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Between Fact and Fiction: an Analysis of the Case Law on Article 12 ECHR

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The right to marry and found a family is currently the subject of worldwide debate. New Zealand and France recently opened up the right to marry to same-sex couples, which has led to mass protests, heated debates, and renewed violence against gay people in France. The Duma has passed a law prohibiting ‘homosexual propaganda’, and in the United States, the Supreme Court has delivered its revolutionary decision on the Defense of Marriage Act. This study enriches the existing debate by analysing the case law of the European Court of Human Rights regarding Article 12 of the European Convention on Human Rights, containing the right to marry and found a family. It will be shown that although the article was incorporated in the Convention as a typical negative right and anti-discrimination provision, until 2000 the Court has approached it from a Christian/conservative perspective, adopting very far-reaching restrictions on the rights of immigrants, denying transsexuals and same-sex couples the right to marry, denying a right to divorce, and denying the right to found a family through artificial insemination or adoption. It is only since 2000 that the Court has struck a somewhat more liberal tone, although many of the conservative doctrines still stand.

Keywords: Gay marriage, transgender, adoption, divorce, marriage

1. Introduction

One of the many discussions between Kant and Hegel regarded the constitution of marriage and the place of the family in society. Kant, who reportedly died as a virgin, described marriage in rather graphic terms as a purely contractual relationship between two individuals granting them the mutual right to use each other’s genitalia.¹ Hegel, who is known to have been a family man, criticised Kant and defined marriage as an ethical unity between husband and wife, and saw the family as the basis of and a model for the ideal society.² Much later, the postmodernist philosopher Derrida referred to the fact that Hegel fathered an illegitimate child with his landlord’s wife and wondered which status such child would have in Hegel’s philosophy.³ The illegitimate son does not fit into the traditional conception of the family as ethical unity, but if he is excluded from it, it might give ground for a society based on exclusion.

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¹ I Kant, *Grundlegung zur Metaphysik der Sitten* (Berlin Ausgabe, 2d edn, 2013).

² GWF Hegel, *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse* (Akademie Verlag, 1st edn, 1981).

³ J Derrida, *Glas* (Galilée, 1st edn, 1974).

It is this dilemma that symbolises the struggle of the European Court of Human Rights (ECtHR) and the former European Commission of Human Rights (ECmHR),⁴ existing until 1998, with regard to the interpretation of Article 12 of the European Convention on Human Rights (ECHR), which simply holds: ‘Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.’ The question is whether this right should be approached from a conservative perspective, protecting the traditional marriage and family, or that a more liberal interpretation should prevail, in which marriage is regarded above all as a juridical construct in which two individuals lay down the terms and conditions under which they wish to arrange their lives and possessions.

The question of interpretation is complicated by the numerous aspects, legal and non-legal, that are aligned to the concepts of marriage and family. Marriage may be regarded as the religious manifestation of the divine bond between man and woman, but it also has more earthly consequences related to taxes and inheritance law. Marriage may be seen as a ceremonial expression of deeply felt love, but it can also be entered into for convenience or for the sake of obtaining a residence permit. Marriage may be concluded between husband and wife, but it may also involve two persons of the same sex who wish to found a family through the means of adoption. Two prisoners may wish to marry and found a family through artificial insemination, etc.⁵

The interpretation of Article 12 ECHR, therefore, always strikes a balance between a factual and a fictional, a biological and a legal, a historical and an evolutionary interpretation. A person may be one’s child biologically speaking, but not legally, and vice versa, a person may be regarded as a man from a biological point of view, while at the same time being a woman from a legal perspective, and vice versa, an individual may be joined in matrimony with one person, but spend his actual life with another, a man may have a family legally speaking, but may in practice be separated from them by imprisonment, etc. This means that the interpretation of Article 12 ECHR is not only complicated by the many aspects that are aligned to it; it is also highly dependent upon the question of which - method of - interpretation and point of view is adopted.

In the course of time, a shift has taken place with respect to these methods and assumptions relating to the interpretation of Article 12 ECHR. Originally, the article was incorporated in the ECHR, inspired by the Universal Declaration of Human Rights (UDHR), as a classical human right that protects citizens against government interference in their marital and family life.⁶ In the early case law of the ECmHR and the ECtHR, however, this right was approached as a conservative doctrine under which only the traditional marriage and the biological family were protected. As from 2000 onwards, a more progressive interpretation of Article 12 ECHR is finally gaining ground in the Court’s jurisprudence. These three interpretations of the same article will be discussed in the following three sections.

2. The Genesis of Article 12 ECHR

⁴ The Commission’s role was to assess the admissibility of the case. Only if the case was declared admissible the Court would engage in a substantive review of the case. Since 1998, this role of the Commission has been transferred to a separate chamber of the Court.

⁵ See further: J Eekelaar, *Family law and personal life* (Oxford University Press, 1st edn, 2007).

⁶ The ICCPR incorporates a similar provision in Article 23. For the genesis of this article see: MJ Bossuyt, *Guide to the “Travaux Préparatoires” of the international covenant on civil and political rights* (Martinus Nijhof Publishers, 1st edn, 1987).

The origins of Article 12 ECHR can be found in Article 16 of the UDHR stating: '(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.'

This article was adopted against the background of the family politics instituted by the Nazis and other fascist regimes, propagating a ban on racially mixed marriages and same-sex relationships, discouraging certain groups in society to procreate, and actively stimulating the creation of a pure Aryan race.⁷ Likewise, in communist regimes families were often torn apart and the state had supremacy over the individual. With these violations still fresh in their memory, the drafters of both the Convention and the Declaration not only wanted to protect the right to privacy in general, but the right to marry and found a family in particular.

Thus, the initial draft of Article 16 UDHR was proposed very early in the legislative history of the Convention, although it has undergone several substantial changes. Initially the article read: '(1) The family deriving from marriage is the natural and fundamental unit of society. Men and women shall have the same freedom to contract marriage in accordance with the law. (2) Marriage and the family shall be protected by the State and Society.'⁸

One of the major changes lies in the fact that the wording of the final text is not 'the family deriving from marriage', which would establish an explicit link between marriage and family. Rather, the adopted version of the article separates the right to marry from the right to found a family, so that they may be invoked independently. Marriage, consequently, may be enjoyed without founding a family, which is all but evident in societies with religious supremacy, and the family is protected even if it is not founded in marriage. One of the reasons for establishing these rights separately was to provide extra protection to the illegitimate child: 'The connection between marriage and family was deleted, principally out of the fear that it would stigmatize children born out of wedlock.'⁹

No divine or religious basis for marriage is included in the article. Rather, it explicitly states that marital life is protected regardless of any religious background. The article does provide that the family is the 'natural and fundamental group unit of society'. This should not, however, be interpreted as a religious or conservative principle; rather, it refers to the classical liberal principle that the family and the individual precede the state and society. As the state is composed of separate family units, it can never curtail their rights and freedoms substantially since it would undermine its own foundations.

Article 16 UDHR provides additional protection to women. Not only does it mention that men and women can equally rely on the two rights enshrined in Article 16 UDHR, it also suggests that marriage can only be concluded under the free and full consent of both partners. The logic behind these clauses is prevention of 'any compulsion by the parents, by the other spouse, by the authorities, or anyone else'.¹⁰ The article explicitly opposed the widespread practice of forced marriages of women and girls. The words 'full age' in paragraph 1 should be interpreted along this line, suggesting a minimum age at which one can legally give 'free and full consent'. 'From the *travaux préparatoires*, it is apparent that this clause was designed

⁷ On this topic: M Mouton, *From nurturing the nation to purifying the Volk: Weimar and Nazi family policy, 1918-1945* (Cambridge University Press, 1st edn, 2007). L Pine, *Nazi family policy, 1933-1945* (Berg, 1st edn, 1997).

⁸ See further: A Verdoodt, *Naissance et signification de la Déclaration Universelle des droits de L'Homme* (Warny, 1st edn, 1964).

⁹ D Browning, 'Meaning of Family in the Universal Declaration of Human Rights', p. 39, in A Scott Loveless and T Holman, *The Family in the New Millennium, Vol. I* (Praeger publishers, 1st edn, 2007).

¹⁰ MK Eriksson, 'Article 16', at pp 246-247, in A Eide, *The universal declaration of human rights: a commentary* (Scandinavian University Press, 1st edition, 1992). Eriksson cites Robinson.

to prevent child marriages, as further shown by the use of the phrase “men and women”.¹¹ The use of the term ‘men and women’ suggests that they have reached the state of maturity.¹²

Not only is equality between men and women central to the article, the two rights under Article 16 are guaranteed ‘without any limitation due to race, nationality or religion.’ These words are supplementary to Article 2 UDHR, which contains a general prohibition on discrimination based on, inter alia, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The fact that Article 16 only incorporates some of these grounds must not be interpreted to mean that distinctions on the basis of the other grounds mentioned in Article 2 UDHR would be legal. ‘[T]he phrase “due to race, nationality or religion” was inserted only to strengthen and not to weaken the general non-discrimination provision of Art 2.’¹³ In doing so, the article confirms that interracial marriages, which at the time of the materialisation of the Declaration still faced considerable opposition, were allowed, and that discrimination on the basis of religious background was prohibited,¹⁴ like discrimination on the basis of national origin, which addressed the practice existing in many states of prohibiting immigrants to marry or restricting their options through adopting procedural formalities in national laws.¹⁵

Just as in the genesis of the UDHR, the right to marry and found a family formed part of the deliberation on the ECHR from the start.¹⁶ Article 12 ECHR was, like many other rights under the European Convention, inspired by the UDHR, in this case Article 16.¹⁷ Initially, only the core of the rights under the UDHR was incorporated in the draft of the ECHR, so as to enable a compact list of core rights and freedoms. ‘It has always been understood that in utilising one or other liberty, the resolution adopted by the Committee did not relate to all the provisions of the article in question, but only to those specifying the content of the liberty dealt with in this resolution.’¹⁸ Thus, only the rights to marry and to found a family were incorporated,¹⁹ while the prohibition of discrimination was adopted solely in the predecessor of Article 14 ECHR, a provision similar to Article 2 UDHR, whereas a separate article in the Convention contained a general limitation clause, specifying if and on what ground rights and freedoms might be curtailed.²⁰

Article 12 of the ECHR was conceived as a classical human right protecting the individual against government interference. This was confirmed when, for instance, a small opposition was formed against the incorporation in the Convention of this right, the right to protection of family life, and the right of parents to choose the education of their children: ‘[] the majority of the Committee thought that the racial restrictions on the right of marriage

¹¹ Eriksson, (supra note 10), at p 244.

¹² See otherwise: N Robinson, *The universal declaration of human rights: its origin, significance, application, and interpretation* (World Jewish Congress, 1st edn, 1958), at p 125.

