] The adoption cases can also be found on the "Parental rights" factsheet.

parents dealt by the Court were explored in this research therefore this is indeed an accurate analysis.

Finally, it has to be emphasised that even though the CRC, which must be regarded as the most authoritative source for the interpretation of the best interest principle, it is not as such binding for the ECtHR. Moreover, since the thesis' conclusions will be based on the European Court's approach to the best interest principle, one could argue that it is the European legal and moral development that should be the source of the research rather than international standards. However, one should bear in mind that regional systems play a crucial role in promoting human rights and should reinforce universal standards and their protection.[12]

[12] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, paragraph 37.

CHAPTER I

The best interests of the child

1.1. Origin, concept and problems

The concept of best interests of the child was first used in 1959, in the Declaration of the Rights of the Children.[13] Its article 2 promoted that the principle should have *the paramount* consideration in the enactment of laws related to children.[14] The "paramountcy" suggests that children should be the sole determining factor in decisions and legal approach as will be further discussed. However, due to its legal status, the Declaration was not able to bind States to comply with obligations.

It was with the United Nations Convention on the Rights of the Child, which entered into force in 1990, that the international community created the first legally binding international instrument that aimed to protect the children and incorporated the full range of human rights – civil, cultural, politic, economic, and social rights.[15] The Convention contains 54 articles that deal with many issues such as parental guidance (art.5); registration and nationality (art.7); preservation of identity (art.8); freedom of expression (art.13) thought, conscience and religion (art.14); adoption (art.21); and right to education (art.28). The Convention is widely supported among UN member States since it has been ratified by all States, mid 2013 the only exceptions being of South Sudan, Somalia and The United States.[16]

The CRC promotes four core principles: non-discrimination (art. 2); the right to life, survival and development; the respect for the views of the child (art. 6, art. 12); and the

[13] UNICEF, 2007, p. 35, available at www.unicef.org/publications/index_43110.html (consulted on 15 June 2013).
[14] "*The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration*"
[15] United Nations Treaty Collection, available at http://treaties.un.org/Home.aspx (consulted on 10 May 2013).
[16] Idem.

consideration of the best interests of the child (art.3).[17] The latter will be the basis for this paper and will be discussed in detail.

The concept of the best interest of the child has been the object of study of many scholars and has been the subject of more academic analyses than any other concept included in the CRC.[18] Children's welfare and protection are widely supported because children are vulnerable and dependent therefore must be protected from harm.[19]

Different from the Declaration of 1959, the best interest principle (BIP) in the Convention is not referred to as *the paramount*, but as *a primary* consideration, as stated in article 3: *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"*. The term *a primary* suggests that there are other considerations that can also contribute to the enactment of laws or decision-making process involving children.

Next to the general principle in article 3, the Convention also mentions the best interests of the child in cases of separation from the parents (art. 9), parental responsibilities (art. 18), depravation of family environment (art. 20), restriction of liberty (art. 37), and in penal cases involving juvenile and court hearings (art. 40). The United Nations Children's Fund (UNICEF) has indicated that in such situations the child's interests should be seen as the paramount consideration even if the CRC just refers to the paramountcy in adoption cases.[20]

The only situation where the idea of paramountcy is explicitly mentioned in the Convention is in cases of adoption as stated in article 21: *"States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration"*. Therefore, in general terms, States should consider the BIP as the primary consideration in decision-making processes. However, in adoption, the principle must have the paramount consideration.

[17] See also "General guidelines regarding the form and content of initial reports to be submitted by States Parties under article 44, paragraph 1(a)", UN Doc. CRC/C/5, 1991.
[18] UNICEF, 2007, p. 36.
[19] Cretney, 1992, p. 526.
[20] UNICEF, 2007, p. 39.

Before zooming in on the principle itself, it is important to elaborate on the difference between the paramountcy and primacy of the BIP. Archard explains that a consideration that is paramount outranks and trumps all other considerations. [21] It is, in effect, the unique consideration determinative of an outcome. A consideration that is primary is a leading consideration, one that is first in rank among several. But, although no considerations outrank a primary consideration, there may be other considerations of equal, first rank. Moreover a leading consideration does not trump even if it outranks all other considerations. A primary consideration is not the only consideration determinative of an outcome. Therefore, the difference resides in the absolute prevalence of the paramountcy and the importance, but not the sole consideration, of the primacy.

Much critique have been addressed to the idea of the principle as paramount. The paramountcy's authority lies in its apparent neutrality and fairness, but can be used to justify any decision[22]. For instance, one could imagine that judges would decide against non-traditional adoption, such as by a single and suitably capable homosexual to adopt, in the name of the paramount consideration of the best interest of the child. According to Kline, the concept enables politicians to propose laws and public policies that hide a political, ideological or moral intention with reference to the paramountcy of the children[23]. One could argue that the parent's rights are threatened by the children's needs. The problems with applying the paramountcy principle are rooted in its empty concept: while everybody agrees that children's welfare should be paramount, everybody has different views on what children's welfare demands.[24]

On the other hand, one could argue that the BIP needs to be vague to an extent so it's possible to implement it according to each circumstance. For instance, Van Bueren thinks that "*...a lack of certainty or indeterminacy is inherent in the best interest principle. Indeed, such a lack of certainty, which some may regard as flexibility and as*

[21] Archard, 2003, p. 39.
[22] King, 1987, p. 189.
[23] Kline, 1992, p. 375.
[24] Cretney, 1992, p. 262.

a virtue, is essential in the case-by-case approach, which the best interest standard requires."[25]

The principle is a delicate one, because its indeterminacy leaves an open field to whoever is interpreting it. There might be questions related to the exact meaning of BIP or how to implement it. Archard identifies two difficulties in accepting the concept of the best interest of the child: "*the import of the principle and the interpretation of best interests.*"[26]

Firstly, the import of the principle suggests that the best should be done, not simply what is good or enough. There are cases in which only two options are actually feasible and the best for the child can be easier assessed, for instance in some custody disputes or medical decision-making. The better option is the best. However, in cases of multiple possible solutions, how can the best be achieved? Public policies affecting children may find difficulties in defining priorities: if it is not possible to achieve the best due to a lack of resources, would the enough be enough, so other groups can also have enough? Or should the best prevail to the children especially when interpreted as the paramount principle? That is one of the concerns regarding the import of the BIP.

In case the principle as paramount is respected, as it stands, other people's interests would not be taken in account. Exceptionally, if the best interest of a child is at stake due to the best interest of another child, it will be hard to reach the best for both children. Naturally, the parents would feel that their own child needs more assistance.

A similar issue can happen, even more regularly, when interests of adults seem to conflict with the child's. The child's needs are usually more apparent and therefore tend to weight more. Helen Reece argues that in some cases involving children, they are not necessarily the most vulnerable people. She explains that, for instance, if a Court decides that a child should live with his/her mom in the light of the best interest of the child, because better conditions are there, it might be that another individual will be impacted. For example, an old grandmother or a disabled relative, that theoretically

[25] Van Bueren, 2007, p. 32.
[26] Archard, 2003, p. 41.

needs more attention, will be in a prejudicial position compared to the assistance given to the child.[27]

Secondly, regarding the interpretation of the principle, Archard proposes two methods: the hypothetical choice – that means to try to understand what the child would choose – and the objectivist choice – the best interest of the child should be evaluated in practical terms, as what is the best option for the child at the moment, regardless of the child's wishes. Both methods present challenges when trying to interpret and implement the principle.

As for the "objectivist choice", considering old same models and applying them generally to every child might underestimate the existent differences between each child. According to Smart and Sevenhuijsen, the best interests of the child criterion is not necessarily the best one to secure the child's interests in a custody case for instance, when the primary consideration should be the best caretaker, the one that would have more time to dedicate to the child and provide better assistance for instance.[28] Another delicate point here is the cultural background of the children and of those who should determine the best interest. Moral and cultural views can be a difficulty to assess what is the best for the child.

As for the "hypothetical choice", the one in charge of deciding what the best is for the child should act according to what individual would choose if he were not incompetent.[29] In a way, despite the fact that children usually choose what is pleasant and not the best, this method sounds acceptable because it tries to include the child's opinion and make a fair decision to what, in fact, the minor would like. Nevertheless, it does not seem to be a perfect method either, because the decision will, unavoidably, be influenced by the adult's way of thinking and the reality is that one cannot know, for sure, what the child wants, therefore, the decision would be made, again, based on assumptions.[30]

[27] Reece, 1996, p.11.
[28] Smart and Sevenhuijsen, 1989, p. 110.
[29] Buchanan and Brock, 1989, p. 10.
[30] Archard, 2003, p. 53.

Even with all the critiques, "*no-one would argue against the principle of prioritising a child's welfare.*"[31] Possibly, due to all these international discussions and the need for clarification on how to implement the BIP, the Committee on the Rights of the Child finally published in May, 2013, General Comment No 14, on "*the right of the child to have his or her best interest taken as a primary consideration.*"[32]

1.2. The implementation of the BIP in the light of CRC and GC No 14

Before it adopted the GC No 14, the Committee on the Rights of the Child had already elaborated a bit on the BIP. For instance, it stated in its report of the Day of Discussion on "*Children and armed conflict*" in 1992, that the principle is not subject to derogation in times of emergency. [33]

In 2003, through General Comment No 5, on "*General measures of implementation for the CRC*", the Committee called attention to the inclusion of the principle in domestic legislation of member States.[34] In GC No 6, on "*Treatment of unaccompanied and separated children outside their country of origin*", the Committee emphasises that the principle must be respected during all stages of the displacement process involving children and provides some elements to be considered when assessing the BIP, such as the child's ethnic background.[35]

In GC No 8, on "*The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment*", the Committee concluded that corporal punishment or other traditional violent practice, motivated by cultural relativism,

[31] Radford, J, 1995, p. 24.
[32] CRC/C/GC/14, 2013.
[33] The *Committee on the Rights of the Child, 1992, CRC/C/10, paragraph 67,* states that the principle does not "*admit a derogation in time of war or emergency*".
[34] CRC/GC/2003/5.
[35] CRC/GC/2005/6, paragraphs 19-21 : "*A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. Consequently, allowing the child access to the territory is a prerequisite to this initial assessment process… the appointment of a competent guardian as expeditiously… serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child…*"

conflict with the child's human dignity and are forbidden in respect of the best interest of the child.[36]

The recent GC No 14 must be considered as the most appropriate document to clarify crucial points about the principle given the fact that it is focused exclusively on the best interest of the child as a primary consideration.

The GC No 14, on the "*the right of the child to have his or her best interest taken as a primary consideration*", recalls that the aim of the principle is "*to ensure both the full and effective enjoyment of all the rights recognised in the Convention and the holistic development of the child.*"[37] It underlines that the principle is composed of three different elements: firstly, a substantive right that means the right that a child has to have his or her best interest assessed, protected and implemented as primary. Secondly, it is an interpretative legal principle which indicates that, in case there is more than one possible interpretation of a provision, the chosen option should be the one that better protects the child's interest. Finally, it serves as a rule of procedure, that demands that the impact of a decision must be always evaluated before the decision is made, based on a method focused on the interest of the child, and the reasonable justification for the final decision must be presented.[38]

The Committee recognises the complexity, flexibility and adaptability of the principle and states that the BIP should be determined on a case-by-case basis.[39] In this sense, the Committee clarifies that potential conflicts involving also adults should be critically analysed case-by-case, with flexibility, but through a method in which the primacy of the principle is always respected.[40] The Committee emphasis the idea that in adoption

[36] CRC/C/GC/8.
[37] CRC/C/GC/14, paragraph 4.
[38] Idem, paragraph 6.
[39] Idem, paragraph 32.
[40] Idem, paragraph 39: "*Potential conflicts between the best interests of a child, considered individually, and those of a group of children or children in general have to be resolved on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise. The same must be done if the rights of other persons are in conflict with the child's best interests. If harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best.*"

processes the principle is strengthened and the best interest of the child is the paramount consideration, the determining factor in decision-making processes.[41]

The document stresses the importance of linking the BIP with the other three general principles, namely the right to non-discrimination, the right to life, survival and development and the right to be heard. States should act with promptness and be aware of positive measures that must be taken in order to deal with inequalities and avoid prejudices. The opinion of children is important and shall be considered in the assessment of the best interest.[42]

As for the most pragmatic part of the General Comment, and probably the most important, the implementation of the principle needs to take consideration of two steps: the assessment and determination of the principle; and the procedural safeguards on the implementation. [43]

Regarding the first topic, the Committee presents a non-exhaustive list of seven elements that should be taken into consideration when assessing and determining the child's best interests. The child's view must be regarded. He or she has to be heard, and the fact that the child is too young, immature or in a vulnerable situation cannot exclude the weight of his or her opinion from the assessing the BIP.

