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Sexual Orientation and the ECtHR: what relevance is given to the best interests of the child? An analysis of the European Court of Human Rights' approach to the best interests of the child in LGBT parenting cases

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1 Introduction

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

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

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

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

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

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

The main question to be addressed here is: does the ECtHR interpret and apply the best interests of the child in cases related to family law in the same manner regardless of the sexual orientation (or gender identity) of the parents in those cases? Are there any indications suggesting a biased approach of the Court when referring to the best interests of the child in relation to the sexual diversity of the child's parents or guardians?

To answer these questions, the concept of the best interests of the child will firstly be discussed and a few remarks made by the United Nations (UN) Convention on the Rights of the Child (CRC), the authoritative source to interpret the principle, will be presented.

In order to better assess the importance and consistency attached to children's best interests by the ECtHR, analysis of two situations in which the best interests of the child have paramount consideration, namely child abduction and adoption, will be presented.[8]

Furthermore, the consistency of the ECtHR's approach to the best interests of the child will be analysed by comparing cases involving LGBT parents with cases involving heterosexual parents (or at least not identified as LGBT). This paper is dedicated to examining the Court's attention to the best interests of the child when confronted with cases involving LGBT, especially LG applicants. First, the notions of European consensus and margin of appreciation will be discussed. How sovereign can European states be when deciding upon sexual orientation issues, even if the child's welfare is at stake? Would sexual orientation take the place of the best interests of the child as the focus of dispute?

To answer the aforementioned questions, all relevant ECtHR case law will be analysed, which means all cases where the applicants are LGBT people and the rights of children are at stake. The research for case law is based on the Human Rights Documentation (HUDOC), online database of the ECtHR case law run by the Court, the "Parental Rights" and "Sexual Orientation" factsheets, published by the Court, and doctrine.[9] The main focus will be adoption cases, since four out of the eight complaints in the Court were pledged by gays or lesbians.[10]

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

Regarding the limits of the article, one could say that the number of cases analysed in the research is limited and argue that the conclusions derived from the comparison, based on a limited number of cases and a specific group, do not fully reflect the Court's approach to the best interests of the child. Nevertheless, it is important to highlight that all existing cases involving LGBT parents dealt by the Court were explored in this research, therefore this is indeed an accurate analysis. Moreover, the core of the research is based on cases involving lesbian and gay applicants, given the lack of existing cases involving children and bisexual persons, and the single case involving a trans parent (its analysis was also included in this research). Furthermore, this study aims at analysing the consistency of the ECtHR's approach to the principle of the best interests of the child and does not aim at analysing and proposing solutions for the *de facto* situation of applicants and children.

Finally, it has to be emphasised that even though the CRC, which is used here as a guideline given its authoritative source for the interpretation of the best interests principle, it is not as such binding for the ECtHR. Moreover, since the article's conclusions will be based on the European Court's approach to the best interests principle, one could argue that it is the European legal and moral development that should be the source of the research, rather than international standards. However, one should bear in mind that regional systems play a crucial role in promoting human rights, and should reinforce universal standards and their protection.[11]

2 The best interests of the child, primacy and paramountcy

The concept of best interests of the child was first used in 1959, in the Declaration of the Rights of the Children.[12] Article 2 sets out that the principle should have *the paramount* consideration in the enactment of laws related to children.[13] The "paramountcy" suggests that children should be the sole determining factor in decisions and legal approach as will be further discussed. However, due to its legal status, the Declaration was not able to bind states to comply with obligations.

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

The CRC promotes four core principles: non-discrimination; the right to life, survival and development (Art. 2); the respect for the views of the child (Art. 6, Art. 12); and the consideration of the best interests of the child (Art. 3).[16] The latter will be the basis for this paper and will be discussed in detail.

The concept of the best interests of the child has been the object of study of many scholars and has been the subject of more academic analyses than any other concept included in the CRC.[17] Children's welfare and protection are widely supported because children are vulnerable and dependent therefore must be protected from harm.[18]

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

Next to the general principle in Article 3, the Convention also mentions the best interests of the child in cases of separation from the parents (Art. 9), parental responsibilities (Art. 18), depravation of family environment (Art. 20), restriction of liberty (Art. 37), and in penal cases involving juvenile and court hearings (Art. 40).

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

In this sense, it is important to elaborate on the difference between the paramountcy and primacy of the BIP. Archard explains that a consideration that is paramount outranks and trumps all other considerations.[19] It is, in effect, the unique consideration determinative of an outcome. A consideration that is primary is a leading consideration, one that is first in rank among several. But, although no considerations outrank a primary

consideration, there may be other considerations of equal, first rank. Moreover a leading consideration does not trump even if it outranks all other considerations. A primary consideration is not the only consideration determinative of an outcome. Therefore, the difference resides in the absolute prevalence of the paramountcy and the importance, but not the sole consideration, of the primacy.

Much critique have been addressed to the idea of the principle as paramount. The paramountcy's authority lies in its apparent neutrality and fairness, but can be used to justify any decision[20]. For instance, one could imagine that judges would decide against non-traditional adoption, such as by a single and suitably capable homosexual to adopt, in the name of the paramount consideration of the best interests of the child. According to Kline, the concept enables politicians to propose laws and public policies that hide a political, ideological or moral intention with reference to the paramountcy of the children[21]. One could argue that the parent's rights are threatened by the children's needs. The problems with applying the paramountcy principle are rooted in its empty concept: while everybody agrees that children's welfare should be paramount, everybody has different views on what children's welfare demands.[22]

The Committee on the Rights of the Child published in May, 2013, General Comment No 14, on "*the right of the child to have his or her best interests taken as a primary consideration*"[23] is the most appropriate document to clarify crucial points about the principle given the fact that it is focused exclusively on the best interests of the child as a primary consideration. In the document, the Committee also emphasises the idea that in adoption processes the principle is strengthened and the best interests of the child is the paramount consideration, the determining factor in decision-making processes[24] and that it should be determined on a case-by-case basis.[25]

Bringing the discussion to the situation of LGBT families, next topic will expose the fact that LGBT families may face challenges not experienced by families whose parents are cisgender and/or living in a heterosexual relation. It is extremely important that, while making decisions, professionals involved on adoption cases must adopt a fair and impartial assessment on a case-by-case basis, and not reproduce and reinforce the widespread discrimination against LGBT parents.

3 Children and their LGBT parents

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

According to the European Union Agency for Fundamental Rights (FRA), thirty-one percent of the LGBT population in Europe are parents.[26] In the United States of America, a number of up to six million American children and adults may have an LGBT parent, which implies that approximately two

percent of the population have an LGBT-identified parent.[27] It is hard to find precise numbers and figures because many of the children that have been raised by a gay or lesbian parent were born to opposite-sex couples that later broke up.[28] Furthermore, LGBT people that haven't come out or identified themselves as homosexuals are not counted in statistics.