¹³ Robinson, (supra note 12), at p 125.

¹⁴ See further: G Johnson and J Symonides, *La Déclaration universelle des droits de l'homme: 40e anniversaire, 1948-1988* (L'Harmattan, 1st edn, 1990).

¹⁵ UN document: E/CN.4/AC.1/SR.8. See further: UN documents E/HR/18, A/C.3/SR.124, A/C.3/SR.125, E/CN.4/32 and E/CN.4/SR.37.

¹⁶ AH Robertson (ed.), *Collected edition of the 'travaux préparatoires' of the European Convention on Human Rights = Recueil des travaux préparatoires de la Convention Européenne des Droits de l'Homme. Vol. 1 Preparatory Commission of the Council of Europe Committee of Ministers, Consultative Assembly, 11 May-8 September 1949* (Nijhoff, 1st edn, 1975), at p 160.

¹⁷ Robertson, (Supra note 16), at p 168 and 176.

¹⁸ Robertson, (Supra note 16), at p 194.

¹⁹ Robertson, (Supra note 16), at p. 218.

²⁰ As alternative to ‘full age’, the term ‘age of consent’ has been proposed. AH Robertson (ed.), *Collected edition of the 'travaux préparatoires' of the European Convention on Human Rights = Recueil des travaux préparatoires de la Convention Européenne des Droits de l'Homme; Council of Europe. Vol. 6 / Consultative Assembly = Assemblée Consultative* (Nijhoff, 1st edn, 1975), at p 288.

made by the totalitarian regimes, as also the forced regimentation of children and young persons organised by these regimes, should be absolutely prohibited.’²¹ Later, when doubts were casted again on the inclusion of the right to marry, the right to education, and the right to property,²² this line was confirmed: ‘The outstanding feature of the totalitarian regimes was the ruthless and savage way in which they endeavoured to wipe out the concept of the family as the natural unit of society. If we delete paragraphs 10 and 11, I submit that we are accepting the validity of that philosophy. We are declaring that the Nazis were justified in everything they did to prevent some human beings from perpetuating their race and name.’²³ That Article 12 must be regarded as a classic human right is also apparent from the fact that this right is incorporated in the Convention, which only lists civil and political rights, as opposed to social-economic rights such as the right to property and the right to education, which were moved to the First Protocol to the Convention, to which signing was optional.²⁴

Later in the drafting process of the ECHR, an alternative to listing the core rights and freedoms was proposed. This alternative suggestion was to define the various rights in a first section of an article and to include a limitation clause in the second section.²⁵ It is remarkable that in this alternative, which finally prevailed and was already quite similar to the final version of the Convention in its original form, both the former and the current version of Article 12 differed from most other Convention rights in its limitation clause. Initially, the draft of Article 12 still contained a second paragraph and held: ‘(1) Men and women of full age have the right to marry and found a family. (2) Each State party hereto shall be entitled to establish rules governing the exercise of these rights.’²⁶ Later on, the two sections were simply merged.²⁷

Article 12 of the ECHR holds that men and women have the right to marry and found a family, according to the national laws *governing the exercise* of this right; thus, states may lay down procedural conditions, but may never restrict the essence of this right. Alternatively, as the ECmHR would later hold in its assessment of the difference between Article 8 of the Convention - specifying the right to privacy in the first section and in the second section that states may curb this right in accordance with the law, if necessary in a democratic society and in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others - and Article 12 ECHR: ‘[] the right to found a family is an absolute right in the sense that no restrictions similar to those in para. (2) of Art. 8 of the

²¹ Robertson, (Supra note 16), at p 220. Questions have also been raised as to what ‘full age’ exactly means. AH Robertson (ed.), *Collected edition of the 'travaux préparatoires' of the European Convention on Human Rights = Recueil des travaux préparatoires de la Convention Européenne des Droits de l'Homme; Council of Europe. Vol. 2 Consultative Assembly, second session of the Committee of Ministers, Standing Committee of the Assembly, 10 August-18 November 1949* (Nijhoff, 1st edn, 1975), at p 54.

²² Robertson, (Supra note 21), at pp 2-132 and specifically pp 56-60.

²³ Robertson, (Supra note 21), at p 90. It is also repeated that the fundamental difference between the democratic and the totalitarian state is that in the former the individual has priority over the state, while in the latter it is the other way around. Robertson, (Supra note 21), at pp 90-96. Besides the atrocities by the Nazis and communist states, the crimes by the Italian regime were referred to. Robertson, (Supra note 21), at p 100.

²⁴ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms
CETS No.: 009. <<http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm>>.

²⁵ AH Robertson (ed.), *Collected edition of the 'travaux préparatoires' of the European Convention on Human Rights = Recueil des travaux préparatoires de la Convention Européenne des Droits de l'Homme; Council of Europe. Vol. 4 Committee of Experts, Committee of Ministers, Conference of Senior Officials, 30 March-June 1950* (Nijhoff, 1st edn, 1975), at p 18.

²⁶ AH Robertson (ed.), *Collected edition of the 'travaux préparatoires' of the European Convention on Human Rights = Recueil des travaux préparatoires de la Convention Européenne des Droits de l'Homme /; Council of Europe. Vol. 3 Committee of Experts, 2 February-10 March 1950*, (Nijhoff, 1st edn, 1976), at p 292.

²⁷ Robertson, (Supra note 25), at p 190.

Convention are expressly provided for []'.²⁸ In contrast to the right to privacy, with regard to which it may be necessary to enter someone's home or tap someone's telephone in order to prevent or prosecute criminal activities, it is hard to see why such substantial infringements would be necessary in a democratic society in relation to the right to marry and found a family. Consequently, the legal space for states to curb these rights is limited by the drafters of the Convention to procedural rules, for example relating to the requirement that every child must be documented and obtain a birth certificate.

3. The Case Law Until 2000

Article 12 ECHR roughly consists of four parts. First, it specifies who may invoke the right, namely men and women of marriageable age. They have two rights, namely the right to marry and the right to found a family. Finally, the article has a limitation clause, which holds that men and women of marriageable age enjoy these rights according to the national laws governing the exercise of this right. The jurisprudence on these four parts until the year 2000 is discussed in the following four sub-sections. Until that year, the Court and the Commission took a rather conservative stance when referring to marriage and the family. Moreover, the Court was very reluctant to establish a violation of Article 12. There is only one case in the early case law in which a violation of Article 12 was accepted, namely that of *F. v. Switzerland*, and even this case has been of minor importance.²⁹

3.1 Men and Women of Marriageable Age

Article 12 ECHR differs from other articles under the Convention in that it does not use the wording 'everyone' or 'no one', but instead uses 'men and women'.³⁰ Although this originates from an egalitarian concern and aims to provide additional protection to women, the former Commission, in its early case law, interpreted these words as meaning that Article 12, unlike Article 8 ECHR, does not protect relationships between persons of the same sex.³¹ *C. and L. M. v. the United Kingdom (1989)* concerned a lesbian couple living in the United Kingdom; one of the partners was about to be deported to Australia and the other was the mother of a child. They claimed to form a *de facto* family unit. The couple relied on Article 8, which protects the right to respect for a person's private and family life, his home and his correspondence, and on Article 12 ECHR. Although the Commission did accept that a lesbian relationship may in principle be protected under Article 8, it held that in this case a restriction

²⁸ ECmHR 21 May 1975, appl.no. 6564/74 (X./UK).

²⁹ See for a more general overview of Article 12 ECHR inter alia: P Van Dijk, 'Chapter 16: The right to marry and found a family (Article 12)', in P van Dijk, *Theory and practice of the European Convention on Human Rights*, (Intersentia, 4th edn, 2006).

³⁰ This implies that only natural persons can invoke this article. ECmHR 13 December 1984, appl.no. 10995/84 (M./UK). Regarding discrimination between man and woman see also: ECmHR 15 December 1977, appl.no. 8042/77 (Hagmann-Hüsler/Switzerland).

³¹ See also: ECmHR 09 May 1978, appl.no. 7654/76 (Van Oosterwijck/Belgium). See further: LR Helfer, 'Finding a consensus on Equality: the homosexual age of consent and the European Convention on Human Rights' (1990) 65 *New York University Law Review* 1044. CB Rabinowitz, 'Proposals for Progress: sodomy laws and the European Convention on Human Rights' (1996) 21 *Brooklyn Journal for International Law* 425. KL Walker, 'Evolving Human Rights Norms Around Sexuality' (1999) 6 *ILSA Journal International & Comparative Law* 343. JA Wallbank, S Choudhry and J Herring (eds.), *Rights, gender, and family law* (Routledge, 1st edn, 2010). K Boele-Woelki and A Fuchs (eds.), *Legal recognition of same-sex relationships in Europe: national, cross-border and European perspectives* (Intersentia, 2nd edn, 2012). SM Cretney, *Same sex relationships: from 'odious crime' to 'gay marriage'* (Oxford University Press, 1st edn, 2006).

of their rights was not unlawful, since such a relationship did not fall under the scope of Article 12.³²

A similar approach was taken by the Commission and the Court in the assessment of the right of transsexuals to marry.³³ *Rees v. the United Kingdom (1986)* regarded the desire of a man, formerly a woman, to marry a woman.³⁴ This freedom was denied to him by the government since it referred to the gender of Rees as registered in the birth registry and banned gay marriages. The Court did not object to such an interpretation and pointed out that Article 12 ECHR ‘[] refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 (art. 12) is mainly concerned to protect marriage as the basis of the family.’³⁵

In subsequent cases, a biological criterion was applied as well,³⁶ linked to the question whether a person had adopted all biological features of the new gender, including the possibility of reproduction. An example is *Cossey v. the United Kingdom (1990)*, a case which in many respects resembles Rees, albeit that Cossey was a woman, formerly a man. The Court considered whether there were grounds to depart from the Rees judgment and held that there was no consensus in the various national approaches towards transsexualism and that ‘[] no significant scientific developments [] have occurred in the meantime; in particular, it remains the case [] that gender reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex.’³⁷ Regarding the suggestion of Cossey that Article 12 ECHR does not incorporate such a biological criterion, the Court responded by claiming ‘[] that attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person’s sex for the purposes of marriage, this being a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry.’³⁸

In the dissenting opinions, particular dissatisfaction was expressed with the link between the right to marry and the ability of partners to procreate. Palm, Pekkanen, and Foighel held: ‘Gender reassignment surgery does not change a person’s biological sex. It is impossible for Miss Cossey to bear a child. Yet, in all other respects, both psychological and physical, she is a woman and has lived as such for years. The fact that a transsexual is unable to procreate cannot, however, be decisive. There are many men and women who cannot have children but, in spite of this, they unquestionably have the right to marry. Ability to procreate is not and cannot be a prerequisite for marriage.’³⁹ Along the same line, Martens challenged the reasoning of the majority ‘[] because marriage is far more than a union which legitimates sexual intercourse and aims at procreating: it is a legal institution which creates a fixed legal

³² ECmHR 09 October 1989, appl.no. 14753/89 (C. and L.M./UK).