The child's identity is also extremely relevant. The particularities of each child are important and differences such as national origin, cultural identity, religion and beliefs, sex and sexual orientation must be respected and taken into consideration.

Another element of importance is the preservation of the family environment and maintaining relations. The Committee considers that shared parental responsibilities are usually in the child's best interests, therefore separation should be the last alternative, only in cases where the assistance to the family is not sufficiently efficient to protect the child or avoid risk of abandonment and neglect.

[41] Idem, paragraph 38.
[42] Idem, IV, B.
[43] Idem, V, A, 1, paragraphs 52-79.

One should not neglect the care, protection and safety of the child. Action should be taken if the child's well being and development are endangered. The situation of vulnerability is also relevant. In this sense, authorities should bear in mind and particularise to each decision the child's situation of vulnerability, such as being a refugee or asylum seeker, victim of abuse, having a disability or belonging to a minority. Lastly, the Committee emphasises the needed consideration to the child's right to health and right to education. These two elements are a central point in assessing the BIP, for instance in granting resident permit or in humanitarian assistance.

The Committee elaborates on how to balance these elements that have no hierarchical order.[44] In cases where two elements are in conflict, for instance the preservation of the family environment and the child's risk from suffering violence by the parents, they must be balanced in order to achieve the best solution for the child.[45] The maturity and age of the child should guide the balancing of the elements,[46] but one should not forget that the situation and child will evolve, therefore decisions should assess stability and continuity of the child's present, but also future.[47]

Regarding the second part, namely the procedural safeguards to guarantee the implementation of the principle, the Committee list eight child-friendly formal and procedural safeguards and securities that should be primary in the implementation of the principle. [48] The right of the child to express his or her own views is again emphasised.

In addition, facts must be well established in the sense that the information relevant to the case must be reliable. The element of time perception is considered once the passing of time is perceived differently between an adult and a child, therefore delicate situations must have priority and need to be solved with promptness. States have to make sure there are qualified professionals dealing with the child, including available legal representation. It is recommended that States develop their own child-rights

[44] Idem, paragraph 50 (for non-hierarchy) and 80 (for the balance).
[45] Idem, paragraph 81.
[46] Idem, paragraph 83.
[47] Idem, paragraph 84.
[48] Idem, paragraphs 89-99.

impact assessment (CRIA), in which the Government at all levels needs to make an impact study on how different policies, or decisions, will impact children.

As for the judicial system, the legal reasoning must be coherent, in the sense that decision must be motivated, justified and explained on the basis of the primacy of the best interest of the child. There must be mechanisms to review or revise decisions.

Given the publication of this important General Comment, and new guidance for the assessment and implementation of the best interest of the child, it is hoped that Courts will approach the principle in a more structured and effective way, considering the aforementioned elements. The Government plays an important role on the promotion, and creation of public policies, of a more consistent BIP among other professionals working with minors, such as the director of the school or social workers.

The BIP is widely accepted by the international community and is not only present in the Convention on the Rights of the Child, which seems to be the most appropriate authoritative source to deal with the principle due to its specialisation in children's rights. It is true that the implementation has been a challenge due to the problems afore discussed. However, many international instruments and domestic and regional Courts have been using the principle as a primordial guidance for strategies and decisions. Before discussing the European Court of Human Rights' approach to the principle in the next chapter, there will be a brief exploration on the BIP in international treaties and domestic decisions worldwide.

1.3. The BIP in international and regional instruments

The BIP is present in international human rights treaties other than the CRC. In the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the best interest of the child are primordial in the education of family and recognition of a common responsibility among both parents towards the child (art. 5). In article 16, regarding all matters relating family and marriage, the principle of best interest should be paramount.

The Convention on the Rights of Persons with Disabilities (CRPD) also recognises the importance of the principle. Article 7 is a general provision that says that "*in all actions*

concerning children with disabilities, the best interests of the child shall be a primary consideration". For cases involving children with disabilities and guardianship, wardship, trusteeship, adoption or similar situations, the principle shall be paramount (art. 23).

The principle is not explicitly mentioned in the International Bill of Human Rights, but the Human Rights Committee (HRC), body that monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR), has already referred to the best interest of the child: the General Comments No 17 and 19 referred to the paramountcy of the principle in cases of divorce and parental rights.

As an example of a UN agency dealing with the principle, the UN High Commissioner for Refugees (UNHCR) has elaborated Guidelines on Determining the Best Interest of the Child in 2008.[49] The guidelines stressed the need for using the principle, not only in decisions, but also in policy-making process "*The principle arising from Article 3, that the best interests of the child shall be a primary consideration, should be applied in a systematic manner in any planning and policy-making by the Office that affects a child of concern to UNHCR and must permeate all protection and care issues involving UNHCR."*[50]

The Hague Convention on the Civil Aspects of International Child Abduction 1980, in its preamble, confirms the paramountcy of the interest of children involved in matters of custody. The African Charter on the Rights and Welfare of the Child (ACRWC), 1990, and the American Convention on Human rights (ACHR), 1978, are example of regional instruments that recognise the primordial attention to the best interest of the child.[51]

The European Union (EU) Charter of Fundamental Rights, which is legally binding to EU member States since the entry into force of the Lisbon Treaty in December 2009, refers to the "primary consideration" of BIP for all actions related children in its article

[49] UNCHR, 2008, at http://www.unhcr.org/4566b16b2.pdf (consulted on 10 May 2013).
[50] Ibid, pg. 20.
[51] The ACRWC has similar provisions to the CRC and use the same term primacy of the best interest of the child in the general provision (art. 4) and considers the paramountcy in case of adoption (art. 24). The ACHR is prior to the CRC, but already proposes that in cases of marriage dissolution **"***provision shall be made for the necessary protection of any children solely on the basis of their own best interests*." in article 17 (4).

24 (2). The preamble of the European Convention on the Adoption of Children recognises that "the best interest of the child shall be of paramount consideration", besides the fact that other provisions expressly invoke the principle, such as in cases of consultation of the child (art. 6) and minimum age of adopter (art. 9). In the European Convention on Human Rights, there is no mention to the BIP, but that does not mean that the European Court of Human Rights (ECtHR) hasn't recognised the principle. This topic will be the object of study in the next chapter.

To conclude, it seems that the ultimate importance of the best interests of the child has been recognised both international and regionally. However, as discussed, critics are still puzzled so as to the exact contents and scope of the principle and. General Comment No 14 has been issued to give some direction on this matter. Zooming in at a regional level, the next chapter will analyse if the Court relies on the CRC and how the best interest principle is being applied.

CHAPTER II

The European Court of Human Rights' approach to the Best Interests of the Child

2.1. The CRC's influence in the ECtHR

Given the fact that all member States of the Council of Europe (CoE) have ratified the CRC,[52] one could affirm that there is a shared intention of the 47 members to promote and protect children's rights. Since many of the provisions in the ECHR are written in similar terms to the CRC's provisions, the ECtHR is able to interpret the European Convention inspired by the Children Convention.[53] The ECHR is a living instrument and its interpretation should follow the development of society, [54] including present-day challenges faced by children. The ECtHR has been referring to the CRC when deciding cases involving children as will be discussed in this chapter.

Regarding cases of children's rights, the first reference made to the CRC was in 1992.[55] In the *case Olssen v Sweden*, that deals with the restriction of visits to the applicant's children, the French Judge Petitti, joined by other two, wrote a dissenting opinion and referred to the UN Convention. He emphasised the dissatisfaction with the fact that the child wasn't heard in the process and stated that "*it is paradoxical that in the year of the implementation of the United Nations Convention on the Rights of the Child, which stresses the importance of parent-child relations, there should have been such a failure in the application of Article 8 (art. 8) of the European Convention*".[56]

A decade later, the Court confirmed that "*the human rights of children and the standards to which all governments must aspire in realising these rights for all children are set out in the Convention on the Rights of the Child*."[57] With this statement, ten years after the first mention of the CRC, it seems the Court decided to endorse the importance and influence of the Children's Convention. In the same year 2003, Portugal

[52] Van Bueren, 2007, p. 36.
[53] Idem, p. 19.
[54] The Court stated in *Tyrer v. UK (ECtHR, 1978)*, that "*the Convention is a living instrument which must be interpreted in the light of present day conditions*", paragraph 31.
[55] Based on HUDOC analyses.
[56] *Olsson v. Sweden* (ECtHR, 1992) last paragraph of the partly dissenting opinion of Judge Petitti.
[57] *Sahin v. Germany* (ECtHR, 2003) paragraph 39.

was found to have violated article 8 in a case concerning custody, because it had failed to return the child to its father, the applicant, promptly.[58] The Court made clear that the ECHR must be applied in harmony with the principles of international law, in the light of the CRC.[59]

Regarding adoption cases, in 2004, the ECtHR recognised the importance of following and interpreting the ECHR in the light of the CRC. In the *case Pini and others v Romania*, the Court stated that " *obligations in the field of adoption, and the effects of adoption on the relationship between adopters and those being adopted, must be interpreted in the light of the United Nations Convention of 20 November 1989*".[60] Later in 2007, in *Emonet and others v Switzerland*, the Court reaffirmed that the State's obligation to consider the CRC and BIP's paramountcy must be considered in the final decision.[61]

Recently, in 2012, the Court referred to a specific concept, enshrined in the CRC, in *Harroudj v France*. The Strasbourg Court upheld the French refusal to allow an Algerian applicant to adopt an Algerian baby, who was already under her full care and control, following the Islamic *kafalah* guardianship system. Since the CRC makes reference to the kafalah and understands it as an "*alternative care*", the ECtHR expressed the importance of the UN Convention and recognised that, not only the negative, but also positive obligations under article 8 must be interpreted according to the CRC.[62]

As for cases involving a parent's right to be reunited with her or his child, the Court has already promoted the importance of considering the CRC, such as in the *cases Morfis v France*, where the Court considered admissible because the State acted in the light of the UN Convention,[63] and *Maumousseau and Washington v France* of 2007. [64] In the latter, the ECtHR even used a Concluding Observation made by the Committee on the

[58] *Maire v Portugal* (ECtHR, 2003).
[59] Idem, paragraph 72.
[60] *Pini and others v Romania* (ECtHR, 2004), Paragraph 139.
[61] *Emonet and others v Switzerland* (ECtHR, 2007), paragraph 65.
[62] *Harroudj v France* (ECtHR, 2012), paragraph 42.
[63] *Morfis v France* (ECtHR, 2007).
[64] *Maumousseau and Washington v France* (ECtHR, 2007), 46 and 60.

Rights of the Child and stated that obligations must be in line with the requirements made in the CRC.

However, the UN Committee and ECtHR have adopted divergent approaches to specific topics involving children, such as the child's right of identity within the concept of private life. In *X, Y and Z v UK*, the European Court used the lack of European consensus to decide that there was no violation to the right of a child if the donor of sperm remains anonymous,[65] whereas the Committee on the Rights of the Child has recommended that "*such anonymity would prevent children from obtaining birth information central to their right to identity*"[66].

The Court has not referred to the UN Convention in every single case involving children.[67] Officially, the European Court itself is not bound by the CRC, but States are. Therefore the Court's practice of constantly affirming that States' obligations must be interpreted in the light of the Children's Convention is a form of recognising the rights of the children. In a way, it creates the expectation that the Court itself will continue to follow and implement the international instrument's provision and recommendation.

To wrap up, the case law demonstrates that the ECtHR is "*not only capable of developing new standards of human rights protection from a child's perspective, but it is equally willing to build on those that currently exist, under the CRC*".[68] And that's what has been happening with the principle of the best interest of the child.