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

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

In the European Union (EU), for instance, same-sex families experience real impediments to exercising their freedom of movement, which in turn impede the exercise of other rights.[29] The best interests of the child might be in danger. For instance, if a same-sex couple marry and have kids in Spain, their family ties will be at risk if they need to move to Italy, a country where same-sex families are not recognised.
Nationality issues can also arise within the EU. If a lesbian couple, where one woman is British and the other is Italian, have a child by artificial insemination in the United Kingdom, the child might not be eligible to obtain Italian nationality. The Italian registrar of birth could argue that, according to Italian law, artificial insemination can only be used by heterosexual couples. The child can have only one mother, the one that gives the birth; having two mothers would go against the Italian public order.[30]

For the purpose of this study, an explorative qualitative research was conducted in order to identify possible legal challenges that a child raised by same-sex parents might face in the Netherlands.[31] The participants highlighted that the legal status of the known donor in cases of artificial insemination remains a challenge. In the majority of the cases, only one of the two lesbian mothers was registered as a legal parent, because the donor, who was a gay friend, also wanted to register as the parent of the kid. Therefore the non-biological mother was not considered the legal mother. In this sense, the Dutch green party GroenLinks has already expressed their interest on passing a bill to recognise more than two official parents.[32]

As for the social aspect, children raised by same-sex parents have been a constant object of research for the last decades. Studies intend to assess

whether these children present differences in their behaviour and cognitive skills when compared to children raised by traditional families. In March 2013, the American Academy of Pediatrics, after analysing more than 80 studies, concluded that there is no cause-and-effect relation between children's welfare and the parents' sexual orientation.[33]

It is sometimes assumed that children raised by same-sex couples will be homosexuals. This assumption becomes untenable when the opposite is questioned: what would explain the sexual orientation of gays raised by heterosexual couples? What about the heterosexuals raised by couples living in a homosexual relation? In general terms, it seems there is no doubt about the capability of LGBT persons to raise children per se.
However, there are two arguments used against same-sex parenting that may be relevant: the influence of parental gender - the impact of having a mother and a father; and the stigmatisation - the discrimination towards homosexuals by society that will impact on the upbringing of the child, for instance, being bullied at school for having gay, lesbian or bisexual parents living in a homosexual relation.

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

Nevertheless, as recommended by the CRC, and General Comment No 14, the analysis of the best interests of the child should be made on a case-by-case basis. States shall make sure that staff involved in child care are well prepared, and work with clear criteria in order to assess the elements that guarantee the welfare of the child, not solely considering parental gender. This argument cannot be used to legitimise possible discriminatory concepts.

As for the second argument, in fact, discrimination on the basis of sexual orientation is a reality in society. The FRA survey concluded that about forty-seven percent of the EU LGBT population felt personally discriminated in the year preceding the survey (finalised in August 2012) due to their differences.[34] One could argue that children of this population might experience a discriminatory impact upon their lives due to their parent's sexual orientation.

However, the possibility of discrimination cannot be used as a legitimate argument to limit the individuals' enjoyment of rights. This was emphasised by the Inter-American Court of Human Rights (IACHR) when clearly stated in *Atala v Chile* that "*potential social stigma due to the mother or father's sexual orientation cannot be considered as a valid 'harm' for the purposes of determining the child's best interest. If the judges who analyze such cases confirm the existence of social discrimination, it is completely inadmissible to legitimize that discrimination with the argument of protecting the child's best interest*."[35]

In cases of custody, as in *Atala v Chile*, Courts have consistently interpreted the best interests of the child as favouring heterosexual parents over homosexual parents.[36] The possibility of leaving room for a possible biased

approach towards the interpretation of the BIP requires a systematic and clear application of the principle. The next topic will compare the ECtHR's approach to two different circumstances in which the BIP must be of paramount consideration: in child abduction and in adoption cases.

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

As previously pointed out, in cases of adoption, the CRC refers to the BIP as having the paramount consideration in Article 21, which means that the principle must be the most relevant component in the decision-making processes.[37]

The paramountcy of the principle is also found in another international instrument as mentioned in the first chapter: the Hague Convention on the Civil Aspects of International Child Abduction 1980 mentions, in its preamble, that the interests of the children "*are of paramount importance in matters relating to their custody*". The Convention is a multilateral treaty developed by the Hague Conference on Private International Law (HCCH), and there are 93 states parties to the Convention.[38]

The European Court constantly refers to the Hague Convention, and has recognised the paramountcy of the BIP. In the ECtHR's factsheet regarding child abduction, seven out of the seven analysed cases on child abduction lodged by the abducting parent were decided by the Court in light of the BIP's paramountcy and the Hague Convention.[39] That means that assessing the best interests of the child was determinant in those decisions.

In the aforementioned *case Neulinger and Shuruk v Switzerland*, the Court goes through each article of the Hague Convention, and also to some of the instruments presented in the first chapter, in order to promote the principle of the best interests of the child as the paramount consideration. In this sense, the Court notes that "*there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount*".[40] Furthermore it concludes the case stating that "*the Court is not convinced that it would be in the child's best interests for him to return to Israel.*"[41]

The Court considers itself in line with the "philosophy" underlined in the Hague Convention when referring to the implementation of the BIP's paramountcy[42]. In *Sneersone and Kampanella v Italy*, the Court refers to the paramountcy, and adds that it is competent, particularly in the light of the BIP, to assess whether Italy has violated art 8.[43] In *X v Latvia*[44] and *B v Belgium*,[45] the paramountcy is emphasised and, further, the Court concludes that the principle is considered the most important aspect in a decision.[46] Finally, in the *Eskinazi case*, the Court "*agrees with the first applicant that the concept of the child's best interests should be paramount*".[47]

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

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

Out of the eight cases involving adoption, the Court weights the principle's paramountcy in five.[48] In one case, the Court does not even mention the best interests of the child.[49] It does not seem fair to decide on a case of adoption without discussing the interests of the child at all - the subject of main concern in an adoption process.

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

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

Harroudj	Yes	No

After analysing the fifteen cases, it is possible to find two elements that may explain the different resolutions. Firstly, the ECtHR uses an element in half of the adoption cases that it does not use at all in the child abduction cases: the existence of a common understanding among European states on a specific topic. Out of the seven decisions on child abduction, none contains any reference to a "*European consensus*" nor to the idea of a common harmonisation of values and understanding among the CoE countries.[50]

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

To conclude, a final finding in the cases of adoption is that the attention given by the Court to the non-discrimination provision and European consensus is derived from a reason: the sexual orientation of the applicants.[51] Would that be a reason to neglect the application of the best interests of the child? The next point is dedicated to exploring the ECtHR's approach to the BIP parenting cases in which the applicant is a gay man or lesbian woman.

5 Is the BIP's paramountcy conditional on the parent's sexual orientation?

The European Court of Human Rights has dealt with eight adoption cases and, according to international law and practices, the best interests of the child must be of paramount consideration in these cases. However, out of the eight, three decisions had no paramount consideration, and were therefore not in line with the CRC.