³³ J Kingston, ‘Sex and Sexuality under the European Convention on Human Rights’, in L Heffernan, *Human rights: A European Perspective* (The Round Hall Press, 1st edn, 1994).

³⁴ See on the British approach to family law and the influence thereon by the European case-law, among other things. G Douglas, *An introduction to family law* (Oxford University Press, 2nd edn, 2004). H Swindells, *Family law and the Human Rights Act 1998* (Family Law, 1st edn, 1999). CM Lyon and AP Lyon, *Butterworths family law handbook* (Butterworths, 1st edn, 1991). EM Clive, *The law of husband and wife in Scotland* (Sweet & Maxwell, 1st edn, 1992). PM Bromley, NV Lowe and G Douglas, *Bromley's family law* (Oxford University Press, 10th edn, 2007). R Probert and SM Cretney, *Cretney's family law* (Thomson Sweet & Maxwell, 6th edn, 2006).

³⁵ ECtHR 17 October 1986, appl.no. 9532/81 (Rees/UK), § 49.

³⁶ Interestingly, in the case of Erikson and Goldschmidt v. Sweden (1989), which is ignored in subsequent case law, a legal criterion is applied and accepted. ECmHR 09 November 1989, appl.no. 14573/89 (Eriksson and Goldschmidt/Sweden).

³⁷ ECtHR 27 September 1990, appl.no. 10843/84 (Cossey/UK), § 40

³⁸ Cossey/UK, § 46

³⁹ Cossey/UK, Dissenting Opinion Palm, Foighel and Pekkanen, § 5

relationship between both the partners and third parties []'.⁴⁰ Despite this opposition, the Court confirmed⁴¹ its line in *Sheffield and Horsham v. the United Kingdom (1998)*⁴² as it found again that no significant medical, scientific, or legal changes had occurred in the acceptance or treatment of transsexuals.

The line adopted by the former Commission and the Court seems to depart from the original position of the drafters of the Convention on a number of points. Although gay marriage is not explicitly mentioned in the text, the rationale behind the right to marry and found a family was one of freedom and protection against discrimination, and, moreover, the background of the article lies in its opposition to totalitarian politics, for instance by the Nazi regime, of which among others, gay men fell victim.⁴³ From the fact that the text uses the wording 'men and women' it may neither be assumed that the drafters thought a man and woman should be the ones to marry, nor, following the same logic, does this wording imply that it must concern several men and women, since the plural form used. The reason for explicitly referring to men and women, as opposed to speaking of 'everyone' or 'no one', was an egalitarian one, providing extra protection to women, for instance against arranged marriages.

It is also noteworthy that the Court applied a biological test when determining the sex of an individual and seemed to focus in particular on the question whether the reproduction capacities of this individual, now belonging to the other sex, were functional. This establishes a link between the right to marry and the right to found a family, whilst these two rights had been explicitly separated in the article. However, the link between these two rights may also be inferred from the Court's phrasing 'marriage as the basis of the family' which is very similar to the deleted term 'family deriving from marriage' in the original draft of Article 16 UDHR. Finally, it should be noted that in the approach adopted by the Commission and the Court, a difference arises between transsexuals and adopted children. While adoptive parents are registered in the birth register, in addition to or instead of the biological parents, the correction of gender in the register is qualified by the government in Rees as perverting the historical truth.

3.2 The Right to Marry

With regard to the right to marry, a conservative line was adopted as well. It is clear that a restriction or partial restriction of this right in relation to prisoners did not entail a violation of Article 12 ECHR.⁴⁴ With regard to immigrants, far-reaching restrictions were likewise permitted.⁴⁵ Under the ECHR, there is in any case no right to choose where one wants to

⁴⁰ Cossey/UK, Dissenting Opinion Martens, § 4.5.2

⁴¹ See also: ECmHR 13 February 1990, appl.no. 13343/87 (L.B./France).

⁴² ECtHR 30 September 1998, appl.nos. 22985/93 and 23390/94 (Sheffield and Horsham/UK).

⁴³ This is of course not to say that the drafters of the European Convention intended for gay marriages to be legal. Still, the background of Article 12 ECHR lies in preventing active discrimination by governments. Moreover, this provision is based on Article 16 UDHR and it must be kept in mind that in many countries taking part in the drafting process of the Declaration, there was less emphasis on the monogamous marriage and the sacred union between man and wife than in most western countries at that time and a greater acceptance of same-sex couples and transsexualism.

⁴⁴ See for the case law regarding prisoners, convicted and suspected persons for instance: ECmHR 02 June 1990, appl.no. 16252/90 (G.T./Italy). ECmHR 22 February 1995, appl.no. 22937/93 (Z., S., G. and V. I./Greece and UK). ECmHR 13 October 1977, appl.no. 7114/75 (Hamer/UK). ECmHR 22 June 1970, appl.no. 3898/68 (X/UK). ECmHR 19 April 1991, appl.no. 14460/88 (Z./Sweden).

⁴⁵ See for case law on immigrants and emigrants, from which it is clear that a temporary threat to lose or a refusal to extend or grant a residence permit does not lead to a violation of Article 12: ECmHR 13 October 1986, appl.no. 10003/82 (G./UK). ECmHR 13 October 1986, appl.no. 10570/83 (J. and R.T./UK). ECmHR 13 July 1987, appl.no. 11054/84 (Issop/UK). ECmHR 09 December 1987, appl.no. 10579/83 (Janab/UK). ECmHR 09

enjoy one's married life or to found one's family.⁴⁶ Only if special circumstances were invoked was this privilege granted, in relation to which the Commission made a distinction between those who already have a been married and enjoy a family life in a European country and those who intend to do so, and between 'real' marriages, which are based on love, and marriages of convenience, which have been established for rational reasons.⁴⁷ Unlike people who enjoy a 'lawful and genuine marriage', people for whom the '[] primary purpose of the marriage was to effect the husband's entry into the United Kingdom for economic purposes'⁴⁸ may be restricted by states in their right to marry for economic reasons.⁴⁹ Immigrants suspected of or convicted for criminal activities may likewise be restricted by states in their rights in order to ensure national order and security.⁵⁰

Besides the distinction between marriages based on love and those based on rational reasons, the Commission considered whether a married life already existed or whether concrete wedding plans had been made.⁵¹ In the case of *X. v. Germany (1976)*,⁵² a man from India whose residence permit was not renewed and who claimed that this prevented him from marrying his German fiancé, the Commission noted that the complainant had not sufficiently demonstrated that he had concrete plans to marry or that these plans were realistic, and that he might also marry or have a marital life outside of Germany. The Commission confirmed this line in its subsequent case law.⁵³

Besides obtaining a residence permit, marriage may entail other legal and economic consequences, such as relating to inheritance, tax and welfare.⁵⁴ This can lead to a distinction between married and unmarried couples, and between children of married and unmarried couples. Nevertheless, according to the case law of the former Commission and the Court this does not lead to a violation of Article 12, either independently or in conjunction with Article 14 ECHR, as is apparent from, for example, *Staarman v. the Netherlands (1985)*,⁵⁵ in which a woman lost her social benefits because she married, from *Lindsay v. the United Kingdom*

December 1987, appl.no. 12881/87 (Karli and Balci/Netherlands). ECmHR 09 December 1987, appl.no. 10596/83 (Saleh/UK). ECmHR 10 March 1989, appl.no. 14404/88 (Tekeste/Sweden). ECmHR 13 July 1990, appl.no. 13905/88 (Olsen/Sweden). ECmHR 05 October 1990, appl.no. 15200/89 (M./UK). ECmHR 07 March 1991, appl.no. 16547/90 (Guirguis/Netherlands). ECmHR 13 January 1992, appl.no. 18418/91 (Altinkaya/Sweden). ECmHR 01 April 1992, appl.no. 15606/89 (B./Netherlands). ECmHR 02 December 1992, appl.no. 18417/91 (Kücükaslan/Sweden). ECmHR 14 April 1994, appl.no. 23111/93 (F.D./France). ECmHR 29 June 1994, appl.no. 23278/94 (Ben Rhaïem/France). ECmHR 30 November 1994, appl.no. 21839/93 (Gourkis/Sweden). ECmHR 06 May 1986, appl.no. 11618/85 (A./Netherlands). ECmHR 11 October 1988, appl.no. 12492/86 (H./UK). ECmHR 25 September 1965, appl.no. 1611/62 (X./Germany). ECtHR 09 November 1999, appl.no. 34891/97 (Schober/Austria).

⁴⁶ ECmHR 19 February 1992, appl.no. 17504/90 (Babul/UK). ECmHR 13 February 1992, appl.no. 17229/90 (N.A./UK).

⁴⁷ ECmHR 14 December 1988, appl.no. 14069/88 (Patel/UK).

⁴⁸ ECmHR 06 July 1992, appl.no. 19788/92 (S./UK).

⁴⁹ ECmHR 03 December 1997, appl.no. 33257/96 (Klip and Krüger/UK). ECmHR 30 November 1994, appl.no. 24485/94 (Bacovic/Sweden). ECmHR 16 October 1996, appl.no. 31401/96 (Sanders/France). ECmHR 16 January 1996, appl.no. 25050/94 (Yavuz/Austria).

⁵⁰ ECmHR 21 October 1997, appl.no. 34025/96 (Gelaw/Sweden).

⁵¹ ECmHR 16 October 1986, appl.no. 12236/86 (S./UK). See also: ECtHR 26 March 1992, appl.no. 12083/86 (Beldjoudi/France).

⁵² ECmHR 12 July 1976, appl.no. 7175/75 (X./Germany).

⁵³ See among others: ECmHR 13 October 1993, appl.no. 16479/90 (Capoccia/Italy). ECmHR 16 April 1996, appl.no. 27962/95 (S.D.P./Italy). ECmHR 12 July 1976, appl.no. 7031/75 (X./Switzerland). ECmHR 06 May 1986, appl.no. 11619/85 (B./Netherlands). ECmHR 26 June 1996, appl.no. 31042/96 (R.K.-V./Switzerland). ECmHR 11 March 1986, appl.no. 11866/85 (O./Switzerland). ECmHR 05 December 1995, appl.no. 26829/95 (A.A.Q./Italy). ECmHR 22 April 1998, appl.no. 37175/97 (Bolignari/Italy).

⁵⁴ See further: ECmHR 13 May 1986, appl.no. 11617/85 (B./UK). ECmHR 02 July 1997, appl.no. 35426/97 (Staiku/Greece).