2.2. The recognition of the best interests of the child principle by the ECtHR

As previously mentioned in section 1.3, the ECHR does not have any provision on the best interest of the child. One should bear in mind that the Convention came into force in 1953, thirty seven years before the CRC entered into force. It was drafted in 1950,

[65] *X, Y and Z v The UK* (ECtHR, 1997) paragraph 44: "*there is no consensus amongst the member States of the Council of Europe on the question whether the interests of a child conceived in such a way are best served by preserving the anonymity of the donor of the sperm or whether the child should have the right to know the donor's identity*".
[66] CRC/C/GC/14, paragraphs 89-99 p. 21.
[67] Kilkelly, 2001, p. 308, explains that "*while it is not apparent that the Court (or the Commission, up to its abolition in 1998) has followed a consistent strategy to refer to the Convention on the Rights of the Child in all children's cases, it has been making such references with increasing frequency and with significant effect*".
68 Kilkelly, 2010, p. 261.

influenced by the atrocities in the Second World War and the Universal Declaration of Human Rights.[69] It is mainly focused on civil and political rights, such as the right to life, freedom from torture, freedom of assembly, expression and privacy.

On the one hand, reading the Convention, one could state that children did not receive much attention, even though, in article 5(d) referring to the right to liberty and security of a person, the "*detention of a minor*" is only allowed if for the purposes of education or to be brought before the competent authority. The only other provision that refers to children is article 6, in which the "*interest of juveniles*" is mentioned as relevant when deciding on the involvement of public in part of the fair trial or entirely. The closest reference to the BIP is made outside the original text of the Convention: in the Protocol No 7, article 5, regarding equality between spouses, States are welcomed to take "*measures in the interests of the children*" in cases involving spouses, such as new marriage or divorce. Note that "*best*" is not included in the text.

On the other hand, the Court's judicial activism has found space to promote the rights of children even if there is not sufficient attention to the BIP in the Convention's text. The first references to the principle were in 1994. After four years of the UN Convention's entry into force, in *Hokkanen v Finland*, a case regarding the reunion between a child and a father after the death of the mother, the Court added that, particularly, the best interest of the child must be taken into account.[70] After that, in 1996, the European Commission of Human Rights recognised the need to look at the interests of the child due to their vulnerability.[71][72]

In accordance with the UN Convention, and the respect to the child's right to be heard, the Court has already acknowledged the importance of the child's view and opinion to determine its best interest as observed by Professor Van Bueren.[73] The BIP was already

[69] See for example Ovey, Clare, and White C.A., Robin, 2010, p. 1-3.
[70] *Hokkanen v Finland* (ECtHR, 1994), Paragraph 58.
[71] The European Commission, abolished in 1998, was responsible to decide on applications' admissibility before the Court.
[72] *S.P., D.P and A.T v The UK* (ECtHR, 1996), Judgment on the admissibility by the Commission, paragraph 148.
[73] Van Bueren, 2007, p. 35: "*in particular when considering the best interests of the child, the Court places great weight on the exercise of the child's right to freedom of expression and the wishes of the child*."

placed at the "*forefront*", [74] which means "*the leading or most important position*" according the Oxford Dictionary.[75]

In a conference in 2011, the President of the ECtHR at that time, Judge Jean-Paul Costa, stated that "*in the Strasbourg case-law, the principle of giving the priority to safeguarding the [child's] best interests is firmly established*".[76] He explained that, in the unlawful child abduction *case Neulinger and Shuruk v Switzerland*, due to the long passage of time to decide and the lack of efficiency by the Government, the Grand Chamber understanding that the child was already adapted in Switzerland, "*with the best interests of the child uppermost in its mind*", decided that he shouldn't be sent back to Israel.[77]

The case law and Judge Costa's remarks indicate that the Court is implementing children's rights in the light of the BIP and the UN Convention. [78] Nevertheless, the standards that the Court uses to apply the principle are not entirely clear.[79] Even the judges in the Court question the actual implementation of the principle, as for example when Judge Maruste disagrees with the majority's disregard to the child's view. [80] The Court failed to apply the BIP which could change the course of decision.

Hence, in order to identify consistencies or inconsistencies in the Court's decision, it is important to delimitate its approach to the BIP, analysing when and how the Court has been using the principle.

2.3. The status of the BIP in the ECtHR's decisions

The Court deals with child-related cases mostly under the provision of private and family life, article 8 of the ECHR,[81] with issues such as guardianship, custody and

[74] *Pini and others v Romania* (ECtHR, 2004), paragraph 47.
[75] Oxford dictionary, at http://oxforddictionaries.com (consulted on 15 June 2013).
[76] COSTA, Jean-Paul, 2011, p. 1, at http://echr.coe.int/Documents/Speech_20110514_Costa_Dublin_FRA.pdf (consulted on 25 May 2013).
[77] Idem, p. 3, the author states that the Court "*still leaves unanswered the question of which standard of best interests is applicable to the European Convention*".
[78] In *Bronda v Italy* (ECtHR, 1996), *Maslov v Austria* (ECtHR, 2008), *Nielsen v Denmark* (ECtHR, 1988), *Roda and Bonfatti v Italy* (ECtHR, 2006), *T v UK* (ECtHR, 1999), *Wallová and Walla v the Czech Republic* (ECtHR, 2006), the best interest of the child was determinant in the Court's decision.
[79] Van Bueren, 2007, p. 31.
[80] *Ignaccolo-Zenide v Romania* (ECtHR, 2000), partly dissenting opinion.
[81] There are also cases on the basis of article 3, prohibition of torture, inhuman and degrading treatment and punishment.

access, identity alternative care, adoption and child abduction.[82] On the one hand, according to its first paragraph, "*everyone has the right to respect for his private and family life, his home and his correspondence*".

In the cases involving children at the Strasbourg Court, in general terms, applicants complain of a breach of their right to respect their private and family life, when the State interferes in their lives without a reasonable justification or fail to guarantee the enjoyment of their rights, as for instance in matters involving confidentiality of birth information.[83]

In addition to article 8, applicants usually invoke the prohibition of discrimination provision, article 14, when there is a possible difference of treatment on the basis of any ground "*such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*"[84] For example, in *X and others v Austria*, that will be discussed in the next chapter, the Court has found a violation of article 14, taken together with article 8, in the difference of treatment between unmarried same-sex couples and unmarried different-sex couples, because the legislation only guaranteed the possibility of second-parent adoption to the latter. The difference in treatment was considered discriminatory, because it was exclusively based on the sexual orientation of the applicants.

Moreover, there are cases where the Court agrees with applicants' complaint that the State failed to act with due diligence and did not fulfill its positive obligation to respect private and family life.[85]

On the other hand, according to the second paragraph of article 8, States' interference on the right to private and family life of an individual is acceptable if "*in accordance with the law and if necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of*

[82] Kilkelly, 2010, p. 248.
[83] In *Godelli v Italy* (ECtHR, 2012), the applicant "*alleged that the fact that her birth had been kept secret with the result that it was impossible for her to find out her origins amounted to a violation of her right to respect for her private and family life guaranteed by Article 8 of the Convention*" (paragraph 3) and the Court agreed on that and found a violation of art 8.
[84] ECHR, article 14.
[85] For instance, in *Bajrami v Albania* (ECtHR, 2006) due to the lack of legal framework available to the applicant, the Court "*concludes that the efforts of the Albanian authorities were neither adequate nor effective to discharge their positive obligation under Article 8*" (paragraph 68).

disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." Therefore, if the State interferes with the applicant's private and family life, the Court will apply a test to assess if the conditions expressed in paragraph 2 were fulfilled by the State.

To illustrate, in the *case Neulinger and Shuruk v Switzerland*, based on article 8, the applicants allege that, by ordering the return of Shuruk (Neulinger's son) to Israel, the Swiss Court had breached their right to respect for family life. The European Court, assessing whether the State violated the aforementioned right, considers that it must be "*ascertained whether the impugned interference met the requirements of the second paragraph of Article 8, that is to say whether it was 'in accordance with the law', pursued one or more legitimate aims and was 'necessary in a democratic society' in order to fulfill those aims*".[86] And it is through this test, more specifically the third step, that the Court uses the principle of the best interest of the child in its reasoning.

Firstly, the Court assess if the interference was in accordance with the law. In this case, the Court concludes that, in ordering the child's return under Article 12 of the Hague Convention, the interference had sufficient legal basis.[87] Secondly, the Court assesses the legitimate aim of the State's action, which is usually related to the protection of rights and freedoms of the child or others.[88]

Thirdly, assessing the necessity of the interference in a democratic society, the Court recognises the relevance of the BIP. States have to justify why the interference was needed and show that a fair balance between the interests at stake has been struck. The principle of proportionality needs to be respected, which means that there must be a reasonable relationship between a particular objective to be achieved and the means used to achieve that objective.[89]

In the Swiss case, the Court concluded that the State failed to prove a fair balance between the competing interests (of the applicants, the father and the public order), especially because Shuruk's best interest wasn't taken in consideration since the best

[86] *Neulinger and Shuruk v Switzerland* (ECtHR, 2010), Paragraph 91.
[87] Idem, paragraph 105.
[88] Idem, paragraph 106: "*the Court shares that the Federal Court to return the child pursued the legitimate aim of protecting the rights and freedoms of Noam and his father."*
[89] Clayton, 2000, p. 278.

option for him would be to stay in Switzerland and not be send back to Israel.[90] Therefore, the BIP plays a decisive role when deciding if there was reasonability in the State's interference.

Regarding the legal status of the principle in Europe, Van Bueren argues that, given the fact that the BIP is present in all the domestic systems of CoE member States and included in article 24, paragraph 2, of the EU Charter of Fundamental Rights 2000, the BIP has at least achieved the status of regional customary law.[91] In addition, all members of the CoE have also ratified the CRC.[92]

However, Van Bueren criticises the Court when referring to the consistency on using the BIP, especially in regards to the weight that the principle should have in each case.[93] She argues that one of the fundamental values of human rights law is certainty and the ECtHR has not being consistent in its decision. The Court needs to be more pragmatic and constant when dealing with cases involving children to appear less "*divergent and arbitrary*".[94] The next topic will pinpoint the Court's internal divergent approaches when dealing with the principle as the paramount consideration.

2.4. Inconsistencies in the Court's approach to the paramountcy of the BIP: child abduction v. adoption cases

As previously pointed out, in cases of adoption, the CRC refers to the BIP as having the paramount consideration in article 21, which means that the principle must be the most relevant component in decision-making processes.[95]

The paramountcy of the principle is also found in another international instrument as mentioned in the first chapter: the Hague Convention on the Civil Aspects of International Child Abduction 1980 mentions, in its preamble, that the interests of the children "*are of paramount importance in matters relating to their custody*". The

[90] *Neulinger and Shuruk v Switzerland* (ECtHR, 2010), paragraphs 134 and 151.
[91] Van Bueren, 2007, p. 32.
[92] According to the UNTC, Luxembourg is the only country maintains a reservation to BIP. Information available at http://treaties.un.org/untc/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (consulted on 10 June 2013).
[93] Van Bueren, 2007, p.37.
[94] Van Bueren, 2007, p. 36.
[95] For other cases involving children, in the light of the CRC, the principle must be considered as a primary consideration at least.

Convention is a multilateral treaty developed by the Hague Conference on Private International Law (HCCH) and, at the time of writing (mid 2013), there are 89 States parties to the Convention.[96]

The European Court constantly refers to the Hague Convention and has recognised the paramountcy of the BIP. In the ECtHR's factsheet regarding parental rights, seven out of the seven cases on child abduction lodged by the abducting parent were decided by the Court in light of the BIP's paramountcy and the Hague Convention.[97] That means that assessing the best interest of the child was determinant in those decisions.

In the aforementioned *case Neulinger and Shuruk v Switzerland*, the Court goes through each article of the Hague Convention, and also to some of the instruments presented in the first chapter, in order to promote the principle of the best interest of the child's paramount consideration. In this sense, the Court notes that "*there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount*".[98] Furthermore it concludes the case stating that "*the Court is not convinced that it would be in the child's best interests for him to return to Israel*."[99]

The Court considers itself in line with the "philosophy" underlined in the Hague Convention when referring to the implementation of the BIP's paramountcy[100]. In *Sneersone and Kampanella v Italy*, the Court refers to the paramountcy and adds that is competent, particularly in the light of the BIP, to assess whether Italy has breached a violation of art 8.[101] In *X v Latvia*[102] and *B v Belgium*,[103] the paramountcy is emphasised

[96] The list is available on the HCCH's official website at http://www.hcch.net/index_enrphp?act=conventions.status&cid=24 (consulted on 14 June 2013).