In *Keegan v Ireland*, the Court recognises that Ireland tried to apply "first and paramount consideration" to the welfare of the child, but had failed because the Court did not see how placing the child for adoption without the (father) applicant's consent would be in the best interests of the child.[52] In *Wagner and J.M.W.L v Luxembourg*, the applicants complained that the adoption decision pronounced in Peru couldn't be declared enforceable in Luxembourg, because the latter does not recognise adoption by a single person. Bearing "*in mind that the best interests of the child are paramount in such a case, the Court considers that the Luxembourg courts could not reasonably disregard the legal status validly created abroad and corresponding to a family life within the meaning of Article 8 of the Convention*". [53]

In *Kearns v France*, the applicant requested, outside the relevant statutory time limit, the return of her child that she had put up for adoption and registered anonymously. The Court added that "*in striking a balance between these different interests [biological mother, child and adoptive family], the child's best interests should be paramount*", therefore the

Government acted correctly in finding a new family as quickly as possible.[54] In the *Harroudj case*, the Court did not find a violation of Article 8, because the state acted with respect to the BIP's paramountcy enshrined in the CRC, therefore the refusal of a French national to adopt an Algerian baby under kafalah was acceptable.[55]

Lastly, in the fifth case, the Court found no violation when France denied the right to a homosexual to adopt individually. The Court stated that "*the justification for the decision lay in the paramountcy of the child's best interests, which formed the underlying basis for all the legislation that applied to adoption. The right to be able to adopt relied upon by the applicant was limited by the interests of the child to be adopted.*"[56] In the first four cases the applicants did not identify as homosexuals. In this sense, an analysis is relevant when comparing all the eight cases.

Cases	**Was the BIP taken as a paramount consideration?**	**How did the Court vote?**
Adoption cases involving applicants not identified as homosexuals		
Keegan (1990-1994)	Yes	Unanimously
Wagner (2001-2007)	Yes	Unanimously
Kearns (2004-2008)	Yes	Unanimously
Harroudj (2009-2012)	Yes	Unanimously
Adoption cases involving homosexual applicants		
Frette (1997-2002)	Yes	4x3
EB (2002-2008)	No	10x7
Gás Dubois (2007-2012)	No[57]	6x1
X and Others (2007-2013)	No	10x7

There is a similarity among the three cases in which the BIP's paramountcy has not been considered: in *EB v France*, *Gas Dubois v France* and *X and others v Austria* involve homosexuals.[58] In *Fretté v France*, the paramountcy was considered, but the Court was divided in its decision (4x3). Therefore, when dealing with heterosexual applicants in adoption cases, the Court considers the BIP's paramountcy in four out of the four cases. However, when dealing with homosexual applicants, the Court only refers to the principle's paramount consideration in one out of the four cases. Another relevant finding is that the Court has decided unanimously in all the opposite-sex related cases; there is not a single dissenting opinion. However,

in the same-sex related cases, the opposite happens: the Court has not decided unanimously in a single case, and has presented dissenting opinions in all.

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

6 The margin of appreciation and European consensus in the ECtHR

Before examining the ECtHR's approach to the MoA and European consensus in same-sex-related adoption cases, it is necessary to explore these two concepts that are usually intertwined.[59]

The concept of a European consensus is a method used in cases of delicate issues, to compare and try to find a possible harmonisation in law and practices among the contracting states.[60] In other words, it aims to identify if there is a common ground of understanding in the interpretation of a specific topic. The consensus analysis can be used in both applicant and state's argumentation, but it is the Court's final analysis that is relevant to the case's resolution.

Regarding the process used to assess the consensus, Helfer explains that the Court considers three different elements: (a) domestic laws and the legal development of states on the topic; (b) the public opinion and the general impression of Europeans on the issue; (c) the experts' opinions in the field.[61] However, going through its judgments, the Court hasn't been consistent in applying these elements, because often one or more will be present in a judgment, whereas at other times the concept is completely absent.[62]

The Court has shown sympathy with the notion that European society and concepts are constantly changing throughout the time, and that the consensus analysis needs to be revised from time to time. For instance, in 2001, in *Mata Estevez v Spain,* the Court refused the idea that relationships between same-sex couples fall under the scope of family life, therefore meaning that they were not protected by Article 8. However, in 2010, in *Schalk and Kopf v Austria,* the Court acknowledged that same-sex couples enjoy the protection afforded to family life by Article 8. This was due to the "*the rapid evolution of social attitudes towards same sex-couples*" which had taken place in many CoE member states, and the fast growing tendency to include same-sex couples in the notion of family in EU law.[63] Note that the consensus was based on the understanding of the majority of the

countries, and the tendency towards development. Therefore the Court does not expect an absolute consensus among all member states.[64]

Hence, the idea that the ECHR is a living instrument that must be interpreted according to present-day conditions has been a central feature of ECtHR's case law from its very early days.[65] As for the relevance of the consensus analysis, it can be decisive in the Court's judgment and is usually applied together with the other method, also referred as a doctrine, namely the margin of appreciation.

The MoA is not enshrined in the ECHR yet, but it will be soon. In May 2013, the CoE adopted the Protocol 15, which adds a reference to the doctrine in the Preamble of the Convention.[66] Twenty-two countries have signed the new Protocol, which will just enter into force after all the 47 contracting states have acceded to it.[67]

The MoA is a key method used by the ECtHR in its review of complaints. It was first used by the Court in 1976, in the case *Handyside v UK*.[68] By this method, the Court aims to define a scope of expected state obligations, recognising that national authorities are in a better place to judge domestic cases than the Strasbourg Court. Given their divergent cultural and legal traditions, they are in *better position rationale*.[69] The European Court, in accordance with subsidiarity principle, has recognised that "*the Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines*" and concluded "*that State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements [of morals] as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.*"[70]

In this sense, it is possible to identify a relation between the two methods. The Court considers that the lack of European consensus in a matter will normally be accompanied by a wider margin of appreciation for states.[71] Generally speaking, Member states will usually enjoy a broad margin of appreciation if public authorities are required to strike a balance between competing private and public interests or Convention rights - especially where there is no consensus within CoE states as to the relative importance of the interest at risk or as to the best means of protecting it.[72] Since interests between states and applicants are opposite, a wider power of discretion signifies a lower protection standard for the citizens.

The European Court has consistently applied these two methods. On the one hand, one could argue that this is the only way to combine enforcement of the regional court's decision with state sovereignty and national peculiarities. In this sense, MacDonald agrees that the MoA "*gives the flexibility needed to avoid damaging confrontations between the Court and Contracting States over their respective spheres of authority and enables the Court to balance the sovereignty of Contracting Parties with their obligations under the Convention.*"[73] Moreover, the MoA seems to be a good 'pragmatic device', once it reconciles the political, social, economic and cultural diversity of contracting states.[74]

Furthermore, concerning the European consensus, a positive impact is that it

helps to create a minimum human rights standard. In finding a violation, based on a consensus in the majority of contracting states, one could argue that the Court pressures the few remaining countries to change their practices and legislation towards a better human rights understanding.