⁵⁵ ECmHR 16 May 1985, appl.no. 10503/83 (Kleine Staarman/Netherlands).

(1986)⁵⁶ and *Hubaux v. Belgium* (1988),⁵⁷ in which the income tax differed for married and unmarried couples⁵⁸ and from *Marckx v. Belgium* (1979), which regarded the case of an unmarried woman who gave birth to a child. Although she had the option of adopting or otherwise legalising the child, there remained a distinction between this child and children born in wedlock, in relation to, for instance, inheritance. The Court saw no violation of Article 12 ECHR and simply stated that the complainants were not hindered in their right to marry,⁵⁹ which implies that to benefit from certain legal and economic gains, partners may be required by national law to marry.⁶⁰

Subsequently, Member States are allowed to impose rather far-reaching restrictions on the conclusion of marriage,⁶¹ not only on in relation to bigamy⁶² and the age at which marriage may be lawfully concluded,⁶³ but also with regard to the form in which the marriage is closed, thereby legitimising limitations on certain cultural or religious manifestations of marriage,⁶⁴ and towards immigrants, for instance by requiring them to travel to their homeland to obtain a copy of a birth certificate.⁶⁵

Finally, according to settled case law, such as *X. v. Switzerland* (1981), the right to marry does not include the right to divorce.⁶⁶ In *Johnson and others v. the United Kingdom* (1986), the Court argued that from the Convention's drafting history it can be inferred that since the drafters initially chose to adopt a list of core rights and freedoms, and Article 16 UDHR was only incorporated partially, it was the intention of the drafters of the ECHR not to protect the right to divorce, which is guaranteed by the UDHR, under Article 12 ECHR.⁶⁷

In *F. v. Switzerland* (1987), this line was supplemented in a remarkable manner. This case is also the only one in the early case law in which a violation of Article 12 ECHR was accepted. In this case, a man, who had committed adultery and whose marriage was dissolved, wished to remarry, while under Swiss law, a judge was able to determine an *annus luctus*, a period during which a person may not remarry. In this case, such temporary restriction had been adopted for three years. The Court held that the stability of marriage is a legitimate purpose facilitating such a restriction in the public interest, but surprisingly claimed that,

⁵⁶ ECmHR 11 November 1986, appl.no. 11089/84 (Lindsay/UK).

⁵⁷ ECmHR 09 May 1988, appl.no. 11088/84 (Hubaux/Belgium).

⁵⁸ See further: ECmHR 05/04/1993, appl.no. 14881/89 (Dipino and Carrano/Italy). ECmHR 26 October 1995, appl.no. 20798/92 (Maleville/France). ECmHR 29 November 1995, appl.no. 25359/94 (Szokoloczy-Grobet/Switzerland). ECmHR 14 May 1986, appl.no. 11418/85 (Jolie/Belgium).

⁵⁹ ECtHR 13 June 1979, appl.no. 6833/74 (Marckx/Belgium). See also: M Salzberg, 'The Marckx Case. The Impact on European Jurisprudence of the European Court of Human Rights' 1979 *Marckx Decision Declaring Belgian Illegitimacy Statutes Violative of the European Convention on Human Rights*' (1983) 13 *Denver Journal International Law & Policy* 283. A Heyvaert and H Willekens, *Beginselen van het Gezins- en Familierecht na het Marckxarrest: De theorie van het Marckxarrest en haar weerslag op het geldende recht* (Kluwer, 1st edn, 1981).

⁶⁰ See further on this topic: J Finch et al., *Wills, inheritance, and families* (Clarendon Press cop., 1st edn, 1996). M Waterworth, G Bedworth and PSA Rosedale, *Rosedale: Probate and the administration of estates: a practical guide* (Legalease Publishing, 3rd edn, 2005). ED Vauhan, JR Martyn and N Caddick, *Williams, Mortimer & Sunnucks on executors, administrators and probate* (Sweet & Maxwell, 19th edn of Williams on Executors and 7th edn of Mortimer on Probate, 2008). D Burrows, *Stack v Dowden: co-ownership of property by unmarried parties* (Jordans/Family Law, 1st edn, 2007).

⁶¹ See also: ECmHR 12 October 1994, appl.no. 20402/92 (Spetz and others/Sweden).

⁶² ECmHR 22 July 1970, appl.no. 3898/68 (X./UK). See also: ECmHR 29 November 1995, appl.no. 23860/94 (Khan/UK).

⁶³ ECmHR 07 July 1986, appl.no. 11579/85 (Khan/UK).

⁶⁴ ECmHR 18 December 1974, appl.no. 6167/73 (X./Germany).

⁶⁵ ECmHR 12 October 1994, appl.no. 22404/93 (Senine Vadbolowski and Demonet/France).

⁶⁶ ECmHR 05 October 1981, appl.no. 9057/80 (X./Switzerland). See also: ECmHR 09 April 1997, appl.no. 33597/96 (Slimani/France). ECtHR 06 May 1981, appl.no. 7759/77 (Buchholz/Germany).

⁶⁷ ECtHR 18 December 1986, appl.no. 9697/82 (Johnson and others/Ireland). See also: ECmHR 08 May 1987, appl.no. 9584/81 (J.G./Ireland).

although Article 12 does not include the right to divorce and remarry, if ‘[] national legislation allows divorce, which is not a requirement of the Convention, Article 12 secures for divorced persons the right to remarry without unreasonable restrictions.’⁶⁸

Nevertheless, this line has not been confirmed in subsequent cases.⁶⁹ In *De Francesco v. Italy (1990)*⁷⁰ and *De Luca v. Italy (1990)*⁷¹ the possibility of remarriage was obstructed for six years by a court appeal but the Commission found no violation of Article 6 ECHR and held that it could, therefore, not establish a violation of Article 12 ECHR. In *Sanders v. France (1996)* the Commission indicated that the delay caused by procedural requirements, in contrast to judicial or statutory prohibitions, could not lead to a violation of Article 12 ECHR.⁷² The right to remarry of the complainant in *K.M. v. the United Kingdom (1997)* was curtailed, resulting in a significant delay in the remarriage, because the decision of a lower court in which a previous marriage had been dissolved was rescinded. The Court, however, did not find a violation of Article 12 ECHR.⁷³

From these cases it may be derived that a conservative approach was adopted with regard to the right to marry, which on some points seems to be at odds with the original intention of the Convention’s drafters. The right to divorce, contained in Article 16 UDHR, was omitted from Article 12 ECHR, not because the authors of the Convention explicitly thought the right to divorce should not be granted to individuals as a human right, but because initially a list of core rights and freedoms had been envisaged, specifying only rights and freedoms, not the dissolution or limitation thereof.⁷⁴ It follows from the Court’s interpretation that states are allowed to determine that once a person is married, he is obliged to remain married with that person for the rest of his life. Subsequently, Article 12 ECHR may be interpreted as a right that may only be enjoyed once in a lifetime. Such an approach contrasts with other human rights and freedoms, which may be enjoyed more than once and which rights-bearers may decide to give up. The Court’s finding that the right to divorce is not contained in Article 12, but a rapid divorce procedure is, while it does not refer to Article 6 ECHR in this respect, implies that a country may impose an absolute prohibition on divorce but may not implement relative restrictions.

On other points, the conservative interpretation of the Court and the former Commission also resulted in remarkable outcomes. While the premise of Article 12 was egalitarianism, the Commission has accepted differences in the treatment of married and unmarried couples and between children of married and unmarried couples,⁷⁵ between religious forms of marriage, and between candidates of different nationalities. Thus, states may provide that immigrants may only marry if they are in love, a requirement that neither follows from the treaty itself nor from the legislative history of Article 12 ECHR; marriages based on rational reasons were and are a widespread phenomenon. Apart from the fact that the

⁶⁸ ECtHR 18 December 1987, appl.no. 11329/85 (F./Switzerland).

⁶⁹ See also: ECmHR 02 December 1992, appl.no. 20308/92 (W.M./Germany). ECmHR 07 April 1997, appl.no. 29737/96 (B.Y.U./Switzerland).

⁷⁰ ECmHR 12 March 1990, appl.no. 13741/88 (De Francesco/Italy).

⁷¹ ECmHR 12 March 1990, appl.no. 13823/88 (De Luca/Italy).

⁷² ECmHR 16 October 1996, appl.no. 31401/96 (Sanders/France).

⁷³ ECmHR 09 April 1997, appl.no. 30309/96 (K.M./UK).

⁷⁴ One might also argue that the text of Article 16 UDHR does not as such include the right to divorce, as it merely expresses that men and women have equal rights in this respect. If neither of them is granted the right to divorce, they have equal rights in that respect. The provision, on the other hand, explicitly forbids legislation in which the man is allowed to file for divorce, whereas the woman is not.

⁷⁵ See regarding the protection of children under the Convention for instance: U Kilkelly, ‘The Best of Both Worlds for Children’s Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child’ (2001) 23 *Human Rights Quarterly* 2. See on the British approach: A Bainham, *Children - the new law: the Children Act 1989* (Family Law, 1st edn, 1990). J Mitchell, *Children Act private law proceedings: a handbook* (Family Law, 2nd edn, 2006).

state's examination into the sincerity of the future spouses' feelings of love may be regarded as a violation of privacy in itself,⁷⁶ states do not impose such far-reaching investigations on its native citizens, so that this may be interpreted as a form of discrimination. Finally, it should be noted that the reasoning that a state does not need to respect the right to marry if marriage can be concluded elsewhere is seldom applied to the execution of other human rights and freedoms under the Convention.

3.3 The Right to Found a Family

Similar to the right to marry, the Commission adopted a conservative approach⁷⁷ towards immigrants⁷⁸ with respect to the right to found a family,⁷⁹ for instance by providing that Article 12 ECHR does not contain a right to remain in a particular country,⁸⁰ that an imminent deportation entails no violation of family life,⁸¹ and that if an expulsion is permitted under Article 8 paragraph 2 ECHR, the same conclusion must ensue from Article 12 ECHR.⁸²

A similar approach is taken towards prisoners, for instance by holding that a restriction on the right to found a family is implied by imprisonment,⁸³ that Article 12 ECHR does not guarantee that '[...] a person must at all times be given the actual possibility to procreate his descendants',⁸⁴ and that if a limitation on the consumption of marriage is permissible under Article 8 paragraph 2 ECHR, for example in relation to maintaining order, a violation of Article 12 is out of the question.⁸⁵ Finally, reference can be made to the case of *E.L.H. and P.B.H. v. the United Kingdom (1997)*, in which a prisoner was not allowed to consume his marriage but was offered the opportunity to procreate via artificial insemination. He refused this option on religious grounds and demanded conjugal visits to consume his marriage, but the Commission did not accept that such a right was entailed in Article 12 ECHR.⁸⁶

Besides artificial insemination, adopting children provides a way to found a family via a non-biological way. In *X. v. Belgium and the Netherlands (1975)*, the Commission held that a right to adopt did not fall under Article 12 ECHR.⁸⁷ In *X. and Y. v. the United Kingdom (1977)*, however, a more flexible interpretation was applied: 'However the Commission considers that the adoption of a child and its integration into a family with a couple might, at least in some circumstances, be said to constitute the foundation of a family by that couple. It is quite conceivable that a "family" might be "founded" in such a way. Nevertheless, whilst it is implicit in Article 12 that it guarantees a right to procreate children, it does not as such

⁷⁶ ECmHR 03 December 1997, appl.no. 33257/96 (Klip and Krüger/Netherlands). See also: ECmHR 04 July 1991, appl.no. 13158/87 (Hopic/Netherlands).