[97] The ECtHR's Press Service compiles regularly factsheets by theme on the Court's case-law and pending cases. The parental rights factsheet, published in June 2013, can be found on http://www.echr.coe.int/Documents/FS_Parental_ENG.pdf (consulted on 1 July 2013). Out of the seven cases that will be exposed throughout the next paragraphs, only one *X v Latvia* (ECtHR, 2011) hasn't reached the final decision since it is pending at the Grand Chamber but had been previously decided by the Chamber.

[98] *Neulinger and Shuruk v Switzerland*, (ECtHR, 2010), paragraph 135.

[99] Idem, paragraph 151.

[100] *Maumousseau and Washington v France*, (ECtHR, 2007), paragraph 69.

[101] *Sneersone and Kampanella v Italy*,(ECtHR, 2011) paragraph 59 (for the paramountcy) and in 92: "*the Court is competent to ascertain whether the Italian courts, in applying and interpreting the provisions of that Convention and of the Regulation, secured the guarantees set forth in Article 8 of the Convention, particularly taking into account the child's best interests*".

and, further, the Court concludes that the principle is considered the most important aspect in a decision.[104] Finally, in the *Eskinazi case*, the Court "*agrees with the first applicant that the concept of the child's best interests should be paramount*".[105]

Hence, in all child abduction cases lodged by the abducting parent, the ECtHR has complied with international law. In other words, the Court has correctly relied on the BIP's paramountcy as indicated in the Hague Convention.

However, in cases involving adoption, where the best interest shall also be the paramount consideration according to the CRC, the ECtHR has had a different approach. Contrariwise to the approach in child abduction cases, the Strasbourg Court has not maintained the same consistency when applying the BIP's paramountcy.

Out of the eight cases involving adoption, the Court weights the principle's paramountcy in five.[106] In one case, the Court does not even mention the best interest of the child.[107] It does not seem fair to decide on a case of adoption without discussing at all the interest of the child - the subject of main concern in an adoption process.

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[102] *X v Latvia* (ECtHR, 2011), paragraph 72, current referred to the Grand Chamber.
[103] *B v Belgium* (ECtHR, 2012), paragraph 44: "*avec le souci constant de déterminer quelle est la meilleure solution pour l'enfant enlevé*".
[104] *M.R and L.R v Estonia* (ECtHR, 2012), paragraph 37 and 43 (not a, but the primary consideration).
[105] *Eskinazi and Chelouche v Turkey* (ECtHR, 2005), Court's assessment part (no numbered paragraphs available).
[106] In fact, the factsheet provides with ten cases, but one (*Negrepontis-Giannisis v Greece* (ECtHR, 2011) refers to adult adoption and the other (*Kopf and Liberda v Austria* (ECtHR, 2011)) refers to the foster parents' right to visit the child. The remaining eight cases will be explored in the next chapter.
[107] *Gas Dubois v France* (ECtHR, 2012).

Given the importance and recognition of the CRC, why would the Court have such different approaches to child abduction and adoption cases, when the latter has also its paramountcy recognised? Would be that the Court relies more in the Hague Convention even if the CRC has more than a hundred ratifications when compared? In order to answer these questions, one should identify the peculiarities in the adoption cases, or in the Court's decisions, that cannot be found in child abduction. The following table brings relevant information.

Cases	**Does the ECtHR mention/discuss a common European understand on the topic?**	**Is the non-discrimination (art. 14) relevant in the Court's assessment?**
Child abduction (lodged by the abducting parent)		
Eskinazi and Chelouche	No	No
Maumousseau	No	No
Neulinger	No	No
Sneersone	No	No
M R and LR	No	No
B	No	No
X	No	No
Adoption		
Fretté	Yes	Yes
EB	No	Yes
Gas Dubois	No	Yes
X and Others	Yes	Yes
Keegan	No	No
Wagner	No	Yes
Kearns	Yes	No
Harroudj	Yes	No

After analysing the fifteen cases, it is possible to find two elements that may explain the different resolutions. Firstly, the ECtHR uses an element in half of the adoption cases that it does not use at all in the child abduction cases: the existence of a common understanding among European States in a specific topic. Out of the seven decisions on child abduction, none contains any reference to "*European consensus*" nor to the idea of a common harmonisation of values and understanding among the CoE countries.[108]

Secondly, in five out of the eight adoption cases, the non-discrimination provision (art. 14) plays an important role. The Court did not decide only on the right to family and private life (art. 8), but also combined with analyses of a possible discrimination committed by the State. In child abduction cases, the discrimination issue is absent in all cases.

To conclude, a lastly finding in the cases of adoption is that the attention given by the Court to the non-discrimination provision and European consensus derives from a reason: the sexual orientation of the applicants.[109] Would that be a reason to neglect the application of the best interest of the child? The next chapter is dedicated to explore the ECtHR's approach to the BIP in gay parenting cases.

[108] The European consensus will be explored in the next chapter.

[109] Sexual orientation is not mentioned explicitly as a ground for discrimination protected by the ECtHR, but is "undoubtedly covered by Article 14 of the Convention" (*Salgueiro da Silva Mouta v Portugal*, (ECtHR, 1999), paragraph 28) once it can be "*considered as a difference on the grounds of 'sex' or 'other status'*" (Commission report, *Sutherland v UK*, (ECtHR, 1997) paragraph 51).

CHAPTER III

Sexual Orientation and the ECtHR: what relevance is given to the best interests of the child?

3.1. Children raised by gay parents

Children raised by gay parents may be blood-related to their parents. Some are born into previously heterosexual marriages. Others are conceived after an agreement between a lesbian mother and a gay father. Some others might be children of artificial insemination or surrogacy. Non-biological children may come to the household through adoption or fostering for instance.

According to the European Union Agency for Fundamental Rights (FRA), thirty one percent of the LGBT population in Europe are parents.[110] In the United States of America, a number of up to six million American children and adults may have an LGBT parent, which implies that approximately two percent of the population have an LGBT-identified parent.[111] It is hard to find precise numbers and figures because many of the children that have been raised by a gay parent were born to opposite-sex couples that later broke up.[112] Furthermore, LGBT people that haven't come out or identified themselves as homosexuals are not counted on statistics.

It is possible to divide the stakes for children raised by gay parents in two categories: legal and social. As for the first aspect, in countries where same-sex couples cannot establish a legal relationship with their kids, the rights and welfare of the children are at risk of being compromised. These children face challenges that wouldn't occur to children born and raised in hetero family context. Given the fact that only one can be considered as a legal parent, the other will face difficulties in the most common activities in upbringing a child such as opening a joint bank account, representing the kid in school meetings or being considered the legal representative in cases of emergency.

[110] FRA survey at http://fra.europa.eu/DVS/DVT/lgbt.php (consulted on 8 June 2013).
[111] Gates, 2013, p. 2.
[112] Idem, p. 3.

In a worst case scenario, the child may become orphan in case the legal parent dies. One could say that a mere declaration of shared parental responsibility would fix the legal issues. However, there will be a period where the child won't have any legal parent and blood related relatives could dispute the custody of the child. The child has the risk to be even given up to adoption. In addition, inheritance rights belong to the child might be denied to the child in case the non-registered parent passes away.

In the European Union (EU), for instance, gay families have real impediments to exercise their freedom of movement, which results in the impediment of exercising other rights.[113] The best interest of the child might be in danger. For instance, if a same-sex couple marry and have kids in Spain, their family ties will be at stake in case they need to move to Italy, country where gay families are not recognised.

Nationality issues can also arise within the EU. If a lesbian couple, where one woman is British and the other is Italian, have a child by artificial insemination in the United Kingdom, the child might not be eligible to obtain Italian nationality. The Italian registrar of birth could argue that, according to Italian law, insemination artificial can only be used by heterosexual couples; the child can have only one mother, the one that gives the birth; having two mothers would go against the Italian public order.[114]

For the purpose of this study, an explorative qualitative research was conducted in order to identify possible legal challenges that a child raised by gay parent might face in the Netherlands.[115] The participants highlighted that the legal status of the known donor in cases of artificial insemination remains a challenge. In the majority of the cases, only one of the two lesbian mothers was registered as a legal parent, because the donor, who was a gay friend, also wanted to register the kid. Therefore the non-biological mother

[113] More information available at the European Parliament's Intergroup on LGBT Rights' website, at http://www.lgbt-ep.eu/tag/free-movement/ (consulted on 25 May 2013).
[114] Example presented at the European Parliament, in March 2013, by Luís Amorim, NELFA (Network of European LGBT Families Association) board member. At http://www.lgbt-ep.eu/wp-content/uploads/2013/03/LA-NELFA-speech-EP-6-March-2013.pdf (consulted on 10 June 2013).
[115] The sole intention of the research was to give the author a general view about gay parenting in Amsterdam. Six gay parents and two children shared that they have been living without major issues, but recognise that Amsterdam is a very cosmopolitan and tolerant city. They mentioned that gay friends in the Dutch countryside have been suffering discrimination due to their non-traditional family structure. The children commented on the advantage of living in a more tolerant and "open-minded" family, where gender roles are not stereotyped. Further studies in this field will be possibly developed by the author in a PhD research.

was not considered the legal mother. In this sense, the Dutch green party GroenLinks has already expressed their interest on passing a bill to recognise more than two official parents.[116]

As for the social aspect, children raised by gay parents have been a constant object of research for the last decades. Studies intend to assess whether these children present differences in their behaviour and cognitive skills when compared to children raised by traditional families. In March 2013, the American Academy of Pediatrics, after analysing more than 80 studies, concluded that there is no cause-and-effect relation between children' welfare and the parents' sexual orientation.[117]

It is sometimes assumed that children raised by same-sex couples will be homosexuals. This assumption becomes untenable when the opposite is questioned: what would explain the sexual orientation of gays raised by heterosexual couples? What about the heterosexuals raised by homosexual couples? In general terms, it seems there is no doubt about the capability of homosexuals raising children per se.

However, there are two arguments used against gay parenting may be relevant: the influence of parental gender - the impact of having a mother and a father; and the stigmatisation - the discrimination towards homosexuals by society will impact on the upbringing of the child, for instance, being bullied at school for having gay parents.

Regarding the parental gender, the absence of one of the genders in the child's household is not a new phenomenon. Single homosexuals can be perfectly comparable to a divorced father or a single mother that raises a child alone. The difference exists when couples are compared.

Nevertheless, as recommended by the CRC, and General Comment No 14, the analysis of the best interest of the child should be made on a case by case basis. States shall make sure that staff involved in child care is well prepared and based in clear criteria in order to assess the elements that guarantee the welfare of the child, and not sole

[116] Information available in English on the DutchNews website: http://www.dutchnews.nl/news/archives/2012/10/a_child_should_be_able_to_have.php (consulted on 25 March 2013).
[117] Information available at www.aap.org (consulted on 15 June 2013).

consideration of parental gender. This argument cannot be used to legitimise possible discriminatory concepts.

As for the second argument, in fact, discrimination on the basis of sexual orientation is a reality in society. The FRA survey concluded that about forty seven percent of the EU LGBT population felt personally discriminated in the year preceding the survey (finalised in August, 2012) due to their difference.[118] One could argue that children of this population might have an impact on their lives due to their parent's sexual orientation.

However, the possibility of discrimination cannot be used as a legitimate argument to limit the individuals' enjoyment of rights. This was emphasised by the Inter-American Court of Human Rights (IACHR) when clearly stated in *Atala v Chile* that "*potential social stigma due to the mother or father's sexual orientation cannot be considered as a valid 'harm' for the purposes of determining the child's best interest. If the judges who analyze such cases confirm the existence of social discrimination, it is completely inadmissible to legitimize that discrimination with the argument of protecting the child's best interest*."[119]

In cases of custody, as in *Atala v Chile*, Courts have consistently interpreted the best interest of the child as favouring heterosexual parents over homosexual parents.[120] The possibility of leaving room for a possible biased approach towards the interpretation of the BIP requires a systematic and clear application of the principle. Next topic will explore the ECtHR's approach to adoption cases, where the best interest of the child should be of paramount consideration.