On the other hand, both concepts have received sustained criticism. The margin of appreciation is one of the most controversial and widely discussed concepts that the European Court of Human Rights has developed.[75] The doctrine of the MoA has been highly disapproved of.[76] It can be interpreted as "*a conclusory label which only serves to obscure the true basis on which a reviewing court decides whether or not intervention in a particular case is justifiable*."[77]

When the Court relies on the MoA and does not, in fact, decide on the matter brought by the applicant, one could infer that the Court fails in protecting the right at stake. Along the same line, Lord Lester criticises the doctrine and states that the "*margin of appreciation has become as slippery and elusive as an eel*" and is used "*as a substitute for coherent legal analysis of the issues at stake*";[78] or can even be seen as a "*black box magic*."[79]

As for the critiques towards the European consensus, this method does not seem to be the best way to determine human rights minimum standards. Letsas shares that "*judges who adjudicate on [Convention] rights have a duty to discover and give effect to the morally best understandings in human rights irrespective of contracting States' current consensus*".[80]

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

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

7 Challenges to implementing the BIP's paramountcy given the MoA and consensus analysis in adoption cases involving homosexuals

The first complaint involving adoption by a homosexual was lodged in the year that the CRC was drafted. In 1989, the case of *Kerkhoven and Hinke v the Netherlands* was submitted, but was considered inadmissible by the Commission in 1992. The case concerned a request of the non-biological "social parent" of a child, conceived by her lesbian partner through artificial insemination, to have parental authority over the child. [81] At that time, neither same-sex civil partnership, nor second parent adoption by homosexuals was legally possible in the Netherlands. The Commission considered that there was no obligation on the state under Article 8, since the relationship between two women could not be "*equated to a man and a woman living together*", and therefore did not constitute family life. No

references to the MoA and European consensus were made, and the BIP was not seen as the paramount consideration in the Commission's decision.

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

The next two subsections will be exclusively dedicated to the Court's attention to the BIP in the gay or lesbian adoption cases. They were divided in subtopics given the complaints' similarities. Interestingly enough, three out of the four cases were against France – the most recent European state to recognise same-sex marriage and adoption by same-sex couples, in May 2013.[82]

7.1 Adoption by a single homosexual

Fretté v France (2002) and *EB v France (2008)* had comparable complaints: the refusal of an application for authorisation to adopt a child on the basis of sexual orientation when, according to French Civil Code (Art. 343-1), "*any person over twenty-eight years old*" is allowed to apply to adopt a child.[83] Both declared themselves homosexuals during the analysis process that is used to identify if a person should receive the authorisation to adopt or not. For both cases, France rejected the authorisation. The applicants, alleging that the refusal was based on their sexual orientation, decided to bring their cases to the Strasbourg Court.

Surprisingly, given that the sexual orientation played a fundamental role in both decisions, the ECtHR did not identify any violation in the first case, but did in the second case. What happened? Has the European Court changed its conclusion regarding the European consensus on matters of sexual orientation and adoption in six years (from *Fretté's* decision to *EB*'s decision)?

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

Firstly, in *Fretté*, the best interests of the child is central to the whole case, and the Court has strongly relied on the European consensus and margin of appreciation. Regarding the BIP, the Court expresses that the right to adopt is not included among the rights guaranteed by the Convention and the mere desire to found a family did not constitute a family life.[84] Furthermore, it recalls the BIP's paramountcy and states that "*even if the decision to refuse authorisation had been based exclusively or chiefly on the applicant's sexual*

orientation, there would be no discrimination against him in so far as the only factor taken into account was the interests of the child to be adopted. The justification for the decision lay in the paramountcy of the child's best interests, which formed the underlying basis for all the legislation that applied to adoption."[85]

As for the European consensus, the Court refers to the lack of common understanding in the matter among the members of the CoE, in which only the Netherlands had adopted legislation allowing same-sex marriage and joint-adoption.[86] The Court also considers the lack of scientific and psychological conclusive studies regarding the impact that a child experiences when raised by a homosexual parent.[87] Therefore, a wide margin of appreciation must be left to the authorities.[88]

The Court concludes that, due to "*the broad margin of appreciation to be left to States in this area [homosexual parent] and the need to protect children's best interests*", the Government's interference was proportional and legitimate, and therefore no violation could be found.[89] Thus, the best interests of the child was relevant to the judgment in the sense that was used deny the right to adopt, based on the lack of harmonisation in CoE States' legislation and conclusive scientific studies on LGBT parenting.

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

The Court recognises that "*most of the contracting States do not expressly prohibit homosexuals from adopting where single persons may adopt",* but no particular relevance was given to this fact.[90] In this regard, Helfer explains that without a clear understanding of how to define consensus and when it is really relevant, the Court risks losing legitimacy in its decisions.[91] Would the decision be different if the Court had based it on the European consensus of not prohibiting adoption for homosexuals? Would the best interests of the child have been interpreted differently?

When the Court bases its decision on the general lack of scientific consensus about the impact of a parent's homosexuality upon a child, one could have the feeling that the Court is not advocating for the protection of human rights as expected. At the end, there is a risk that a method can gain more weight than the actual reasoning on a possible unreasoned interference or discrimination based on the grounds of sexual orientation per se. When referring to the different age of consent for homosexual acts, even the Commission has recognised that "*what is important is not the balance struck in other European countries, but the reasonable and objective nature of the arguments adduced in favour of the actual limit chosen*".[92]

One could even argue that the consensus analysis is a way of backing up the Court's morally inclined line of argument. In saying "*even if the decision to refuse authorisation had been based exclusively or chiefly on the applicant's*

sexual orientation, there would be no discrimination against him in so far as the only factor taken into account was the interests of the child to be adopted", the Court could be considered as expressing its opinion that homosexuality can be the sole reason for rejecting authorisation to adopt. Johnson is very critical about this, saying that "*consensus analysis is better understood, like the margin of appreciation itself, as a framework through which the Court legitimizes a particular moral understanding on homosexuality*."[93] In *Fretté*, the Court concluded that, based on both methods, the State's interference could be interpreted in the best interest of the child.

Using a different approach, and probably aware of the aforementioned critiques, in the *EB case*, the Court recognises that "*the case does not concern adoption by a couple or by the same-sex partner of a biological parent, but solely adoption by a single person*". [94] It "prefers" to invoke neither the MoA, nor the consensus analysis, and therefore finds a breach of Article 8 combined with the non-discrimination provision (Art. 14). Both methods are absent in the decision.

Thus, comparing the Court's different approach to the cases, the MoA and consensus analysis seem to have been inconsistently applied. In 2008, the large majority of CoE countries were still against same-sex marriage and joint adoption by homosexuals, which was an argument used in *Fretté*. Scientific studies were still criticising same-sex parenting according to the States' defense.[95] Johnson thinks that, in cases involving homosexuality, the Court "*shows a highly capricious and frequently contested use of statutory, expert and public consensus analysis*".[96] When comparing both cases, he recalls the Court's impartiality and explains that "*the different approaches adopted in E.B and Fretté demonstrate that the selective use of this method [consensus] is determined by, and not determinative of, the Court's moral reasoning*."[97]

Finally, in *EB*, the Court rejects the State's argument that the interference was explained by the intention on protecting the best interest of the child. When comparing to *Fretté*, the Court has concluded that the State gave too much weight for the applicant's sexual orientation.[98] Therefore, the Court has concluded that the State's refusal of the authorisation to adopt was discriminatory on the grounds of sexual orientation, and "*there has accordingly been a breach of Article 14 of the Convention taken in conjunction with Article 8.*"[99] In this case, the interests of the child were protected mostly because the Court found a violation based on the differential treatment towards hetero and homosexuals.

A last interesting point is that, besides the fact that the BIP's paramountcy is not used in the Court's final assessment in *EB*, differently from in *Frette*, the Court refers to the CRC in order to sustain its decision on finding a violation.[100] Would the Court refer to the UN Convention only to endorse its decision? The next topic will bring the answer.