⁷⁷ See also: ECmHR 22 October 1997, appl.no. 29245/95 (Foskjaar/Denmark).

⁷⁸ See on this topic for instance: J Murphy, *Ethnic minorities, their families and the law* (Hart, 1st edn, 2000).

⁷⁹ ECmHR 12 March 1987, appl.no. 12408/86 (Dilawar/UK). See also: ECmHR 11 October 1988, appl.no. 12492/86 (H./UK). ECmHR 07 April 1993, appl.no. 14852/89 (Akhtar, Johangir and Johangir/Netherlands).

⁸⁰ ECmHR 16 October 1986, appl.no. 12236/86 (S./UK). ECmHR 30 June 1993, appl.no. 20598/92 (Mahvaz/UK).

⁸¹ ECmHR 13 July 1987, appl.no. 12790/87 (C. Ng./UK).

⁸² ECmHR 02 September 1992, appl.no. 17670/91 (O.A./France).

⁸³ ECmHR 07 July 1986, appl.no. 11579/85 (Khan/UK). ECmHR 05 October 1988, appl.no. 11799/85 (H/France). ECmHR 12 October 1988, appl.no. 11994/86 (Hellegouarch/France). See also: ECmHR 22 July 1970, appl.no. 3898/68 (X/UK). ECmHR 02 July 1990, appl.no. 16252/90 (G.T./Italy).

⁸⁴ ECmHR 21 May 1975, appl.no. 6564/74 (X./UK).

⁸⁵ ECmHR 03 October 1978, appl.no. 8166/78 (X. and Y./Switzerland). ECmHR 10 July 1991, appl.no. 17142/90 (G.S. and R.S./UK).

⁸⁶ ECmHR 22 October 1997, appl.no. 32094/96 and 32568/96 (E.L.H. and P.B.H./UK). See regarding artificial insemination also: ECmHR 07 May 1987, appl.no. 10822/84 (P.G./UK). ECmHR 07 May 1993, appl.no. 20004/92 (R.J. and W.J./UK). See also: ECmHR 28 November 1995, appl.no. 21825/93 and 23414/94 (McGinley and Egan/UK).

⁸⁷ ECmHR 10 July 1975, appl.no. 6482/74 (X/Belgium and Netherlands).

guarantee a right to adopt or otherwise integrate into a family a child which is not the natural child of the couple concerned. The Commission considers that it is left to national law to determine whether, or subject to what conditions, the exercise of the right in such a way should be permitted.’⁸⁸ The Commission took this interpretation even further in *X. v. the Netherlands (1981)*: ‘The Commission is of the opinion that the concept of family life in a great number of Member States legitimates the view that the founding of a family, within the meaning of Article 12, does not only envisage natural children, but also adoptive children. As provided by the Article, the exercise of such a right is governed by the national laws.’⁸⁹

Although neither case resulted in a violation of Article 12 ECHR, a more liberal line seems to have been adopted here. Yet in subsequent cases, this approach was explicitly denounced. In *Di Lazzaro v. Italy (1997)*, for example, the Commission stated: ‘The Commission also recalls that Article 12 of the Convention, which recognises the right of man and woman at the age of consent to found a family, implies the existence of a couple and cannot be construed as including the right of an unmarried person to adopt []. Moreover, Article 12 of the Convention does not guarantee a right to adopt or otherwise integrate into a family a child which is not the natural child.’⁹⁰ This line was confirmed in subsequent cases.⁹¹

It must be concluded that the right to found a family was interpreted in a rather conservative fashion. The freedoms of prisoners and immigrants may be limited to a large extent and the right to found a family, according to the Commission, only refers to the biological family. This is in contrast to, for example, Article 8 of the Convention, which does provide protection to the non-traditional family. Although the Commission seemed to take a somewhat more liberal approach towards adoption initially, it later departed from that line and confirmed its conservative stance.

It should also be noted that the Commission again linked this right to the other right enshrined in Article 12 ECHR, namely the right to marry. For example, in the case of *X. v. Belgium and the Netherlands (1975)* referred to earlier, the Commission held: ‘In the first place, this provision does not guarantee the right to have children born out of wedlock. Article 12, in fact, foresees the right to marry and to found a family as one simple right. However, even assuming that the right to found a family may be considered irrespective of marriage, the problem is not solved. Article 12 recognises in fact the right of man and woman at the age of consent to found a family, i.e. to have children. The existence of a couple is fundamental. In the present case, the adoption of an adolescent by an unmarried person cannot lead to the existence of family life within the meaning of the Convention.’⁹² In subsequent cases, this connection between the two limbs of Article 12 ECHR has been confirmed. Just as the right to marry is explicitly linked to the ability to procreate, the right to found a family is connected to marriage. This is contrary to the drafters’ intention, who separated these two rights inter alia to provide legal protection for illegitimate children.

Finally, like the right to marry, the Commission seems to have interpreted the right to found a family as a right which may be invoked only once. In the case cited above, *X. v. the United Kingdom (1975)*, concerning a prisoner who wished to procreate, the Commission circumvented this question: ‘It is true that Art. 12 of the Convention secures to everyone of marriageable age the right to found a family. But even assuming that this provision were applicable to a person who is already married and has children, the Commission could not, in the circumstances of the present case, reach the conclusion that a violation of Art. 12 has

⁸⁸ ECmHR 15 December 1977, appl.no. 7229/75 (X. and Y./UK).

⁸⁹ ECmHR 10 March 1981, appl.no. 8896/80 (V./Netherlands). See also: ECmHR 13 May 1992, appl.no. 15296/89 (Pitzalis and Lo Surdo/Italy).

⁹⁰ ECmHR 10 July 1997, appl.no. 31924/96 (Di Lazzaro/Italy).

⁹¹ ECmHR 01 July 1998, appl.no. 34986/97 (Akin/Netherlands).

⁹² ECmHR 10 July 1975, appl.no. 6482/74 (X./Belgium and Netherlands)

taken place.’⁹³ In *X. and Y. v. Switzerland* (1978), concerning a husband and wife who were both in prison but wanted to continue consuming their marriage, the Commission considered that a restriction on this freedom was permissible under Article 8 ECHR in terms of maintaining order in prison. When assessing the case under Article 12 ECHR it argued as follows: ‘The applicants are married and have thus already founded a family. They consequently enjoy the right to respect of their family life as guaranteed by Article 8 of the Convention. An interference with family life which is justified under Article 8 (2) cannot at the same time constitute a violation of Article 12.’⁹⁴

3.4 Limitation of the Right

Article 12 of the Convention states that the two rights entailed in it may be enjoyed according to the national laws governing the exercise of these rights. As already argued, from this phrasing it can be inferred that Article 12, unlike many other treaty rights, may be curtailed by states only to a limited extent. Initially, this was confirmed in the case of *X. v. the United Kingdom* (1975) in which the Commission held that ‘[] the right to found a family is an absolute right in the sense that no restrictions similar to those in para. (2) of Art. 8 of the Convention are expressly provided for []’.⁹⁵ This raises the question as to the relationship between Article 12 ECHR, which guarantees the right to found a family, and Article 8, which protects family life.⁹⁶ The interpretation that Article 12 protects the founding of the family whereas Article 8 guards over the already established family, which seems was indeed argued for by the former Commission in a number of cases.⁹⁷ Sometimes this line was not so sharp and cases were simply assessed under both articles, but more commonly, as can already be inferred from the previous sub-section, it was argued that if Article 8 ECHR is not violated or a breach is allowed under the second paragraph, a violation of Article 12 ECHR is out of the question.⁹⁸

Consequently, contrary to the intention of the drafters of the ECHR, the limitation clause of Article 12 was extended to that of Article 8 ECHR. Although it followed from case law that states may not curtail the ‘very essence’ of the rights under Article 12 ECHR, it also followed from case law up till 2000 that transsexuals and gay people could not successfully rely on this article, that the right to divorce and remarry was not guaranteed under Article 12, and that not only ‘procedural rules’, but also ‘substantive rules’ might be issued,⁹⁹ for instance with regard to the prevention of marriages by immigrants.¹⁰⁰

Moreover, the Commission and the Court have generally assumed that given the fact that the phenomena of marriage and founding a family are strongly culturally determined and interpretations of these rights differ from one country to another, the margin of appreciation of a state with regard to Article 12 ECHR was particularly wide. In *F. v. Switzerland* the Court held: ‘In this connection, it recalls its case-law according to which the Convention must be

⁹³ ECmHR 21 May 1975, appl.no. 6564/74 (X./UK).

⁹⁴ ECmHR 03 October 1978, appl.no. 8166/78 (X. and Y./Switzerland).

⁹⁵ ECmHR 21 May 1975, appl.no. 6564/74 (X./UK).

⁹⁶ CR Howell, ‘The right to respect for family life in the European Court of Human Rights’ (1996) 34 *University Louisville Journal for Family Law* 693.

⁹⁷ ECmHR 12 March 1990, appl.no. 13823/88 (De Lucca/Italy). ECmHR 12 March 1990, appl.no. 13741/88 (De Francesco/Italy). ECmHR 10 October 1991, appl.no. 14420/88 (Bertocci Cianchi/Italy). ECmHR 15 May 1986, appl.no. 11588/85 (U. and G.F./Germany).

⁹⁸ See for instance: ECmHR 30 November 1994, appl.no. 20550/92 (J.K./Switzerland). ECmHR 03 May 1993, appl.no. 16031/90 (Tennebaum/Sweden). ECmHR 10 September 1997, appl.no. 31233/96 (B.W. and W.W./Switzerland). ECmHR 30 November 1994, appl.no. 24485/94 (Bacovic/Sweden).

⁹⁹ F./Switzerland.