[118] The result is available on http://fra.europa.eu/DVS/DVT/lgbt.php (consulted on 1 June 2013).
[119] Atala Case of *Atala Riffo and daughters v Chile*, (IACHR, 2012), paragraph 121. Atala had lost the custody of her daughters because of her homosexuality, but the IACHR has overruled the Chile's decision and found a violation of her private life.
[120] Reece, 1996, p. 20

3.2. Is the BIP's paramountcy conditional to the parent's sexual orientation?

As exposed in chapter 2, the European Court of Human Rights has not considered the best interest of the child as paramount consideration in three out of the eight adoption cases.

Five decisions were in line with the CRC. In *Keegan v Ireland*, the Court recognises that Ireland tried to apply "first and paramount consideration" to the welfare of the child, but had failed because the Court did not see how placing the child to adoption without the (father) applicant's consent would be in the best interest of the child.[121] In *Wagner and J.M.W.L v Luxembourg*, the applicants complained that the adoption decision pronounced in Peru couldn't be declared enforceable in Luxembourg, because the latter does not recognise adoption by a single person. Bearing "*in mind that the best interests of the child are paramount in such a case, the Court considers that the Luxembourg courts could not reasonably disregard the legal status validly created abroad and corresponding to a family life within the meaning of Article 8 of the Convention*". [122]

In *Kearns v France*, the applicant requested, outside the relevant statutory time-limit, the return of her child that she had left for adoption and registered anonymously. The Court added that "*in striking a balance between these different interests [biological mother, child and adoptive family], the child's best interests should be paramount*" therefore the Government acted correctly in finding a new family as quickly as possible.[123] In the *Harroudj case,* the Court did not find a violation of article 8, because the State acted with respect to the BIP's paramountcy enshrined in the CRC, therefore the refusal of a French national to adopt an Algerian baby under kafalah was acceptable.[124]

Lastly, in the fifth case, the Court found no violation when France denied the right to a homosexual to adopt individually. The Court stated that "t*he justification for the decision lay in the paramountcy of the child's best interests, which formed the*

[121] *Keegan v Ireland* (ECtHR, 1994), paragraph 12.
[122] *Wagner and J.M.W.L v Luxembourg* (ECtHR, 2007), paragraph 133.
[123] *Kearns v France* (ECtHR, 2008), paragraph 79.
[124] *Harroudj v France* (ECtHR, 2012), paragraph 49.

underlying basis for all the legislation that applied to adoption. The right to be able to adopt relied upon by the applicant was limited by the interests of the child to be adopted."[125] In the first four cases all applicants did not identify as homosexuals. In this sense, an analysis is relevant when comparing all the eight cases.

Cases	Was the BIP taken as a paramount consideration?	How did the Court vote?
Adoption cases involving applicants not identified as homosexuals		
Keegan (1990-1994)	Yes	Unanimously
Wagner (2001-2007)	Yes	Unanimously
Kearns (2004-2008)	Yes	Unanimously
Harroudj (2009-2012)	Yes	Unanimously
Adoption cases involving homosexual applicants		
Frette (1997-2002)	Yes	4x3
EB (2002-2008)	No	10x7
Gas Dubois (2007-2012)	No[126]	6x1
X and Others (2007-2013)	No	10x7

There is a similarity among the three cases in which the BIP's paramountcy has not been considered: in *EB v France*, *Gas Dubois v France* and *X and others v Austria* are homosexuals.[127] In *Fretté v France*, the paramountcy was considered, but the Court was divided in its decision (4x3).

Therefore, when dealing with heterosexual applicants in adoption cases, the Court considers the BIP's paramountcy in four out of the four cases. However, when dealing with homosexual applicants, the Court only refers to the principle's paramount

[125] *Fretté v France*, (ECtHR, 2002), paragraph 36. This decision will be further explored.
[126] The Best interest of the child is not even mentioned in the Court's assessment.
[127] ECtHR, 2008, 2012 and 2013, respectively. In *X and others v Austria* (ECtHR, 2013) the child is also an applicant and his sexual orientation is not considered in the analyses.

consideration in one out of the four cases. Another relevant finding is that the Court has decided unanimously in all the opposite-sex related cases, there is not a single dissenting opinion. However, in the same-sex related cases, it happens the opposite: the Court has not decided unanimously in a single case, but presented dissenting opinions in all.

The result of this analysis indicates that the Court is divided and sexual orientation *might* be at the heart of the little relevance given to the BIP's paramountcy. The certainty comes in reading the three decisions and comparing them to the other five. The conclusion is that the child's welfare, in cases of adoption by gays, is barely considered. Instead of best interests of the child, the Court focuses on the applicants' sexual orientation and the recognition of sexual minorities' rights in Europe. The Court relies on the existence of a European consensus to avoid deciding on specific issues that are of controversial understanding among the European countries. As discussed next in section, the consensus becomes crucial in the Court's judgment together with another concept: the margin of appreciation (MoA).

3.3. The margin of appreciation and European consensus in the ECtHR

Before examining the ECtHR's approach to the MoA and European consensus in adoption gay-related cases, it is necessary to explore these two concepts that are usually intertwined.[128]

The concept of European consensus is a method used in cases of delicate issues to compare and try to find a possible harmonisation in law and practices among the contracting States.[129] In other words, it aims to identify if there is a common ground of understanding in the interpretation of a specific topic. The consensus analysis can be used in both applicant and State's argumentation, but is the Court's final analysis that is relevant to the case's resolution.

Regarding the process used to assess the consensus, Helfer explains that the Court considers three different elements: (a) domestic laws and legal development of States in

[128] Benvenisti, 1999, p. 851.
[129] Idem p. 852.

the topic; (b) the public opinion and the general impression of Europeans on the issue; (c) the experts' opinions in the field.[130] However, going through its judgements, the Court hasn't been consistent in applying these elements, because often one or more will be present in a judgment, whereas at other times the concept is completely absent.[131]

The Court has been showing sympathy with the notion that European society and concepts are constantly changing throughout the time and the consensus analysis needs to be revised from time to time. For instance, in 2001, *Mata Estevez v Spain,* the Court refused the idea that relationships between same-sex couples fall under the scope of family life therefore they were not protected by article 8. However, in 2010, *Schalk and Kopf v Austria,* the Court acknowledged that same-sex couples enjoy the protection afforded to family life by article 8. due to the "*the rapid evolution of social attitudes towards same sex-couples*" which had taken place in many CoE member States and the fast growing tendency to include same-sex couples in the notion of family in EU law.[132] Note that the consensus was based on the understanding of the majority of the countries, and the tendency to development, therefore the Court does not expect for an absolute consensus among all member States.[133]

Hence, the idea that the ECHR is a living instrument that must be interpreted according to present-day conditions has been a central feature of ECtHR's case law from its very early days.[134] As for the relevance of the consensus analysis, it can be decisive in the Court's judgment and is usually applied together with the other method, also referred as a doctrine, namely the margin of appreciation.

The MoA is not enshrined in the ECHR yet, but it will be soon. In May 2013, the CoE adopted the Protocol 15 in which add a reference to the doctrine in the Preamble of the

[130] Helfer, 1990, p. 1056.
[131] Johnson, 2013, p. 77.
[132] *Schalk and Kopf v Austria* (ECtHR, 2010), *paragraph 93.*
[133] *ABC v Ireland* (ECtHR, 2010).
[134] Letsas, 2012, abstract.

Convention.[135] Twenty two countries have signed the new Protocol that will just enter into force after all the 47 contracting States have acceded to it.[136]

The MoA is a key method used by the ECtHR in its review of complaints and it was first used by the Court in 1976, through the *case Handyside v UK*.[137] By this method, the Court aims to define a scope of expected States' obligations, recognising that national authorities are in better place to judge domestic cases than the Strasbourg Court, given their divergent cultural and legal traditions, they are in *better position rationale*.[138] The European Court, in accordance with subsidiarity principle, has recognised that "*the Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines*" and concluded "*that State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements [of morals] as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.*"[139]

In this sense, it is possible to identify a relation between the two methods. The Court considers that the lack of European consensus in a matter will normally be accompanied by a wider margin of appreciation to States.[140] Generally speaking, member States will usually enjoy a broad margin of appreciation if public authorities are required to strike a balance between competing private and public interests or Convention rights - especially where there is no consensus within CoE States as to the relative importance of the interest at risk or as to the best means of protecting it.[141] One could conclude that the Court has to pick one of two: since interests between States and applicants are

[135] Article 1 proposes the addition of "affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention" at the end of the preamble.

[136] The list of countries can be found on the CoE website, at http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG (consulted on 14 June 2013).

[137] Van Bueren, 2007, p. 31, at fn. 66. However, the term "*margin of appreciation*" had already been used by the Commission in *Lawless v Ireland*, (ECtHR, 1961), paragraphs 28-30.

[138] Greer, 2000, p. 8.

[139] *Handyside v UK* (ECtHR, 1976), paragraph 48.

[140] *Rasmussen v Denmark* (ECtHR, 1984), paragraph 40.

[141] *Evans v UK* (ECtHR, 2007), paragraphs 77-81.

opposite, a wider power of discretion signifies a lower protection standard for the citizens.

The European Court has consistently applied these two methods. On the one hand, one could argue that this is the only way to combine enforcement of the regional Court with States' sovereignty and their peculiarities. In this sense, MacDonald agrees that the MoA "*gives the flexibility needed to avoid damaging confrontations between the Court and Contracting States over their respective spheres of authority and enables the Court to balance the sovereignty of Contracting Parties with their obligations under the Convention*."[142] Moreover, the MoA seems to be a good 'pragmatic device', once it reconciles the political, social, economic and cultural diversity of contracting States.[143]

Furthermore, concerning the European consensus, a positive impact of the European consensus method is that it helps to create minimum human rights standard. In finding a violation, based on a consensus in the majority of contracting States, one could argue that the Court pressures the few remaining countries to change their practices and legislation towards a better human rights understanding.

On the other hand, both concepts have received sustained criticism. The margin of appreciation is one of the most controversial and widely discussed concepts that the European Court of Human Rights has developed.[144] The doctrine of the MoA has been highly disapproved.[145] It can be interpreted as "*a conclusory label which only serves to obscure the true basis on which a reviewing court decides whether or not intervention in a particular case is justifiable*."[146]

When the Court relies on the MoA and does not, in fact, decide on the matter brought by the applicant, one could infer that the Court fails on protecting the right at stake. Along the same line, Lord Lester criticises the doctrine and states that the "*margin of appreciation has become as slippery and elusive as an eel*" and is used "*as a substitute*

[142] St. J. MacDonald, 1993, p. 123.
[143] Kavanaugh, 2006, p. 422.
[144] Dzehtsiarou, 2009, introduction.
[145] Johnson, 2013, p. 69.
[146] Singh, 1999, p. 20.

for coherent legal analysis of the issues at stake";[147] or can even be seen as a "*black box magic.*"[148]

As for the critiques towards the European consensus, this method does not seem to be the best way to determine human rights minimum standards. Letsas shares that "*judges who adjudicate on [Convention] rights have a duty to discover and give effect to the morally best understandings in human rights irrespective of contracting States' current consensus*".[149]

In addition, one could say that this method does not work in favour of minority groups. Firstly, they would need to conquer their rights in a sufficient number of jurisdictions to, then, be protected by the European Court. In a way, the method leaves vulnerable minorities on the hands of a majoritarian domination.

The next paragraph will return to the discussion of the best interest of the child. It will explore the impact of the afore discussed methods on the Court's consideration to the principle in cases where the applicants' sexual orientation is raised as a concern.

3.4. Challenges to implement the BIP's paramountcy given the MoA and consensus analysis in adoption cases by homosexuals

The first complaint involving adoption by a homosexual was lodged in the year that the CRC was drafted. In 1989, *Kerkhoven and Hinke v the Netherlands* was pledged but considered inadmissible by the Commission in 1992. The case concerned a request of the non-biological "social parent" of a child, conceived by her lesbian partner through artificial insemination, to have parental authority over the child. [150] At that time, neither same-sex civil partnership nor second parent adoption by homosexuals was legally possible in the Netherlands. The Commission considered that there was no obligation on the State, under article 8, since the relationship between two women couldn't be "*equated to a man and a woman living together*", therefore did not constitute family

[147] Lord Lester of Herne Hill, 1998, p. 75.
[148] Kratochvil, 2011, p. 354.
[149] Letsas, 2007, p. 11.
[150] *Kerkhoven and Hinke v The Netherlands*, (European Commission of Human Rights, 1992).

life. No references to the MoA and European consensus were made and the BIP was not looked as the paramount consideration in the Commission's decision.