7.2 Adoption by unmarried same-sex couples

In both *Gas Dubois v France* and *X and others v Austria*, the applicants were lesbian women living in a stable long relationship and had similar requests.[101] They complained about the national Court's refusal to grant one of the partners the right to adopt the son of the other partner (biological mother), namely second-parent adoption. They complained about the State's interference and argue that there was a violation of Article 8 (family and private life) alone, and also combined with Article 14 (non-discrimination provision) on the basis of their sexual orientation. However, there is a relevant difference between the two cases that seems to be crucial for the ECtHR's decision: the discrimination element.

As for the first case, in France, the Civil Code (Art. 365) did not give rise to discrimination, because second-parent adoption was available only for married couples. Thus, same-sex unmarried couples, the same as opposite-sex unmarried couples, couldn't adopt.[102] Based solely on that, the Court concluded that there has been "*no violation of Article 14 of the Convention taken in conjunction with Article 8*".[103]

Regarding the second case, contrariwise, Austria did allow opposite-sex unmarried couples to apply for second-parent adoption, but prohibited same-sex unmarried couple to do the same (Civil Code, Article 182, 2). Therefore, the "*Court finds that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8 when the applicants' situation is compared with that of an unmarried different-sex couple in which one partner wishes to adopt the other partner's child*".[104]

In *Gas Dubois*, given the fact that marriage was not legalised for same-sex couples, the applicants argue that they shouldn't be compared to unmarried opposite-sex couples because the latter could get married. Instead, they contest that the comparison should be made with a married couple. In this case, a violation would definitely be found.[105]

However, the Court considers that the applicants' legal situation cannot be compared to a married couple, because "*marriage confers a special status on those who enter into it.*"[106] It refers to the *caseSchalk and Kopf* and points out that the ECHR does not impose on member states the obligation to allow same-sex marriage.[107] Without any mention to the European consensus, the Court relies on the margin of appreciation doctrine to give discretion to states to decide on the exact status conferred to same-sex relationships.

Regarding the child affected in the case, the Court does not give any importance to his/her best interests in the decision. The applicants tried to call attention to the BIP by alleging that the State's difference in treatment did not have any legitimate aim and the child "*should have the legal protection of two parents rather than just one.*"[108] The applicants have been cohabiting since 1989 and entered in a civil partnership in 2002.[109] Furthermore, the child, conceived by artificial insemination in 2000, has been living with the applicants since she was born, as a family, and at the time of the ECtHR's decision she was already 12 years old. Nevertheless, the Court ignores the *de facto* situation and does not elaborate or make any reference to the BIP in its assessment. The Committee of the Convention on

the Rights of Child recommends that maturity and age of the child should guide the balancing of elements in a decision.[110]

The approach applied in *Gas Dubois* seems illogical if looked at from the child's perspective, especially if compared to *EB v France*. Given the fact that, generally, unification and legal recognition of family ties are in the best interest of the child, why would the Court protect single individual adoption, but leave states to refuse second parent adoption? [111]

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

It is true that the principle is a delicate one, because its indeterminacy leaves an open field to whoever is interpreting it. There might be questions related to the exact meaning of BIP or how to implement it. As an alternative, when dealing with the principle and its interpretation, Archard proposes two methods: the hypothetical choice – that means to try to understand what the child would choose – and the objectivist choice – the best interest of the child should be evaluated in practical terms, looking at what is the best option for the child at the moment, regardless of the child's wishes. Both methods present challenges when trying to interpret and implement the principle. However, the ECtHR needs to present a methodology to assess the interests of children.

As for the "objectivist choice", considering the same old models and applying them generally to every child might underestimate the existent differences between each child. According to Smart and Sevenhuijsen, the best interests of the child criterion is not necessarily the best one to secure the child's interests in a custody case for instance, when the primary consideration should be the best caretaker, the one that would have more time to dedicate to the child and provide better assistance for instance.[112] Another delicate point here is the cultural background of the children and of those who should determine the best interests. Moral and cultural views can make it difficult to assess what is best for the child.

As for the "hypothetical choice", the one in charge of deciding what the best is for the child should act according to what an individual would choose if he were not incompetent.[113] In a way, despite the fact that children usually choose what is pleasant and not what is best, this method sounds acceptable because it tries to include the child's opinion and make a fair decision on what, in fact, the minor would like. Nevertheless, it does not seem to be a perfect method either, because the decision will, unavoidably, be influenced by the adult's way of thinking and the reality is that one cannot know, for sure, what the child wants, and therefore, the decision would be made, again, based on assumptions.[114] Even with all the critiques, "*no-one would argue against the principle of prioritising a child's welfare.*"[115] The ECtHR fails when it does not assess any of the different impacts that its legal decision would have upon the child's *de facto* situation in these cases. Unfortunately, the restricted information available about each case (basically the sentence

as a unique source) limits the author's capability to analyse and give recommendations in relation to the different interests surrounding the children, such as the position of biological parents, right to information of one's origin, etc.

One of the fundamental values of human rights law is certainty, and the ECtHR needs to show impartiality in its decisions and not reproduce societal discrimination (which might be seen in the views of the judges of the Court).[116] For instance, in *EB*, Judge Loucaides, in referring to the capability of homosexuals to raise a child, stated in his dissenting opinion that "*homosexuals […] must, like any other persons with some peculiarity, accept that they may not qualify for certain activities which, by their nature and under certain circumstances, are incompatible with their lifestyle or peculiarity*."[117] Would this Judge's opinion about the applicant's "*peculiarity*" influence the outcome of the decision? Johnson adds that the Court relies on "*the substantive concept of the margin [of appreciation] to obscure its moral reasoning and upon the structural concept to defer to the authority of the State*."[118]

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

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

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

In regards to *X and Others v Austria*, however, the Court seems to be more receptive to the best interests of the child. Why? Since there was clear direct discrimination in the Austrian legislation, the Court was able to adopt a different approach. Differently from in *Gas Dubois* and *Fretté,* the Court exposed the articles found in the Convention on the Rights of the Child to sustain its view (as in *EB*). Thus the Court chooses to give more relevance to the CRC when a violation is found.

The Court develops an interesting European consensus analysis. Based only on the countries that extend adoption to unmarried couples (ten), the majority (six) allow second-parent adoption by a homosexual.[119] Therefore the MoA left to states shall be narrow.

The Court concludes that "*the Government has failed to adduce particularly weighty and convincing reasons to show that excluding secondparent adoption in a same-sex couple, while allowing that possibility in an unmarried differentsex couple, was necessary for the protection of the family in the traditional sense or for the protection of the interests of the child.*"[120]

Back to the situation of the child, the ECtHR did not considered important steps in its final assessment in order to identify his/her best interests. To help in highlighting what the Court should have assessed in the aforementioned cases, the recommendations of the UN Committee on the Rights of the Child's General Comment No 14, about "the right of the child to have his or her best interest taken as a primary consideration" will be presented.[121] This document must be considered as the most appropriate document to clarify crucial points about the principle.