¹⁰⁰ ECmHR 16 October 1996, appl.no. 31401/96 (Sanders/France). See also: ECmHR 03 December 1997, appl.no. 33257/96 (Klip and Krüger/Netherlands).

interpreted in the light of present-day conditions []. However, the fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect offends the Convention, particularly in a field - matrimony - which is so closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit.’¹⁰¹

Such an approach has consequently left a large margin for states to adopt restrictive regulation in their national laws. Finally, it may be noted that the line in which the freedoms under Article 12 were interpreted in a more limited manner than those protected under Article 8 ECHR is reinforced by the fact that neither the Commission nor the Court have ever derived a positive duty from Article 12 ECHR, this in contrast to, inter alia, Article 8 of the Convention.¹⁰²

4. Case Law Since 2000

From the previous section it follows that in its early case law, the Commission and the Court took a conservative approach towards the interpretation of Article 12 ECHR. In doing so, they departed from the original purpose of the article on a number of points. From 2000 onwards, however, the Court (the Commission having been replaced by a separate chamber of the Court) gradually developed a more liberal line.¹⁰³ Moreover, in contrast to its early case law in which it found a breach of Article 12 only once, namely in *F. v. Switzerland*, a violation of article 12 ECHR was found in a considerable number of cases after 2000.¹⁰⁴

4.1 Men and Women of Marriageable Age

With regard to the position of transsexuals under the Convention, the Court departs radically from its earlier case law. The cases of *Goodwin v. the United Kingdom (2002)*¹⁰⁵ and *I. v. the United Kingdom (2002)*¹⁰⁶ concern the right of transsexuals to marry.¹⁰⁷ The Court referred therein to the biological criterion accepted in *Rees* and the following cases, which implied that the right to marry can only be enjoyed if the two partners have the ability to procreate and found a family, and stated: ‘Reviewing the situation in 2002, the Court observes that Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision.’¹⁰⁸

¹⁰¹ *F./Switzerland*, § 33.

¹⁰² See for instance: ECmHR 10 December 1992, appl.no. 21026/92 (*Mocosko/Czechoslovakia*). ECmHR 11 April 1996, appl.no. 25928/94 (*Cannatella/Switzerland*). See also: AIL Campbell, ‘Positive Obligations under the ECHR: Deprivation of Liberty by Private Actors’ (2006) 10 *Edinburgh Law Review* 399.

¹⁰³ Not on all points there is a radical departure from the early case law. See for instance: ECtHR 09 March 2010, appl.no. 51625/08 (*Ammjadi/Germany*). ECtHR 01 February 2011 appl.no. 26252/06 (*Tekin/Turkey*). ECtHR 10 December 1992, appl.no. 69498/01 (*Mocosko/ Czechoslovakia*). ECtHR 17 November 2005, appl.no. 59624/00 (*Zu Leningen/Germany*).

¹⁰⁴ See more in general: A Mowbray, ‘An Examination of the European Court of Human Rights’ Approach to Overruling its Previous Case Law’ (2009) 9 *Human Rights Law Review* 2.

¹⁰⁵ ECtHR 11 July 2002, appl.no. 28957/95 (*Goodwin/UK*).

¹⁰⁶ ECtHR 11 July 2002, appl.no. 25680/94 (*I./UK*). See with regard to *Goodwin* and *I* also: S Cowan, ‘“Gender is no substitute for Sex”: A comparative Human Rights analysis of the legal regulation of sexual identity’ (2005) 13 *Feminist Legal Studies* 67.

¹⁰⁷ See further: ECtHR 11 July 2006, appl.no. 43113/04 (*Bellinger/UK*).

¹⁰⁸ ECtHR 11 July 2002, appl.no. 28957/95 (*Goodwin/UK*), § 98. This disconnection of the two limbs does not, however, follow from: ECtHR 13 December 2007, appl.no. 39051/03 (*Emonet and others/Switzerland*).

The Court referred to major changes and developments, such as the increased social acceptance of transsexuals, the increased medical acceptance and possibilities, and the broadened legal embedding of the right to marry, with reference to the Charter of Fundamental Rights of the European Union, of which Article 9 guarantees the right to marry and found a family without referring to ‘men and women’.¹⁰⁹ This gave the Court sufficient reason to depart from its earlier jurisprudence as it believed that ‘[] it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex.’¹¹⁰

This more liberal approach also seems to offer opportunities for persons of the same sex who wish to marry, now that the two limbs of Article 12 are no longer connected and Article 9 of the Charter does not contain the wording of ‘men and women’ Moreover, it can be argued that it is artificial to assert that gay people have not been deprived of the right to marry as, according to law, they remain able to marry a person of their opposite sex.¹¹¹ The opposite, however, was argued by the Court¹¹² in *R. and F. v. the United Kingdom (2006)*¹¹³ and *Parry v. the United Kingdom (2006)*.¹¹⁴ Here the Court held that although a number of Member States had legitimised gay marriage in their national legislations ‘[] this reflects their own vision of the role of marriage in their societies and does not, perhaps regrettably to many, flow from an interpretation of the fundamental right as laid down by the Contracting States in the Convention in 1950. The Court cannot but conclude therefore that the matter falls within the appreciation of the Contracting State as how to regulate the effects of the change of gender in the context of marriage [].’¹¹⁵

Although this line is confirmed in *Schalk and Kopf v. Austria (2010)*,¹¹⁶ with the phrase ‘perhaps regrettably to many’ the Court seemed to imply that it hesitated to confirm a conservative interpretation on this point. It remains to be seen in how far the plans of countries like Germany, Finland, Luxembourg, Turkey, and the United Kingdom to allow for gay marriages, besides Belgium, Denmark, France, Iceland, the Netherlands, Norway, Portugal, Spain, and Sweden that have already done so, will lead the Court to depart from its case law on this point. In *Schalk and Kopf* the Court already seemed to adopt a somewhat more liberal interpretation when it noted, as did the complainants, that in itself the phrase ‘men and women’ in Article 12 does entail that marriage must be concluded between a man and a woman and, perhaps more importantly, when it accepted that Article 12 ECHR also offers protection to same-sex couples, although it still remains true that states may impose restrictions in this field.

4.2 The Right to Marry

It follows from the case law from 2000 onwards in the area of divorce and remarriage¹¹⁷ that not only statutory and judicial prohibitions may lead to a violation of Article 12 ECHR, as

¹⁰⁹ Charter of Fundamental Rights of the European Union, *Official Journal of the European Communities*, (2000/C 364/01), 18 December 2000. <http://www.europarl.europa.eu/charter/pdf/text_en.pdf>.

¹¹⁰ ECtHR 11 July 2002, appl.no. 28957/95 (Goodwin/UK), § 101.

¹¹¹ P Johnson, ‘Heteronormativity and the European Court of Human Rights’ (2012) 23 *Law Critique* 1. See for the relationship between Strasbourg and Luxembourg: H Stalford, ‘Concepts of Family Under EU Law – Lessons From the ECHR’ (2002) 16 *International Journal of Law, Policy and the Family* 410.

¹¹² ECtHR 26 February 2002, appl.no. 36515/97 (Frette/France).

¹¹³ ECtHR 28 November 2006, appl.no. 35748/05 (R. and F./UK).

¹¹⁴ ECtHR 28 November 2006, appl.no. 42971/05 (Parry/UK).

¹¹⁵ ECtHR 11 September 2007, appl.no. 27527/03 (L./Lithuania).

¹¹⁶ ECtHR 24 June 2010, appl.no. 30141/04 (Schalk and Kopf/Austria), § 62.

¹¹⁷ See also: ECtHR 10 April 2003, appl.no. 44482/98 (Hutt-Claus/France). ECtHR 31 May 2007, appl.no. 6725/03 (Lizanets/Ukraine). ECtHR 27 May 2008, appl.no. 40364/05 (Martin/France). ECtHR 31 March 2009, appl.no. 37256/04 (Aktas/Turkey). ECtHR 23 Augustus 2011, appl.no. 21980/04 (Simeonovi/Bulgaria).

previously argued, but that delay due to procedural rules or a lengthy course of justice may do so as well.¹¹⁸ This principle of early case law, in which a delay in remarriage of six years did not lead to a breach of Article 12 ECHR, was rejected in the case of *V.K. v. Croatia (2010)*, in which a man wanted to remarry, but was able to do so only after six years due to a lengthy judicial process. While no statutory or judicial prohibition was in place, the Court held that this period, in relation to the circumstances of the case, led to a violation of both Article 6 and 12 ECHR.¹¹⁹

Likewise, with regard to the rights of prisoners, case law seems to have eased considerably.¹²⁰ This is apparent in, for instance, *Jaremowicz v. Poland (2010)*¹²¹ and *Frasik v. Poland (2010)*. In the latter case, a prisoner was not allowed to marry a woman, since she was a witness to his case and the marriage might have influenced her. Besides the fact that an individual assessment had been made by a national court, the case regarded a temporary restriction only, namely for a period of less than eighteen months. Still, the Court held that this violated the right to marry. ‘The Government seem to be suggesting that the fact that the applicant had the possibility of marrying I.K. in the future, which in his case meant a period of more than one year, could alleviate the consequences of the District Court’s refusal. However, a delay imposed, before getting married, on persons of full age and otherwise fulfilling the conditions for marriage under national law, be it as a civil sanction or the practical consequence of such a refusal as in the instant case, cannot be considered justified under Article 12 of the Convention [.]’¹²²

Both in the area of divorce and remarriage and in the area of prisoners’ rights, a more liberal stance has been adopted. Moreover, the rules regarding immigrants seem to have been relaxed considerably.¹²³ The case of *O’Donoghue and others v. the United Kingdom (2010)* concerned a complex system in which the right to marry was curtailed with regard to people who stayed in Britain for a limited time only, unless it was apparent that a marriage was based on genuine love and in which costs were associated with the exercise of the right to marry, although the less well-off were able to recover these expenses. The United Kingdom had already amended and revised this system a number of times. The Court found a violation of Article 12 ECHR, even though the complainants had suffered only a very minor period from the restrictions, among other things because it regarded the barrier of expenses to be contrary to the Convention.¹²⁴

Finally, with regard to the substantive and procedural rules allowed by the Court, a new approach was adopted.¹²⁵ The case of *Lashin v. Russia (2011)*, which regarded restrictions on marriage for people with limited legal capacity, has been declared admissible

¹¹⁸ ECtHR 19 July 2007, appl.no. 43151/04 (Charalambous/Cyprus). ECtHR 29 January 2008, appl.no. 42402/05 and 42423/05 (Wildgruber/Germany).

¹¹⁹ ECtHR 27 November 2012, appl.no. 38380/08 (V.K./Croatia).

¹²⁰ See also: ECtHR 20 October 2005, appl.no. 35115/03 (Vaden/Greece). ECtHR 02 September 2008, appl.no. 42484/02 (Lebedev/Ukraine). ECtHR 14 February 2006, appl.no. 21148/02 (Garriguenc/France).