As previously concluded, out of the four cases lodged by homosexual applicants considered admissible by the Court, the BIP's paramountcy was only mentioned, and relevant for the judgment, in one case. However, out of the four adoption cases where applicants were not identified as homosexuals, the paramountcy was relevant in all the four cases.

The next two sub-section will be exclusively in the Court's attention to the BIP in the gay adoption cases. They were divided in sub-topics given the complaints' similarities. Interestingly enough, three out of the four cases were against France – the most recent European State to recognise same-sex marriage and adoption by gay couples, in May 2013.[151]

3.4.1. Adoption by a single homosexual

Fretté v France (2002) and *EB v France (2008)* had comparable complaints: the refusal of an application for authorisation to adopt a child on the basis of sexual orientation when, according to French Civil Code (art. 343-1), "*any person over twenty-eight years old*"" is allowed to apply to adopt a child.[152] Both declared themselves homosexuals during the analysis process that is responsible to identify if a person should receive the authorisation to adopt or not. For both cases, France rejected the authorisation. The applicants, alleging that the refusal was based on their sexual orientation, decided to bring their cases to the Strasbourg Court.

Surprisingly, given that the sexual orientation played a fundamental role in both decisions, the ECtHR did not identify any violation in the first case, but did in the second case. What happened? Has the European Court changed its conclusion regarding

[151] Given the facts that there are still 38 member States in the CoE that haven't recognised same-sex adoption and that 75% of the gay adoption cases were against France, one could infer that these complaints were an indication of the population's dissatisfaction on how same-sex people were being treated in that country and a way of pressuring authorities to change practices and legislation.
[152] *Fretté v France* (ECtHR, 2002) and *EB v France* (ECtHR, 2008).

the European consensus on matters of sexual orientation and adoption from in six year (from *Fretté's* decision to *EB'*s decision)?

The most obvious answer would be yes, the Court has re-considered its analysis in the sense that the consensus is that homosexual are allowed to adopt, granted a narrower margin of the appreciation to the State and found a violation of article 8 in the applicant's private life combined with the non-discrimination provision (art. 14). However, only the latter seems to fit the bill. The consensus analysis and MoA were not relevant in the Court's decision. What is the difference then? Why does the Court approach to the BIP's paramountcy in *EB case* and does not in the *Fretté*?

Firstly, in *Fretté*, the best interest of the child is the centre of the whole case and the Court has strongly relied on the European consensus and margin of appreciation. Regarding the BIP, the Court expresses that the right to adopt is not included among the rights guaranteed by the Convention and the mere desire to found a family did not constituted family life.[153] Furthermore, it recalls the BIP's paramountcy and states that "*even if the decision to refuse authorisation had been based exclusively or chiefly on the applicant's sexual orientation, there would be no discrimination against him in so far as the only factor taken into account was the interests of the child to be adopted. The justification for the decision lay in the paramountcy of the child's best interests, which formed the underlying basis for all the legislation that applied to adoption.*"[154]

As for the European consensus, the Court refers to the lack of common understanding in the matter among the members of the CoE, in which only the Netherlands had adopted legislation allowing same-sex marriage and joint-adoption.[155] The Court also considers the lack of scientific and psychological conclusive studies regarding the impact that a child has when raised by a homosexual parent.[156] Therefore, a wide margin of appreciation must be left to the authorities.[157]

[153] *Fretté v France* (ECtHR, 2002), paragraph 11.
[154] Idem, paragraph 36.
[155] Idem.
[156] Idem, paragraph 42.
[157] Idem, paragraph 41.

The Court concludes that, due to "*the broad margin of appreciation to be left to States in this area [homosexual parent] and the need to protect children's best interests*", the Government's interference was proportional and legitimate therefore no violation could be found.[158] Thus, the best interest of the child was relevant to the judgment in the sense that was used deny the right to adopt, based on the lack of harmonisation in CoE States' legislation and conclusive scientific studies on gay parenting.

A point of concern regarding this judgment is the evaluation of the European consensus and, as a consequence, the impact on the scope of MoA. The Court pointed out that only the Netherlands had legalised same-sex marriage and joint adoption. However, *Fretté* is not comparable to a same-sex married couple because the issue here is the adoption by a single individual, who happens to be homosexual.

The Court recognises that "*most of the contracting States do not expressly prohibit homosexuals from adopting where single persons may adopt"*, but no particular relevance was given to this fact.[159] In this regard, Helfer explains that without a clear understanding of how to define consensus and when it is really relevant, the Court risks to lose legitimacy in its decisions.[160] Would the decision be different if the Court had based it on the European consensus of not prohibiting adoption to homosexuals? Would the best interests of the child have been interpreted differently?

When the Court bases its decision on the general lack of scientific consensus about the impact of homosexual in the parents' child, one could have the feeling that the Court is not advocating for the protection of human rights as expected. At the end, there is a risk that a method can gain more weight than the actual reasoning on a possible unreasoned interference or discrimination based on the grounds of sexual orientation per se. When referring to the different age of consent for homosexual acts, even the Commission has recognised that "*what is important is not the balance struck in other European*

[158] Idem, paragraph 42.
[159] Idem, paragraph 41.
[160] Helfer, 1993, p. 135.

countries, but the reasonable and objective nature of the arguments adduced in favour of the actual limit chosen".[161]

One could even argue that the consensus analysis is a way of backing up the Court's morally inclined line of argument. In saying "*even if the decision to refuse authorisation had been based exclusively or chiefly on the applicant's sexual orientation, there would be no discrimination against him in so far as the only factor taken into account was the interests of the child to be adopted*", the Court could be considered as expressing its opinion that homosexuality can be the sole reason for rejecting authorisation to adopt. Johnson is very critical about it and says that "*consensus analysis is better understood, like the margin of appreciation itself, as a framework through which the Court legitimizes a particular moral understanding on homosexuality*."[162] In *Fretté*, the Court concluded that, based on both methods, the State's interference could be interpreted in the best interest of the child.

Using a different approach, and aware of the aforementioned critiques, in *EB case*, the Court recognises that "*the case does not concern adoption by a couple or by the same-sex partner of a biological parent, but solely adoption by a single person*". [163] It "prefers" to invoke neither the MoA nor the consensus analysis and therefore finds a breach of article 8 combined with the non-discrimination provision (art. 14). Both methods are absent in all the decision.

Thus, comparing the Court's different approach to the cases, the MoA and consensus analysis seem to have been inconsistently applied. In 2008, the large majority of CoE countries were still against same-sex marriage and joint adoption by homosexuals as an argument used in *Fretté*. Scientific studies were still criticising gay parenting according to the States' defense.[164] Johnson thinks that, in cases involving homosexuality, the Court "*shows a highly capricious and frequently contested use of statutory, expert and public consensus analysis*".[165] When comparing both cases, he recalls to a possible

[161] Commission report, *X v UK*, (ECtHR, 2012), paragraph 174.
[162] Johnson, 2013, p. 78.
[163] *EB v France* (ECtHR, 2008), paragraph 41.
[164] Idem, paragraph 38.
[165] Johnson, 2013, p. 77.

Court's impartiality and explains that "*the different approaches adopted in E.B and Fretté demonstrate that the selective use of this method [consensus] is determined by, and not determinative of, the Court's moral reasoning*."[166]

Finally, in *EB*, the Court rejects the State's argument that the interference was explained by the intention on protecting the best interest of the child. When comparing to *Fretté*, the Court has concluded that the State gave too much weight for the applicant's sexual orientation.[167] Therefore, the Court has concluded that the State's refusal of the authorisation to adopt was discriminatory on the grounds of sexual orientation, and "*there has accordingly been a breach of Article 14 of the Convention taken in conjunction with Article 8.*"[168] In this case, the interest of the child was protected mostly because the Court found a violation on the differential treatment towards hetero and homosexuals.

A last interesting point is that, besides the fact that the BIP's paramountcy is not used in the Court's final assessment in *EB*, differently than in *Frette*, the Court refers to the CRC in order to sustain its decision on finding a violation.[169] Would the Court refer to the UN Convention only when is to endorse its decision? Next topic will bring the answer.

3.4.2. Adoption by unmarried same-sex couples

In both *Gas Dubois v France* and *X and others v Austria*, the applicants were lesbian women living in a stable long relationship and have similar requests.[170] They complained about the national Court's refusal to grant one of the partners the right to adopt the son of the other partner (biological mother), namely second-parent adoption. They complain about the State's interference and argue that there was a violation of article 8 (family and private life) alone, and also combined with article 14 (non-discrimination provision) on the basis of their sexual orientation. However, there is a

[166] Idem, p. 82.
[167] *EB v France* (ECtHR, 2008), paragraph 38.
[168] Idem, paragraph 98.
[169] Idem, paragraphs 30 and 77.
[170] *Gas Dubois v France* (ECtHR, 2012) and *X and Others v Austria* (ECtHR, 2013).

relevant difference between the two cases that seems to be crucial for the ECtHR's decision: the discrimination element.

As for the first case, in France, the Civil Code (art. 365) did not give rise to discrimination, because second-parent adoption was available only for married couples. Thus, same-sex unmarried couples likewise opposite-sex unmarried couples couldn't adopt.[171] Based solely on that, the Court concluded that there has been "*no violation of Article 14 of the Convention taken in conjunction with Article 8*".[172]

Regarding the second case, contrariwise, Austria did allow opposite-sex unmarried couples to joint-adopt, but prohibited same-sex unmarried couple to do the same (Civil Code, article 182, 2). Therefore, the "*Court finds that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8 when the applicants' situation is compared with that of an unmarried different-sex couple in which one partner wishes to adopt the other partner's child*".[173]

In *Gas Dubois*, given the fact that marriage was not legalised for same-sex couples, the applicants argue that they shouldn't be compared to unmarried opposite-sex couples because the latter could get married. Instead, they contest that the comparison should be made between a married couple. In this case, a violation would definitely be found.[174]

However, the Court considers that the applicants' legal situation cannot be compared to a married couple, because "*marriage confers a special status on those who enter into it.*"[175] It refers to the *case Schalk and Kopf* and points out that the ECHR does not impose on member States the obligation to allow same-sex marriage.[176] Without any mention to the European consensus, the Court relies on the margin of appreciation doctrine to give discretion to States decide on the exact status conferred to same-sex relationships.

[171] *Gas Dubois v France* (ECtHR, 2012), paragraph 49.
[172] Idem, paragraph 73.
[173] *X and Others v Austria* (ECtHR, 2013), paragraph 153.
[174] *Gas Dubois v France* (ECtHR, 2012), paragraph 44.
[175] Idem, paragraph 68.
[176] Idem, paragraph 66.

Regarding the child affected in the case, the Court does not give any importance to his/her best interests in the decision. The applicants tried to call attention to the BIP by alleging that the State's difference in treatment did not have any legitimate aim and the child "*should have the legal protection of two parents rather than just one*."[177] The applicants have been cohabiting since 1989 and entered in a civil partnership in 2002.[178] Furthermore, the child, conceived by artificial insemination in 2000, has been living with the applicants since she was born, as a family, and at the time of the ECtHR's decision she was already 12 years old. Nevertheless, the Court ignores the *de facto* situation and does not elaborate nor make any reference to the BIP in its assessment.

The approach applied in *Gas Dubois* seems illogical if looked in the child's perspective, especially if compared to *EB v France*. Given the fact that, generally, unification and legal recognition of family ties are in the best interest of the child, why would the Court protect single individual adoption, but leave States to refuse second parent adoption? [179]

The ECtHR leaves room for critiques. One could doubt about the Court's impartiality and a possible biased position in its judgment. For instance, one could even think that, looking at the effect of the decision, the Court was of the view that one gay parent is acceptable, but two would be too much.