The GC No 14 recalls that the aim of the BIP is "to ensure both the full and effective enjoyment of all the rights recognised in the Convention and the holistic development of the child."[122] It underlines that the principle is composed of three different elements: firstly, a substantive right that means the right that a child has to have his or her best interests assessed, protected and implemented as primary consideration. Secondly, it is an interpretative legal principle which indicates that, in case there is more than one possible interpretation of a provision, the chosen option should be the one that better protects the child's interests. Finally, it serves as a rule of procedure, that demands that the impact of a decision must always be evaluated before the decision is made, based on a method focused on the interests of the child, and a reasonable justification for the final decision must be presented.[123]

The Committee recognises the complexity, flexibility and adaptability of the principle and states that the BIP should be determined on a case-by-case basis.[124] Furthermore, the Committee emphasis the idea that in adoption processes the principle is strengthened and the best interests of the child is the paramount consideration, the determining factor in decision-making processes.[125] In this regard, the ECtHR fails again to analyse the children's concrete interests and balance these very interests in the particular cases.

Moreover, the document stresses the importance of linking the BIP with the other three general principles, namely the right to non-discrimination, the right to life, survival and development and the right to be heard. States should act with promptness and be aware of positive measures that must be taken in order to deal with inequalities and avoid prejudices. The opinion of children is important and shall be considered in the assessment of the best interests.[126] It is time to the Court look at the children as individuals with a legal status who possess rights and interests, and not be the victims of disputes between states and applicants.

As for the most pragmatic part of the General Comment, and probably the most important, the implementation of the principle needs to take into consideration two steps: the assessment and determination of the principle; and the procedural safeguards for the implementation.[127]

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

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

Regarding the second part, namely the procedural safeguards to guarantee the implementation of the principle, the Committee lists eight child-friendly formal and procedural safeguards and securities that should be primary in the implementation of the principle.[128] The right of the child to express his or her own views is again emphasised.
In addition, facts must be well established in the sense that the information relevant to the case must be reliable. The element of time perception is considered since the passing of time is perceived differently between an adult and a child, therefore meaning that delicate situations must have priority and need to be solved with promptness. States have to make sure there are qualified professionals dealing with the child, including available legal representation. It is recommended that states develop their own child-rights impact assessment (CRIA), through which the Government at all levels needs to perform an impact study on how different policies, or decisions, will impact upon children. In the afore-discussed cases, there appears to be no information on the efforts the Court made to take (some of) these recommendations into account.

In the particular cases, some of the recommendations that seem to be repeatedly absent in the Court's decisions are that (1) the child's view should not be disregarded and, when appropriate, the child should have the right to be heard and its opinion be considered in the Court's final assessment. (2) The child's identity should also be better evaluated according to the *de facto* situation in which he/she has been living for years in a homoparental family and identifies himself/herself as a member of this family. Finally, (3) the preservation of the family environment and legal recognition of family ties are not given relevance when opposed to the European consensus consideration.

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

couples.

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

8 The Court's indication of a weak approach to the BIP: the separate opinions in same-sex adoption cases

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

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

Against the majority of four in *Fretté*, the three objector judges refute the argument that France rejected the authorisation to adopt based on the best interests of the child.[129] The State failed to explain how the child's welfare was endangered, since the French Conseil d'Etat itself had recognised the applicant's aptitude and personal qualities for raising a child.[130]

As opposed to the State's arguments, the judges point out three facts that the France and the Court's majority failed in assessing when examining the best interests of the child: there is no indication that homosexuals' children will be homosexual and the majority of homosexuals had heterosexual parents; that studies showed that a child raised in a homoparental family were not impacted by any particular disorder; and that prejudices of society, and a sexual majority, were not sufficient to justify the refusal. They believe that France has acted with discrimination based on the applicant's "*choice of lifestyle*" (expression used by the State) and, if he had hidden his homosexuality, the State would have granted the authorisation to adopt.

Judge Costa has participated in the first three gay adoption cases and expressed concern about the best interests of the child in all of them. In its *EB* dissenting opinion, Costa overrules his former position taken in *Fretté* and considers that it is time "*for the Court to assert that the possibility of applying to adopt a child falls within the ambit of art 8*".[131] Moreover, he recognises that there is an international consensus about the BIP's paramountcy, and that the Court has always used the principle in all cases concerning minors. However, how would he explain the totally absence of the consideration to BIP in the Court's assessment in *Gas Dubois*? If Mr. Costa considers the best interests of the child as of paramount consideration, why had he voted against finding a violation in all cases?

The judge explains that it was not clear that it would be in the best interests of the child to be adopted by Ms Gas, and that the Court is not of "*fourth*

instance" (therefore shouldn't re-examine all demands).[132] Of course, promoting the principle does not mean supporting homosexuals' demands. Nevertheless, it seems the judge preferred to rely on uncertainties, and to base the decision on the margin of appreciation doctrine and European consensus, rather than to advocate for the child's welfare as the supreme factor.

In *Gas Dubois*, there was only one vote against the majority that found no violation committed by France on refusing second-parent adoption to Ms Gas. Judge Villiger, a Swiss national (but representing Liechtenstein), wrote a passionate dissenting opinion advocating for the best interests of child.[133]

Firstly, he states that the judgment failed to identify the relevant elements of the case, namely the interests of the child, whether "*the difference of treatment complained of is justified from the vantage point*" of the BIP.[134] He emphasises that the "*root of the problem*" is the "*blanket prohibition of joint parental custody over children of the parent of a same-gender-couple*" that can be disproportional. These cases should be decided individually, case-by-case.

Secondly, in cases where the de facto situation already exists (the child has been raised by both applicants for years), the law should be able to include and protect these children regardless of the sexual orientation of their parents. Villiger questions "*how can children help it that they were born of a parent of a same-gender-couple rather than of a parent of a heterosexual couple? Why should the child have to suffer for the parents' situation?*" He refers to the *case Mazurek v France*, in which the Court overruled a French law that discriminated against children born outside of the wedlock.[135] He argues that there are no grounds for treating children born into same-sex relationship differently when compared to children born into an opposite-sex relationship. He "firmly" believes that joint parental custody is in the best interests of the child.

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

After all, one could hope that these separate opinions are an indication that the Court will give more importance to the best interests of the child in its decisions. As American Chief Justice Hughes said in 1936: "*A dissent in a Court of last resort is an appeal [...] to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.*"[136]

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

consideration, and a balance between them and the BIP shall be made.[137]

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

The Court has received four complaints involving children outside adoption where applicants were identified as lesbian, gay or transgender.[138] The most recent complaint, *Boeckel and Gessner-Boeckel v Germany (2013)*, was considered inadmissible by the Court because it was manifestly ill-founded.[139] The applicants, two women in a registered civil partnership, complained about the inability to register one of them as a parent in the birth certificate of the other partner's biological child born during their partnership.

Under German law, the name of the man married to the biological mother can be entered into the child's birth certificate as a father, even if he is not the biological one.[140] However, the same does not apply in case of a same-sex couples registered in a civil partnership. The applicants alleged that the State had no reasonable justification to interfere in their private life, and that they were discriminated on the basis of their gender.[141] Therefore, they argued that has been a breach of Article 8 on its own, and in conjunction with Article 14.