¹²¹ ECtHR 05 January 2010, appl.no. 24023/03 (Jaremowicz/Poland).

¹²² ECtHR 05 January 2010, appl.no. 22933/02 (Frasik/Poland), § 97.

¹²³ Not on all points there is a radical departure from the early case law: ECtHR 11 July 2006, appl.no. 8407/05 (Savoia and Bounegru/Italy). ECtHR 11 July 2006, appl.no. 18059/06 (Walter/Italy). ECtHR 15 May 2008, appl.no. 37325/05 (Noah/Switzerland). ECtHR 15 May 2003, appl.no. 76878/01 (Gribenko/Latvia). ECtHR 21 January 2003, appl.no. 52586/99 (Strzalkowska/Poland). ECtHR 14 June 2005, appl.no. 39144/02 (Chau/France). ECtHR 24 May 2011, appl.no. 43817/04 (Bacuzzi/Italy).

¹²⁴ ECtHR 14 December 2010, appl.no. 34848/07 (O’Donoghue and others/UK).

¹²⁵ ECtHR 18 September 2001, appl.no. 47293/99 (Selim/Cyprus). ECtHR 16 July 2002, appl.no. 47293/99 (Selim/Cyprus). Not on all points there is a radical departure from the early case law: ECtHR 08 December 2009, appl.no. 49151/07 (Munoz Diaz/Spain). ECtHR 11 October 2011, appl.no. 25579/09 (A.Y./France). ECtHR 23 October 2006, appl.no. 31990/02 (Wasser and Steiger/Switzerland).

and is pending before the Court.¹²⁶ In *B. and L. v. the United Kingdom (2004)*, the rights of a father-in-law and daughter-in-law to marry were denied with reference to, among other things, the danger of coercion and manipulation by the parent-in-law. The Court stated in this case that, although the law on which the ban was based would remain intact after having been discussed in the British Parliament, there was considerable doubt in Great Britain about these rules. The UK government argued that the prohibition for a parent-in-law and a child-in-law to marry might, after an examination of the individual circumstances, be lifted by parliament. The Court however found a violation of Article 12 ECHR because '[i]n any event a cumbersome and expensive vetting process of this kind would not appear to offer a practically accessible or effective mechanism for individuals to vindicate their rights. It would also view with reservation a system that would require a person of full age in possession of his or her mental faculties to submit to a potentially intrusive investigation to ascertain whether it is suitable for them to marry.'¹²⁷ Thus, pertaining to the right to marry, the Court showed serious doubts on substantial limitations as such.¹²⁸

4.3 The Right to Found a Family

Regarding the right to marry, the Court seems to adopt a more liberal stance towards the right to divorce and remarry and the right to marry of prisoners and immigrants, while at the same time restricting the margin of appreciation by states when curtailing the freedoms under Article 12 ECHR. Likewise, the right to found a family seems to be approached from a more liberal perspective,¹²⁹ e.g. with regard to immigrants.¹³⁰ Moreover, concerning the sterilisation of women¹³¹ without their free and fully informed consent, the Court found in the case *I.G. and others v. Slovakia (2012)* a violation of Article 8 ECHR and held that no separate assessment of the case under Article 12 ECHR was needed.¹³² In the similar case of *V. C. v. Slovakia (2011)*, the Court held essentially the same.¹³³

Finally, with regard to artificial insemination,¹³⁴ a more open view is adopted, although, just as in the cases of sterilisation, Article 8 ECHR seems to have priority over Article 12.¹³⁵ In the case of *Dickson v. the United Kingdom (2006)*, a prisoner wanted to found a family but his wife would be 51 years old at the time of his release. Although the

¹²⁶ ECtHR 06 January 2011, appl.no. 33117/02 (Lashin/Russia), § 91.

¹²⁷ ECtHR 13 September 2005, appl.no. 36536/02 (B. and L./UK), § 40.

¹²⁸ For developments on this topic, see also: M Harper et al., *Civil partnership: the new law* (Family Law, 1st edn, 2005).

¹²⁹ Not on all points there is a radical departure from early case law. ECtHR 06 October 2009, appl.no. 33755/06 (S.W./UK). ECtHR 01 December 2009, appl.no. 45503/99 (Karefyllides and others/Turkey). ECtHR 25 September 2001, appl.no. 45035/98 (K.S./UK). ECtHR 16 July 2002, appl.no. 56547/00 (P., C. en S./UK). ECtHR 05 September 2002, appl.no. 50490/99 (Boso/Italy). ECtHR 06 March 2003, appl.no. 67914/01 (Sijakova/Macedonia). ECtHR 30 August 2011, appl.no. 39622/09 (M.W./UK). ECtHR 28 June 2005, appl.no. 330/03 (Rodrigues/Portugal). ECtHR 08 July 2008, appl.no. 39512/02 (Akun/Turkey). ECtHR 28 June 2005, appl.nos. 60726/00, 22947/02 and 22966/02 (Ivanchenko, Samoylov and Ivanchenko/Ukraine). ECtHR 27 November 2007, appl.no. 632/03 (Mazak/Poland). ECtHR 31 March 2009, appl.no. 28057/08 (Belova/Belgium). ECtHR 25 March 2004, appl.no. 55933/00 (Ivanov/Latvia). ECtHR 29 January 2004, appl.no. 50183/99 (Kolosovskiy/Latvia). ECtHR 20 September 2007, appl.no. 36416/02 (Sadet/Romania).

¹³⁰ ECtHR 08 June 2006, appl.no. 60148/00 (Singh and others/UK).

¹³¹ See also: ECtHR 23 November 2010, appl.no. 62079/09 (M.V./Slovakia). ECtHR 30 August 2011, appl.no. 21826/10 (Ferencikova/Czech Republic).

¹³² ECtHR 13 November 2012, appl.no. 15966/04 (I.G. and others/Slovakia).

¹³³ ECtHR 08 November 2011, appl.no. 18968/07 (V.C./Slovakia).

¹³⁴ See further: E Blyth and A Farrand, 'Reproductive tourism - a price worth paying for reproductive autonomy?', (2005) 25 *Critical Social Policy* 91.

¹³⁵ ECtHR 24 June 2008, appl.no. 11326/07 (Madonia/Italy). ECtHR 15 November 2007, appl.no. 57813/00. (S.H./Austria).

Court acknowledged that artificial insemination was the only realistic chance to conceive a child, it initially held that the seriousness of the crime for which the man was convicted, the long absence of the father when the child would grow up, and the question whether the mother was capable of taking good care of the child, provided the government with sufficient reasons to legitimately limit the right to found a family.¹³⁶ On appeal, however, the Grand Chamber insisted that in this case, the national procedure was inadequate when considering the individual circumstances of the case and the disproportionate impact of a ban on artificial insemination in this specific case was not taken into account with sufficient care. Therefore, it found a violation of Article 8 and again held that no separate issue arose under Article 12 ECHR.¹³⁷

4.4 Limitation of the Right

As regards the relationship between the two rights, it seems that Article 8 has gained priority over Article 12 ECHR, even in cases on founding or the capability of founding a family, for instance by artificial insemination or sterilisation. On the other hand, the Court seems to reverse its position on the restrictions that Article 12 ECHR permits. For example in the cases of *O'Donoghue and others v. the United Kingdom (2010)*, *Jaremowicz v. Poland (2010)*, and *Frasik v. Poland (2010)*, the Court held that states may never completely restrict the right to marry. 'This conclusion is reinforced by the wording of Article 12. In contrast to Article 8 of the Convention, which sets forth the right to respect for private and family life, and with which the right "to marry and to found a family" has a close affinity, Article 12 does not include any permissible grounds for an interference by the State that can be imposed under paragraph 2 of Article 8 "in accordance with the law" and as being "necessary in a democratic society", for such purposes as, for instance, "the protection of health or morals" or "the protection of the rights and freedoms of others". Accordingly, in examining a case under Article 12 the Court would not apply the tests of "necessity" or "pressing social need" which are used in the context of Article 8 but would have to determine whether, regard being had to the State's margin of appreciation, the impugned interference was arbitrary or disproportionate [']'.¹³⁸

Likewise, with regard to the nature of Article 12 ECHR, the Court seems to adopt a different approach; instead of referring to conservative principles and the traditional family and marriage, it refers to concepts of tolerance and broadmindedness. In *Jermowicz and Frasik* it held, for example, that there is no place '[] under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for any automatic interference with prisoners' rights, including their right to establish a marital relationship with the person of their choice, based purely on such arguments as what – in the authorities' view – might be acceptable to or what might offend public opinion [']'.¹³⁹ The Court continued: 'The choice of a partner and the decision to marry him or her, whether at liberty or in detention, is a strictly private and personal matter and there is no universal or commonly accepted pattern for such a choice or decision. Under Article 12 the authorities' role is to ensure that the right to marry is exercised "in accordance with the national laws", which must themselves be compatible with the Convention, as stated above; but they are not allowed to interfere with a detainee's decision to establish a marital relationship with a person

¹³⁶ ECtHR 18 April 2006, appl.no. 44362/04 (Dickson/UK).

¹³⁷ ECtHR 04 December 2007, appl.no. 44362/04 (Dickson/UK).

¹³⁸ Frasik/Poland, § 90.

¹³⁹ Frasik/Poland, § 93.

of his choice, especially on the grounds that the relationship is not acceptable to them or may offend public opinion []',¹⁴⁰

Finally, it should be noted that the discretion of states and their margin of appreciation when interpreting Article 12 ECHR has been limited considerably. In the early case law, it was held that given the cultural differences, states had a wide margin of appreciation, but after 2000, the Court has instead referred frequently to common liberal developments in European countries. For example, in the cases of *Goodwin v. the United Kingdom (2002)* and *I. v. the United Kingdom (2002)*, the British government referred to the line adopted by the Commission and the Court in their early case law from which it appeared that states had a large margin of appreciation when laying down rules on the right to marry by transsexuals. However, the Court rejected this position. 'It may be noted from the materials submitted by Liberty that though there is widespread acceptance of the marriage of transsexuals, fewer countries permit the marriage of transsexuals in their assigned gender than recognise the change of gender itself. The Court is not persuaded however that this supports an argument for leaving the matter entirely to the Contracting States as being within their margin of appreciation. This would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry. The margin of appreciation cannot extend so far. While it is for the Contracting State to determine inter alia the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages (including, for example, the information to be furnished to intended spouses), the Court finds no justification for barring the transsexual from enjoying the right to marry under any circumstances.'¹⁴¹

In conclusion, with regard to the discretion left to states when interpreting Article 12 ECHR, a clear shift can be seen in the Court's case law. Where the Court first held that Article 12 ECHR could be limited to a greater extent than, for example, Article 8, now the Court seems to be more hesitant and it acknowledges that Article 12 does not include any permissible grounds for an interference by the state such as are provided for by paragraph 2 of Article 8. Although it initially referred to conservative principles and concepts of the traditional family and marriage underlying Article 12 ECHR, it now adopts tolerance and broadmindedness as the fundamental principles which should prevail. And whereas the Court initially held the opinion that, given the cultural differences in the fields of marriage and family law, a wide discretion should be granted to states, the Court now holds that limitations on the rights guaranteed under Article 12 ECHR may never go so far as to effectively bar the exercise of those rights.