One of the fundamental values of human rights law is certainty and the ECtHR needs to show impartiality in its decision and not reproduce societal discrimination, which might be present in the Judges of the Court.[180] For instance, in *EB*, Judge Loucaides, in referring to the capability of homosexuals to raise a child, stated in her dissenting opinion that "*homosexuals […] must, like any other persons with some peculiarity, accept that they may not qualify for certain activities which, by their nature and under certain circumstances, are incompatible with their lifestyle or peculiarity*."[181] Would this Judge's opinion about the applicant's "*peculiarity*" influence on the outcome of the

[177] Idem, paragraph 46.
[178] Idem, paragraph 9.
[179] The CRC promotes the importance of family environment in its preamble. The European Court has already pointed out the importance of recognising family ties in de facto situations (*Kroon and others v The Netherlands* (ECtHR, 1994), paragraph 40).
[180] Van Bueren, 2007, p. 37.
[181] Dissenting opinion of Judge Loucaides in *EB*.

decision? Johnson adds that the Court relies on "*the substantive concept of the margin [of appreciation] to obscure its moral reasoning and upon the structural concept to defer to the authority of the State.*"[182]

It is true that homosexuals might find more difficulties to raise a child in a place where, for instance, homophobia is spread. However, recalling the General Comment No 14, the best interest of the child should be assessed according strict criteria. Cases might differ among them and the parents' sexual orientation should not be the most relevant element in every case.

Another matter of concern is that no violation was found because, according to the Court, there was no discrimination. The Court does not analyse whether the interference was necessary in a democratic society. It rather just explains the State's argument that the biological mother's parental responsibility would be transferred to the adoptive mother according to French legislation. The Court does not assess if there is a nexus between the interference caused by the French law, limiting second-parent adoption to married couple, and a legitimate aim. The Court limits to the conclusion that no discrimination is found when comparing unmarried same-sex couples to unmarried opposite-sex couples. The Court does not either explore the indirect discrimination, raised by the applicants, towards same-sex couples once they couldn't get married as unmarried opposite-sex couples.

Differently than the other cases, the Court does not even consider the best interest of the child. Therefore one could assume that the MoA, European consensus and the limitation the non-discrimination element contribute to the Court's lack of attention to the child and to give the best interest of the child a flexible paramount consideration.

In regards to *X and Others v Austria*, however, the Court seems to be more receptive to the best interest of the child. Why? Since there was a clear direct discrimination in Austrian legislation, the Court was able to adopt a different approach. Differently than in *Gas Dubois* and *Fretté,* the Court exposed the articles found Convention on the

[182] Johnson, 2013, p. 76.

Rights of the Child to sustain its view (as in *EB*). Thus the Court chooses to give more relevance to the CRC when a violation is found.

The Court develops an interesting European consensus analysis. Based only on the countries that extend adoption to unmarried couples (ten), the majority (six) allows second-parent adoption by a homosexual.[183] Therefore the MoA left to States shall be narrow.

The Court concludes that "*the Government has failed to adduce particularly weighty and convincing reasons to show that excluding second-parent adoption in a same-sex couple, while allowing that possibility in an unmarried different-sex couple, was necessary for the protection of the family in the traditional sense or for the protection of the interests of the child*."[184]

Regarding the CRC GC No 14, the ECtHR hasn't considered important steps in its final assessment in order to identify the best interest of the child. [185] The child's view should not be disregarded and, when appropriate, the child should have the right to be heard and its opinion be considered in the Court's final assessment. The child's identity should also be better evaluated due to *de facto* situation in the sense that he/she has been living for years in a homoparental family and identifies himself/herself as a member of this family. Finally, the preservation of the family environment and legal recognition of family ties have not played its relevance when opposed to the European consensus consideration.

To wrap up, the applicants' sexual orientation was definitely a determinant element in the judgments. In *Gas Dubois,* the MoA and the absence of a direct discrimination between opposite-sex and same-sex couples were the sole of decision and sufficient to ignore the best interest of the child. In *X and Others,* the BIP only became relevant after finding European consensus on the matter and a clear discrimination towards same-sex couples.

[183] *X and others v Austria* (ECtHR, 2013), paragraph 56-57.
[184] Idem, paragraph 151.
[185] CRC/C/GC/14, V, A, 1.

However, there is a minority in the Court concerned about the application of the principle. That was a minority that has called attention to the children's welfare and advocated for the BIP's supreme importance in each case. The opinion of this minority will be presented in the next section.

3.5. The Court's indication of a weak approach to the BIP: the separate opinions in gay adoption cases

As previously explained, the four cases where applicants were not identified as homosexuals were decided unanimously (and considered the BIP's paramountcy). Contrariwise, in the four cases involving homosexual applicants, the Court has issued separate opinions expressing a common concern to all cases: the lack of attention to the best interest of the child.

Separate opinions, especially dissenting opinions, might be seen as an indication that something needs to be changed in the Court's approach. When the Court votes without consensus, it creates a minority that can try to open the eyes of a majority to concern different than the regular ones.

Against the majority of four in *Fretté*, the three objector judges refute the argument that France rejected the authorisation to adopt based on the best interest of the child.[186] The State failed to explain how the child's welfare was endangered once the French Conseil d'Etat itself had recognised the applicant's aptitude and personal qualities for raising a child.[187]

As opposed to the State's arguments, the judges point out three facts that the France and the Court's majority failed while assessing the best interest of the child: there is no indication that homosexuals' children will be homosexual and the majority of homosexuals had heterosexual parents; that studies showed that a child raised in a homoparental family were not impacted by any particular disorder; and that prejudices of society, and a sexual majority, were not sufficient to justify the refusal. They believe

[186] Joint partly dissenting opinion of judges Sir Nicolas Bratza and judges Fuhrmann and Tulkens in *Fretté v France* (ECtHR, 2002).
[187] The same concern was raised in the joint partly dissenting opinion of Judges Casadevall, Ziemele, Kovler, Jociene, Sikuta, De Gaetano e Sicilianos, in *X and Others v Austria* (ECtHR, 2013).

that France has acted with discrimination based on the applicant's "*choice of lifestyle*" (expression used by the State) and, if he had hidden his homosexuality, the State would have granted the authorisation to adopt.

Judge Costa has participated in the first three gay adoption cases and expressed concern about the best interest of the child in all of them. In its *EB* dissenting opinion, Costa overrules his former position taken in *Fretté* and considers that it is time "*for the Court to assert that the possibility of applying to adopt a child falls within the ambit of art 8"*.[188] Moreover, he recognises that there is an international consensus about the BIP's paramountcy and the Court has always been using the principle in all cases concerning minors. However, how would he explain the totally absence of the consideration to BIP in the Court's assessment in *Gas Dubois*? If Mr. Costa considers the best interest of the child as of paramount consideration, why had he voted against finding a violation in all cases?

The Judge explains that it was not clear that it would be in the best interest of the child to be adopted by Ms Gas and the Court is not a "*fourth instance*" therefore shouldn't reexamine all demands.[189] Of course that promoting the principle does not mean supporting homosexuals' demands. Nevertheless, it seems the Judge preferred to rely on uncertainties, and to base on the margin of appreciation doctrine and European consensus, than to advocate for the child's welfare as the supreme factor.

In *Gas Dubois*, there was only one vote against the majority that has found no violation committed by France on refusing second-parent adoption to Ms Gas. Judge Villiger, a Swiss national but representing Liechtenstein, wrote a passionate dissenting opinion advocating for the best interest of child.[190]

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[188] Dissenting opinion of judge Costa, joined by judges Turmen, Ugrekhelidze and Jociene, in *EB v France* (ECtHR, 2008). In the same case, judge Zupancic expresses in his dissenting opinion that "*the non-represented party, whose interest should prevail absolutely in such litigation, is the child whose future best interests are to be protected. When set against the absolute right of this child, all the other rights and privileges pale*".

[189] Concurring opinion of Judge Costa joined by Judge Spielmann, in *Gas Dubois v France* (ECtHR, 2012).

[190] Judge Costa and Judge Spielmann, joined by Berro-Lefevre, in their concurring opinion recognised the relevance of Villiger's dissenting opinion.

Firstly, he states that the judgment failed to identify the relevant elements of the case, namely the interest of the child, whether "*the difference of treatment complained of is justified from the vantage point*" of the BIP.[191] He emphasises that the "*root of the problem*" is the "*blanket prohibition of joint parental custody over children of the parent of a same-gender-couple*" that can be disproportional. These cases should be decided individually, case-by-case.

Secondly, in cases that de facto situation already exists (the child has been raised by both applicants for years), the law should be able to include and protect these children regardless the sexual orientation of their parents. Villiger questions "*how can children help it that they were born of a parent of a same-gender-couple rather than of a parent of a heterosexual couple? Why should the child have to suffer for the parents' situation?*" He refers to the *case Mazurek v France*, in which the Court overruled a French law that discriminated children born outside of the wedlock.[192] He argues that there are no grounds for treating children born into same-sex relationship differently when compared to children born into opposite-sex relationship. He "firmly" believes that joint parental custody is in the best interest of the child.

Judge Villiger, finally, concludes that there has been a violation in the light of the BIP: second-parent adoption is in the favour of the child, but it was only available for married couples. Since opposite-sex couples could marry and same-sex couldn't, France has violated article 8 combined with article 14.

After all, one could hope that these separate opinions are an indication that the Court will give more importance to the best interest of the child in its decisions. As American Chief Justice Hughes said in 1936: "*A dissent in a Court of last resort is an appeal […] to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed*."[193]

[191] Dissenting opinion of Judge Villiger, in *Gas Dubois*. *v France* (ECtHR, 2012).
[192] *Mazurek v France* (ECtHR, 2000), paragraph 54: "*an adulterine child cannot be blamed for circumstances for which he or she is not responsible. It is an inescapable finding that the applicant was penalised on account of his status as an adulterine child..*"
[193] Ginsburg, 1990, p. 65.

Before moving to the conclusion, the next, and last, topic will assess whether the Court has been attentive to the interests of the child in LGBT cases not related with adoption. Therefore the focus will be in cases where the CRC provides that the BIP should be of primacy consideration, and there is no recommendation for a paramount consideration as in adoption disputes. In other words, the best interests of the child should be essential part of the Court's assessment, but other elements might be also of primary consideration and a balance between them and the BIP shall be made.[194]

3.6. The Court's approach to the BIP in LGBT-related cases involving children outside adoption

The Court has received four complaints involving children outside adoption where applicants were identified as lesbian, gay or transgender.[195] The most recent complaint, *Boeckel and Gessner-Boeckel v Germany (2013),* was considered inadmissible by the Court because it was manifestly ill-founded.[196] The applicants, two women in a registered civil partnership, complained about the inability to register one of them as a parent in the birth certificate of the other partner's biological child born during their partnership.

Under German law, the name of the man married to the biological mother can be entered into the child's birth certificate as a father, even if he is not the biological one.[197] However, the same does not apply in case of a same-sex couples registered in a civil partnership. The applicants alleged that the State had no reasonable justification to interfere in their private life and that they were discriminated on the basis of their gender.[198] Therefore they argued that has been a breach of article 8 on its own and in conjunction with article 14.

Contrariwise, the Court decided that the applicants could not be considered in an analogous situation to a married couple, because they were registered as civil partners

[194] See CRC GC No 14.
[195] Information based both ECtHR Parental Rights factsheet and Sexual Orientation.
[196] *Boeckel and Gessner-Boeckel v Germany, (*ECtHR, 2013).
[197] Idem, paragraph 21.
[198] Idem.

and not married.[199] In relation to the impossibility of same-sex marriage in Germany, the Court relied on the MoA and stated that the ECHR does not oblige contracting States to legalise marriage between homosexuals.[200] Thus the complaint was rejected because it was manifestly ill-founded.

The Court has not considered the best interest of the child in its assessment even though he or she was the most affected individual in the case. The Court limited its decision to the assessment of a possible gender discrimination and did not evaluate if the State's interference was reasonable to achieve a legitimate aim.