Contrariwise, the Court decided that the applicants could not be considered in an analogous situation to a married couple, because they were registered as civil partners and not married.[142] In relation to the impossibility of same-sex marriage in Germany, the Court relied on the MoA and stated that the ECHR does not oblige contracting states to legalise marriage between homosexuals.[143] Thus the complaint was rejected because it was manifestly ill-founded.

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

Once more, regarding same-sex marriage, the Court relied on the MoA, and avoided ruling on a law that creates indirect discrimination on the basis of sexual orientation, as this case is about. A same-sex partner cannot marry and therefore cannot add her name in the birth certificate of the other partner's child. Meanwhile marriage is available for opposite-sex couples, which means that there is possibility of registering the partner's child.[144]

The ECtHR has received other three complaints, which were admissible, but a violation was only found in one. In *Salgueiro da Silva Mouta v Portugal*, the Court rejected the State's argument that the applicant's joint custody was withdrawn on account of the best interests of the child.[145] Instead, the Court decided that the reason for this was the applicant's sexual orientation.

The Court highlights the, one could say, the homophobic approach of the domestic decision. The Portuguese Court of Appeal states that "*it is not our*

task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations", and therefore "*the child should live in ... a traditional Portuguese family*."[146] The Court argued that it could not find a reasonable nexus between the interference and the legitimate aim, namely the "*health and rights of the child*", and believed that the Portuguese decision was made because of the applicant's homosexuality.[147] Therefore the Court concluded there has been a violation of Article 8 in conjunction of Article 14.

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

The last two cases were not lodged by homosexual applicants, but by transsexuals. Sexual orientation and gender identity are two different concepts.[148] The first refers to "*each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender*."[149] In this sense, a homosexual is a person who is sexually attracted to people of his/her own sex.[150]

Gender identity refers to the individual's experience of gender, which may or may not correspond with the sex assigned at birth.[151] For instance, a person biologically born as a man and registered accordingly can be self-identified as a woman, and might want to change the birth certificate or/and go through a sex-change operation. Transgender is a person who self-identity does not conform unambiguously to conventional notions of female/male gender.[152] A transsexual is a person who emotionally and psychologically feels that belongs to the opposite-sex.[153] Therefore, being transgender or transsexual does not mean being homosexual. He or she can have relations with someone from the same-sex or not.

However, both groups are usually referred as sexual minorities and might face similar discrimination, for instance, in employment or education.[154] They are usually grouped together under the LGBT abbreviation.[155] In the EU, forty-six percent of transgender people are parents.[156] As for the CoE, contracting states have different legal approaches towards LGBT rights, and therefore the MoA and European consensus often play a role in the ECtHR's decisions[157]. Given the aforementioned facts, the analysis of the two cases involving children pledged by transsexuals is relevant to this study.

In both cases, no violation was found, and the best interests of the child played a primary role in only one of them. In *PV v Spain*, the applicant, a male-to-female transsexual who was married and had a son prior to the sex change, complained about her limited right to visit the child imposed by the Spanish Court.[158] She alleged that there has been an unjustified interference on her private and family life (Art. 8), combined with discrimination on the basis of her transsexuality (Art. 14). The state argued that the restriction on the access to the child was not based on the applicant's transsexuality, but on the child's welfare, that could be affected by the applicant's emotional

instability right after the sex change. The restriction aimed to gradually prepare the child for the applicant's gender reassignment without creating harm to the child's psychological integrity and development of personality.[159]

The ECtHR noted that the case was not about "sexual orientation", but recognised that transsexuality could be considered as a notion covered by the non-discrimination provision (Art. 14).[160] However, the Court accepted the State's argument that the restriction was made in the best interests of the child, rather than based on the applicant's transsexuality.[161]

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

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

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

As for the last case to be discussed in this research, the Court considered the BIP in its final assessment, but in a questionable way. *X, Y and Z v UK* is about a female-to-male transsexual, X, who was living with a woman, Y, and their child, Z, born after artificial insemination with donated sperm.[162] Under English law, the child's father name was not automatically registered if he was not married to the mother.[163] However, his name could be entered in the child's birth certificate if a joint request with the mother was made. In the case of X, the state refused the joint request and argued that "only a biological man could be regarded as a father for the purposes of registration."[164] The applicants alleged that there has been a violation of Article 8 in conjunction with Article 14 on the basis of X's transsexuality.

Even though the Court recognised that de facto situation between the applicants amounted to "family life", it found no violation of the ECHR in the State's refusal to register X as Z's father.[165] The Court, once more, relied on the European consensus and MoA, in the sense that there was no common ground amongst the CoE States regarding the parental rights of transsexuals

or the registration of a non-biological father on the birth certificates of children born from donor insemination. Therefore the margin of appreciation given to States was considered to be wide. What about the best interests of the child?

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

Referring to the impact of the decision, the Court stated that "it is impossible to predict the extent to which the absence of a legal connection between X and Z will affect the latter's development."[166] However, the consequences that flow from the lack of the legal recognition are various. The applicant highlighted some occasions that might be impacted, such as registration with a doctor or school, insurance policies, passport issues, or if the family wants to move abroad and X wants to declare Z as a dependent.[167] It seems that the Court preferred to rely on the MoA and consensus analysis rather than look at the child's best interests in order to avoid reasoning on a delicate issue, such as gender identity or sexual orientation. Van Bueren argues that the approach of the ECtHR seems to be incorrect due to the further amendment of the law by the UK, with the conclusion that no harm has been reported to the lives of children with transsexual parents.[168]

To wrap up, it seems the Court has considered the best interests of the child as a primary consideration only in *PV*, even though it relied only on the State's argument to give a superficial analysis. On the other occasions, the Court did not give any attention to BIP (*Boeckel*), relied on the MoA and European consensus to apparently disregard the interests of the child (*X,Y and Z*) and, lastly, found a clear discrimination on the basis of the applicant's sexual orientation without elaborating on what was the best for the child (*Salgueiro*). In none of them did the ECtHR refer to the Convention on the Rights of the Child.

10 Conclusion

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

Given that all members of the CoE have ratified the CRC, and that the EU Charter of Fundamental Rights gives primary consideration to the principle, the BIP has at least achieved the legal status of regional customary law. Therefore, European states, and the Human Rights Court, shall legally safeguard the interests of the child.

However, the approach to the interests of children in cases involving LGBT parents is not clear in Strasbourg. The best interests of the child become an argument to justify possible discrimination and the necessity of state interference upon the applicants' life. In this regard, the Court seems to lack criteria that are specific enough to assess the best interests principle and to maintain consistent consideration in all cases.

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

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

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

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

It is to be hoped that the separate opinions are an indication of a change in the Court's approach towards the BIP. Given the relevance of the ECtHR to setting up international human rights standards, it is naturally expected that children's welfare is safeguarded. The Court should be aware of its influence on other regional human rights, or domestic decisions, with jurisprudence in

which the child does not receive primary or paramount consideration. The international community does not refer to the MoA or to the consensus, but to the final decision. Therefore the Court plays an important international role in the protection of children and can contribute to the fight against discrimination on the basis of sexual orientation and gender identity not only in Europe, but the rest of the world.

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

Noten

1 Jaffee, Sara, et al, 'Life with (or without) Father: The Benefits of Living with Two biological Parents Depend on Father's Antisocial Behaviour', p. 109, in Child Development, 74/1, 2003.