5. Conclusion

The problem of the illegitimate son is an ancient dilemma. The dilemma is not only whether the illegitimate son belongs to the family or is excluded from it, the question is also what criterion is applied when making this choice. One might look at actual facts, whether the son is incorporated in and lives with the family, but one might also point towards the legal reality, whether the son has been legally recognised or not. The same choice between fact and fiction plays a role with regard to many other dilemmas in relation to the rights to marry and to found a family. Is a person's gender to be determined on the basis of facts, e.g. how he or she behaves, dresses, and possibly has been physically transformed, or should the legal reality be the guiding principle, i.e. the gender contained in the birth register? Should the underlying principle in legislation, such as inheritance regulation, refer to biological facts, the actual

¹⁴⁰ Frasiak/Poland, § 95.

¹⁴¹ Goodwin/UK, § 103.

parent-child relationship, or to the legal status, as is common in relation to adoptive children? Will there be protection only for the biological family, founded through natural reproduction, or are artificial ways to reproduce also protected, such as artificial insemination? When divorce is imminent, should factual reality, for instance when a couple is living separately, prevail over legal reality and the promise to be faithful till death do them part? Should the factual relationship between immigrants be determinative or their legal desire to obtain a residence permit? These are just a few of the questions in which the choice between fact and fiction plays a role.

It is clear that the Commission and the Court struggle with this choice. While Article 12 ECHR was incorporated in the Convention as a classical human right, they initially approached the article as a social right, on which states may impose far-reaching restrictions, and as a civil right, on which immigrants cannot rely or only to a limited extent. In doing so, the Commission and the Court adopted a conservative interpretation of this article in which reference was made solely to the biological family and traditional marriage. As from 2000, however, the Court seems to adopt a more liberal stance so that non-traditional marriages and non-biological families are also offered protection, in concordance with the rights of transsexuals, immigrants, prisoners, and married couples who want to divorce.

However, the interpretation of the right to marry and found a family as a classical human right - in respect to which it should be remembered that the discretion left to states under Article 12 ECHR is very limited - is not yet applied to all issues under the article. Not only should gay marriages be accepted in this view; this liberal approach also questions the prohibition to marry family members of a certain degree, as this prohibition is based on the presumption that marriage must lead to founding a family, and children from these couples have an increased risk of malformation. Moreover, there is no reason why people should not be allowed to divorce and remarry and one might even ask whether the ban on polygamy should remain intact, since, from a liberal perspective, there is no reason why three or more people could not live together and be bound by marriage.

In addition, perceiving Article 12 ECHR as a classical human right, families founded through adoption or artificial insemination should enjoy the same protection as families established by natural conception, with respect to its founding, taxes, pension rights, and inheritance laws. In the same line, the link between marriage and children resulting from it and obtaining a residence permit should be reviewed. The requirement that marriages should be based on love would be questioned when approaching Article 12 ECHR in a more liberal manner, as it is not for the state to decide upon people's feelings or reasons leading up to their desire to marry.

Consequently, interpreting the right to marry and found a family as a classical human right would require states to alter their legislation on numerous points. The question arises whether such an approach, which primarily aims at protecting the individual against state interference, would allow for any substantial limitation or restriction, with exception perhaps to age. Although the conservative interpretation has long dominated the approach taken by the ECmHR and the ECtHR, in more recent years the Court seems to adopt a more liberal stance when interpreting the rights guaranteed under Article 12 ECHR by opening it up to transsexuals, immigrants, prisoners and persons wishing to file for divorce. It remains to be seen whether the Court will go so far in its liberal approach as to accept not only these but also other changes deriving from the interpretation of Article 12 ECHR as a classical human right, as suggested above.

This will depend on how the Court approaches the Convention and views its own position in interpreting it. This point and the Court's doctrine of the Convention as a 'living instrument' has been a matter of debate for decades. The first case in which the Court adopted the 'living instrument' doctrine, *Tyler v. the United Kingdom* (1978), regarded the issue of

whether corporal punishment, still a common practice at that time in some states but increasingly denounced and rejected by others, could be seen as an inhuman or degrading treatment or punishment in violation of Article 3 ECHR. The Court held that ‘the Convention is a living instrument which [] must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.’¹⁴²

On the other hand, it has since long been a corner stone of the Court’s jurisprudence to accord to Member States a margin of appreciation when interpreting the Convention’s rules and provisions. It has also accepted the subsidiarity principle, which means that Member States have a primary position to safeguard the human rights and freedoms contained in the ECHR. To confirm this, the recent protocol 15 to the Convention will, if ratified, introduce a new recital in the preamble to the Convention: “‘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’”.¹⁴³

These two positions may conflict with each other. In order to impose on Member States certain policies and laws or a certain interpretation of the Convention, the Court often adopts an evolutive interpretation of the ECHR and emphasises the Convention’s role of living instrument. Often this entails a positive obligation for the state to facilitate certain ‘liberal’ or progressive rights or freedoms and claims of minority groups. This article has signalled a number of examples, relating among other things to the right to marry by transsexuals, prisoners, immigrants, relatives, and people with limited legal capacity. The living instrument doctrine is thus used to curb the margin of discretion by national authorities to adopt rules and an interpretation of the provisions in the Convention according to their own national or cultural traditions. The doctrine is consequently used to bring uniformity in the legislation existing in individual Member States and to provide a minimum standard for the protection of human rights in Europe.

Emphasising the margin of appreciation for Member States and the principle of subsidiarity, on the other hand, places a large discretion into the hands of national authorities to interpret and apply the Convention’s provisions. These principles are partly based on the respect for democracy. National parliaments that are elected by fair and open elections must be deemed to voice the opinion of the people, which may include a reference to local traditions and to specific cultural or religious views on ethical and moral questions. The Court has adopted this approach in its interpretation of Article 12 ECHR, for instance in relation to the right to marry for same-sex couples. Consequently, this approach is not aimed at achieving unity in the legal frameworks of individual Member States, but, to the contrary, facilitates a wide range of diverse interpretations of the Convention.

Usually, these two principles are used by the Court in a balanced manner when interpreting a provision in the Convention. For example, Article 10 ECHR, which provides protection to the freedom of expression, is applied by the Court on matters not envisaged by the Convention’s authors, such as the online-environment, and has accepted, *inter alia*, that internet users may also qualify as amateur-journalists and thus invoke a particularly protected status.¹⁴⁴ On the other hand, it also acknowledges that authorities may place restrictions on the freedom of expression if prescribed by law and necessary in a democratic society for the

¹⁴² ECtHR 25 April 1978, appl.no. 5856/72 (Tyrer/UK).

¹⁴³ CETS 213 – Convention for the Protection of Human Rights (Protocol No. 15), 24.VI.2013.

<http://www.echr.coe.int/Documents/Protocol_15_ENG.pdf>.

¹⁴⁴ See among others: ECtHR 14 April 2009, appl.no. 37374/05 (Társaság a Szabadságjogokért/Hungary).

protection of health and morals. These may take into account specific religious or cultural beliefs of a country's population.¹⁴⁵

With regard to Article 12 ECHR, however, the Court seems to have difficulty finding a balance. Before 2000, the Court consistently chose to accord a wide margin of appreciation to national states to interpret the right to marry and found a family according to their own religious and cultural traditions. Notwithstanding the fact that the Convention must be interpreted in the present daylight, the Court emphasised that if - at the end of a gradual evolution - a country finds itself in an isolated position regarding one aspect of its legislation, it is not necessarily implied that this aspect offends the Convention. This is particularly so, the Court held, in the field of matrimony which is so closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit.¹⁴⁶

In cases from 2000 onwards, however, the Court has adopted a position almost diametrically opposed to its earlier stance. It has imposed on Member States the respect for a wide range of matters and rights not embodied in their legislation and sometimes directly opposed to longstanding cultural and social traditions in a number of countries. It has stressed, for instance, that tolerance and broadmindedness are the acknowledged hallmarks of a democratic society, and that under the Convention system, there is no place for any automatic interference with a person's right to marry or found a family.¹⁴⁷

Not only is this radical shift quite remarkable, it also seems as though the Court takes these interpretations, in their respective periods, rather too far. It has been stressed in this article that the Court's interpretation of Article 12 ECHR in cases up until 2000 has been on some accounts directly opposed to the background of the adoption of the right to marry and found a family and contrary to the intention of the Convention's authors. This holds true, for example, with regard to national laws and practices, which were deemed legitimate by the Court, entailing a very strict interpretation of the right to marry for transsexuals, immigrants, and prisoners; which deny a right to divorce; which connect the right to marry to the capacity to found a family and vice versa; and which accord a wide discretion to Member States to impose not only procedural but also substantive restrictions on the two rights enshrined in Article 12 ECHR.

From 2000 onwards, however, the Court has used its supervisory role increasingly to impose on countries a 'liberal' or progressive interpretation of the right to marry and to found a family. However, here too, it seems to go quite far, choosing interpretations which go against the grain and directly oppose national traditions of many countries. Normally, the Court uses its discretion to impose a certain interpretation on a Member State against strongly held traditions and convictions of that country only when there is a clear consensus among the Member States to the Convention. With regard to Article 12 ECHR, however, the Court often seems to follow a small minority of countries and adopts a pioneer role. For example, although there seemed to be no consensus among the European countries about the right to marry for transsexuals, the Court nevertheless accepted that such a right followed from the Convention. Quite remarkably, the Court imposed on the Member States to the Convention a progressive interpretation, not by referring to European consensus, but to international developments. However, not only is there no international consensus on this point, the countries that do accord a right to marry to transsexuals are often no member to the Convention, so that it remains unclear why this would be relevant for interpreting the European Convention on Human Rights. If the Court would continue along this line, it would be likely that in the near future Article 12 ECHR will be used to impose upon Member States

¹⁴⁵ See among others: ECtHR 24 May 1988, appl.no. 10737/84 (Müller and others/UK).

¹⁴⁶ F./Switzerland, § 33.

¹⁴⁷ Frasik/Poland, § 93.

to the Convention many more practices which might come into conflict with their long held traditions and beliefs.

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