Once more, regarding same-sex marriage, the Court relied on the MoA and avoided ruling on a law that creates indirect discrimination on the basis of sexual orientation as this case is about. A same-sex partner cannot marry therefore cannot add her name in the birth certificate of the other partner's child. Meanwhile marriage is available for opposite-sex couples, which means that there is possibility of registering the partner's child.[201]

The ECtHR has received other three complaints, which were admissible, but only in one a violation was found. In *Salgueiro da Silva Mouta v Portugal*, the Court rejected the State's argument that the applicant's joint custody was withdrawn on account of the best interest of the child.[202] Instead, the Court decided that the reason for that was the applicant's sexual orientation.

The Court highlights the, one could say, homophobic approach of the domestic decision. The Portuguese Court of Appeal states that "*it is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations*" therefore "*the child should live in ... a traditional Portuguese family.*"[203] The Court argued that it could not find a reasonable nexus between the interference and the legitimate aim, namely the

[199] Idem, paragraph 31.
[200] Idem, paragraph 28.
[201] As in *Schalk and Kopf v Austria* (ECtHR, 2010).
[202] *Salgueiro da Silva Mouta v Portugal* (ECtHR, 1999).
[203] Idem, paragraph 34.

"*health and rights of the child*" and believed that the Portuguese decision was made because of the applicant's homosexuality.[204] Therefore the Court concluded there has been a violation of article 8 in conjunction of article 14.

In this case, the Court makes clear that the BIP cannot be used to justify any discrimination. After a clear discrimination on the basis of sexual orientation by Portugal, the ECtHR found sufficient to find a violation and did not elaborate further on the BIP.

The last two cases were not lodged by homosexual applicants, but by transsexuals. Sexual orientation and gender identity are two different concepts.[205] The first refers to "*each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.*"[206] In this sense, a homosexual is a person who is sexually attracted to people of his/her own sex.[207]

Gender identity refers to the individual's experience of gender, which may or may not correspond with the sex assigned at birth.[208] For instance, a person biologically born as a man and registered accordingly can be self-identified as a woman and might want to change the birth certificate or/and go through a sex-change operation. Transgender is a person who self-identity does not conform unambiguously to conventional notions of or female male gender.[209] Transsexual is a person who emotionally and psychologically feels that belongs to the opposite-sex.[210] Therefore being transgender or transsexual does not mean being homosexual. He or she can have relations with someone from the same-sex or not.

[204] Idem, paragraph 36.
[205] Yogyakarta Principles, Preamble, 2006.
[206] Idem.
[207] Oxford dictionary.
[208] Yogyakarta Principles, Preamble, 2006.
[209] Oxford dictionary.
[210] Idem.

However, both groups are usually referred as sexual minorities and might face similar discrimination, for instance, in employment or education.[211] They are usually grouped together under the LGBT abbreviation.[212] In the EU, forty six percent of transgender people are parents.[213] As for the CoE, contracting States have different legal approaches towards LGBT rights therefore the MoA and European consensus often play a role in the ECtHR's decisions[214]. Given the aforementioned facts, the analysis of the two cases involving children pledged by transsexuals is relevant to this study.

In both cases, no violation was found and the best interest of the child played a primary role in only one of them. In *PV v Spain*, the applicant, a male-to-female transsexual that was married and had a son prior to the sex change, complained about her limited right of visit the child imposed by the Spanish Court.[215] She alleged that there has been an unjustified interference on her private and family life (art. 8) combined with discrimination on the basis of her transsexuality (art. 14). The State argued that the restriction on the access to the child was not based on the applicant's transsexuality, but on the child's welfare that could be affected by the applicant's emotional instability right after the sex change. The restriction hoped to gradually prepare the child to the applicant's gender reassignment without creating harm to the child's psychological integrity and development of personality.[216]

The ECtHR noted that the case was not about "sexual orientation", but recognised that transsexuality could be considered as a notion covered by the non-discrimination provision (art. 14).[217] However, the Court accepted the State's argument that the restriction was made in the best interest of the child rather than based on the applicant's transsexuality.[218]

[211] See Sexual Policy Watch, 2008, p. 1. The author prefers to use the term "sexual and gender minorities" though. At http://www.sxpolitics.org/wp-content/uploads/2009/03/sexual-minorities1.pdf (consulted on 1 July 2013).
[212] In 2011, the UN Human Rights Council adopted a resolution to fight against violence and human rights violation based on sexual orientation and gender identity. (A/HRC/RES/17/19).
[213] FRA survey, available on http://fra.europa.eu/DVS/DVT/lgbt.php (consulted on 8 June 2013).
[214] For instance, see *H v Finland* (ECtHR, 2012).
[215] *PV v Spain*, (ECtHR, 2010).
[216] Idem, paragraph 32.
[217] Idem, paragraph 30.
[218] Idem, paragraph 36.

Different than in *Salgueiro*, the Court accepted that the BIP as the justification to the State's interference. In fact, in *PV*, the State made reference to a psychological report proving the instability of the applicant and made clear that the transsexuality was not the reason, but the impact of her instability on the child.

However, the Court's assessment did not go beyond the Spanish's arguments. What if the Spanish psychologist that evaluated the applicant's situation was against her transsexuality? Whilst the ECtHR is not a "fourth instance" of the State, this case could have been used by the Court as an opportunity to give indication on how the BIP should be applied in the light of the ECHR. In this sense, the CRC General Comment No 14 seems to be of great use in future cases.

Moreover, the Court could have brought scientifical studies about the impact of the visits made by parents under gender reassignment on their children. One could say that maybe it would be better for the child to face the reality as it is: his/her father is becoming a woman. Given that forty six percent of transgender people have children, what is the experience of European States on this topic? Should contracting States enjoy a wide MoA in this case? The Court was silent about it and, per consequence, leaves room for critiques regarding the consistency on referring to the margin of appreciation doctrine and European consensus analysis.

As for the last case to be discussed in this research, the Court considered the BIP in its final assessment, but in a questionable way. *X, Y and Z v UK* is about a female-to-male transsexual, X, who was living with a woman, Y, and their child, Z, born after artificial insemination with donated sperm.[219] Under English law, the child's father name was not automatically registered if he was not married with the mother.[220] However, his name could be entered in the child's birth certificate if a jointly request with the mother was made. In the case of X, the State refused the jointly request and argued that "only a biological man could be regarded as a father for the purposes of registration."[221] The applicants alleged that there has been a violation of article 8 in conjunction with article 14 on the basis of X's transsexuality.

[219] *X, Y and Z v UK* (ECtHR, 1997).
[220] Idem, paragraph 23.
[221] Idem, paragraph 17.

Even though the Court recognised that de facto situation between the applicants amounted to "family life", it found no violation of the ECHR in the State's refusal to register X as Z's father. The Court, once more, relied on the European consensus and MoA, in the sense that there was no common ground amongst the CoE States regarding parental rights to transsexuals or the register of non-biological father on donor inseminated children's birth certificate. Therefore the margin of appreciation given to States was considered to be wide. What about the best interests of the child?

At the time of the ECtHR's decision, X and Y were living in a stable relation for 18 years and Z, five years old, was raised by both parents since the birth. The Court recognised the "family life" and *de facto* situation, but did not find a violation when the State did not allow legalising the family ties. How to explain the child that the family exists even though the father couldn't be registered in his/her the birth certificate? In this sense, Judge Gotchev, in its dissenting opinion,

Referring to the impact of the decision, the Court stated that "it is impossible to predict the extent to which the absence of a legal connection between X and Z will affect the latter's development."[222] However, the consequences flowed from the lack of the legal recognition are various. The applicant highlighted some occasions that might be impacted, such as registration with a doctor or school, insurance policies, passport issues or in case the family wants to move abroad and X wants to declare Z as a dependent.[223] It seems that the Court preferred to rely on the MoA and consensus analysis rather than look at child's best interest in order to avoid reasoning on delicate issue, such as gender identity or sexual orientation. Van Bueren argues that the approach of the ECtHR seems to be incorrect due to the further amendment of the law by the UK, with the conclusion that no harm has been reported to the lives of children with transsexual parents.[224]

To wrap up, it seems the Court has considered the best interest of the child as a primary consideration only in *PV*, even though it relied only on the State's argument to give a superficial analysis. In the other occasions, the Court did not give any attention to BIP

[222] Idem, paragraph 51.
[223] Idem, paragraph 45.
[224] Van Bueren, 2007, p. 121.

(*Boeckel*), relied on the MoA and European consensus to apparently disregard the interest of the child (*X,Y and Z*) and, lastly, found a clear discrimination on the basis of the applicant's sexual orientation without elaborating on what was the best for the child (*Salgueiro*). In none of them the ECtHR referred to the Convention on the Rights of the Child.

Conclusion

The intention of this research was to analyse the approach of the European Court of Human Rights to the best interest of the child, especially in LGBT-related cases involving children. Given the stigmatisation of sexual minorities and the diverse legal and moral normative on the topic in Europe, the research aimed to identify if the ECtHR has consistently regarded to the BIP's paramountcy in opposed to the margin of appreciation doctrine and lack of European consensus.

Generally, as discussed in the second chapter, the Court has recognised the importance and influence of the Convention on the Right of the Child for the European human rights system. Moreover, the best interests of the child have been referred to on many occasions by the Court. Given that all members of the CoE have ratified the CRC, and that the EU Charter of Fundamental Rights gives primary consideration to the principle, the BIP has at least achieved the legal status of regional customary law. Therefore, European States, and its Human Rights Court, shall legally safeguard the interests of the child.

However, some of the critiques to the principle explained in the first chapter, such as the challenges to its implementation, seem to be reflected at the Strasbourg approach to child's welfare. The best interests of the child become an argument to justify possible discrimination and the necessity of the States' interference on the applicants' life. In this regard, the Court seems to lack criteria that are specific enough to assess the best interest principle and to maintain consistent consideration in all cases.

The case analysis reveals that the Court took a different approach to the BIP's paramountcy in cases of adoption, when compared to cases of child abduction lodged by the abducting parent. In adoption cases lodged by homosexual applicants, the BIP's paramountcy was differently approached when compared to the cases lodged by heterosexuals. The applicants' sexual orientation in adoption cases seems to result in the Court's overlooking to the best interests of the child. In cases outside adoption, the primary consideration of the principle was also disregarded.

Given the fact that the BIP has been used to favour heterosexual over homosexuals at domestic level, just as in *Salgueiro da Silva Mouta v Portugal*, it seems the European Court does not make enough effort to reduce the risk of discriminatory use and interpretation of the best interests of the child. At least, the analysis has identified indication of a biased approach of the Court. Why would the Court rule for a single adoption, but refuse the right for second-parent adoption, especially in a case where the child has been living with the lesbian parents for more than ten years? What are the best interests of the child? Why would the Court just refer to the CRC in order to sustain its own views?

In this sense, the margin of appreciation and European consensus reveals to be a challenge on the implementation of the principle, because the disputes were centralised on the sexual orientation of the applicants instead of on the child. In a way, one could say that the Court legitimises the position of the State and contributes to the understanding of a majority. In addition, when the Court based its decision on the discrimination element between homosexuals and heterosexuals, it did not analyse if the interference was reasonable to achieve the legitimate aim and no attention is given to the child's welfare or *de facto* situation.

General Comment No 14 is a great source of information and could help the ECtHR to develop guidelines on how CoE States should determine the child's best interest and ensure the existence of procedural safeguards in order to implement the principle. Based in clear criteria, the Court needs to have a consistent method when interpreting and applying the principle and consider the child's best interests in all cases, consistently. In this way, critics will have no reasons of questioning a possible biased approach in sensitive areas, such as sexual orientation.

It is to be hoped that the separate opinions are an indication for changing the Court's approach to the BIP. Given the relevance of the ECtHR to contribute for setting up international human rights standards, it is naturally expected that children's welfare are safeguarded. The Court should be aware of its influence on other regional human rights, or domestic decision, with jurisprudence in which the child does not receive primary or paramount consideration. The international community does not refer to the MoA or to

the consensus, but to the final decision. Therefore the Court plays an important international role on the protection of children and can contribute to the fight against discrimination on the basis of sexual orientation and gender identity not only in Europe.

Finally, States and ECtHR should bear in mind that, while theoretical discussions about a possible consensus or discrimination take place in Strasbourg, children are having their rights limited in whole Europe. For applicants, and their constituted families, the only hope is to have their dignity respected and be treated equally, not only as heterosexual people, but also as children of heterosexual people. Human rights are for everyone, right?

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