2 See for instance the Office of the High Commissioner for Human Rights' discourse on the "Role of the family in the promotion of the Rights of the Child", at http://www.ohchr.org/EN/HRBodies/CRC/Documents/Recommandations/family.pdf (consulted on 09 July 2013).

3 Gates, 2013, p. 2. Available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf (consulted on 25 March 2013).

4 In May 2013, the results of the biggest LGBT survey realised in the European Union, in which 93000 LGBT Europeans participated, was published on and can be found at http://fra.europa.eu/DVS/DVT/lgbt.php (consulted on 8 June 2013).

5 Idem.

6 For instance, out of the 47 member states in the CoE, only 9 have legalised joint same-sex adoption (The Netherlands, Denmark, Sweden, Norway, Iceland, Spain, UK, France and Belgium).

7 *Tyrer v. UK (ECtHR, 1978),* paragraph 31.

8 The paramountcy is based on the CRC, Art. 21 and the Hague Convention 1980, Preamble.

9 More information about HUDOC can be found at http://www.echr.coe.int/Pages/home.aspx?p=caselaw/HUDOC/FAQ (consulted on 8 July 2013) The factsheets are available at http://www.echr.coe.int/Documents/FS_Parental_ENG.pdf (consulted on 1 July 2013) and http://www.echr.coe.int/Documents/FS_Sexual_Orientation_ENG.pdf

(consulted on 1 July 2013). For doctrine, see Johnson, Paul, Chronological list of decisions and judgments of the European Court of Human Rights and former Commission of Human Rights in respect of homosexuality, New York: Routledge, January 2014. (collection with all cases since the first petition related to homosexuality in 1955).

10 The adoption cases can also be found on the "Parental rights" factsheet.

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

12 UNICEF, Handbook: Geneva, Implementation Handbook for the Convention on the Rights of the Child, third edition, p. 35, available at www.unicef.org/publications/index_43110.html (consulted on 5 June 2013).

13 "*The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration*"

14 United Nations Treaty Collection, available at http://treaties.un.org/Home.aspx (consulted on 10 May 2013).

15 Idem.

16 See also "General guidelines regarding the form and content of initial reports to be submitted by States Parties under article 44, paragraph 1(a)", UN Doc. CRC/C/5, 1991.

17 UNICEF, Handbook: Geneva, Implementation Handbook for the Convention on the Rights of the Child, third edition, p. 37, available at www.unicef.org/publications/index_43110.html (consulted on 5 June 2013).

18 Cretney, Stephen, Elements of Family Law, p. 526, London: Sweet & Maxwell, 1992.

19 Archard, David William, Children, Family and State, p. 39, Aldershot: Ashgate Publishing, 2003.

20 King, M., 'Playing the Symbols: Custody and the Law Commission', p. 189, in Family Law, 17, 1987.

21 Kline, Marlee, 'Child Welfare Law, 'Best Interests of the Child' Ideology, and First Nations', p. 375 in Osgoode Hall Law Journal, 30, 1992.

22 Cretney, Stephen, Elements of Family Law, p. 262, London: Sweet & Maxwell, 1992.

23 CRC/C/GC/14, 2013.

24 Idem, paragraph 38.

25 Idem, paragraph 32.

26 FRA survey at http://fra.europa.eu/DVS/DVT/lgbt.php (consulted on 8 June 2013).

27 Gates, Gary J., LGBT Parenting in the United States, The Williams Institute, University of California, Los Angeles (UCLA), February 2013, p. 2, at http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf (consulted on 28 March 2013).

28 Idem, p. 3.

29 More information available at the European Parliament's Intergroup on LGBT Rights' website, at http://www.lgbt-ep.eu/tag/free-movement/ (consulted on 25 May 2013).

30 Example presented at the European Parliament, in March 2013, by Luís Amorim, NELFA (Network of European LGBT Families Association) board member. At http://www.lgbt-ep.eu/wp-content/uploads/2013/03/LA-NELFA-speech-EP-6-March-2013.pdf (consulted on 10 June 2013).

31 The sole intention of the research was to give the author a general view about same-sex parenting in Amsterdam. Six gay parents and two children shared that they have been living without major issues, but recognise that Amsterdam is a very cosmopolitan and tolerant city. They mentioned that gay friends in the Dutch countryside have been suffering discrimination due to their non-traditional family structure. The children commented on the advantage of living in a more tolerant and "open-minded" family, where gender roles are not stereotyped. Further studies in this field will be possibly developed by the author.

32 Information available in English on the DutchNews website: http://www.dutchnews.nl/news/archives/2012/10/a_child_should_be_able_to_have.php (consulted on 25 March 2013).

33 Information available at www.aap.org (consulted on 15 June 2013).

34 The result is available on http://fra.europa.eu/DVS/DVT/lgbt.php (consulted on 1 June 2013).

35 Atala Case of *Atala Riffo and daughters v Chile*, (IACHR, 2012), paragraph 121. Atala had lost the custody of her daughters because of her homosexuality, but the IACHR overruled Chile's decision and found a violation of her private life.

36 Reece, Helen, 'The paramountcy principle – consensus or construct', p. 267-304 in Current Legal Problems, 49(1), 1996.

37 For other cases involving children, in the light of the CRC, the principle must at least be considered as a primary consideration.

38 The list is available on the HCCH's official website at http://www.hcch.net/index_en.php?act=conventions.status& cid=24 (consulted on 14 March 2015).

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

40 *Neulinger and Shuruk v Switzerland*, (ECtHR, 2010), paragraph 135.

41 Idem, paragraph 151.

42 *Maumousseau and Washington v France*, (ECtHR, 2007), paragraph 69.

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

44 *X v Latvia* (ECtHR, 2011), paragraph 72, current referred to the Grand Chamber.

45 *B v Belgium* (ECtHR, 2012), paragraph 44: "*avec le souci constant de déterminer quelle est la meilleure solution pour l'enfant enlevé*".

46 *M.R and L.R v Estonia* (ECtHR, 2012), paragraph 37 and 43 (not a, but the primary consideration).

47 *Eskinazi and Chelouche v Turkey* (ECtHR, 2005), Court's assessment part (no numbered paragraphs available).

48 In fact, the factsheet provides ten cases. However, one (*Negrepontis-Giannisis v Greece* (ECtHR, 2011) refers to adult adoption and the other (*Kopf and Liberda v Austria* (ECtHR, 2011)) refers to the foster parents' right to visit the child. The remaining eight cases will be explored in the next chapter.

49 *Gas Dubois v France* (ECtHR, 2012).

50 The European consensus will be explored in the next chapter.

51 Sexual orientation is not mentioned explicitly as a ground for discrimination protected by the ECtHR, but is "undoubtedly covered by Article 14 of the Convention" (*Salgueiro da Silva Mouta v Portugal*, (ECtHR, 1999), paragraph 28) once it can be "*considered as a difference on the*

grounds of 'sex' or 'other status'" (Commission report, *Sutherland v UK*, (ECtHR, 1997) paragraph 51).

52 *Keegan v Ireland* (ECtHR, 1994), paragraph 12.

53 *Wagner and J.M.W.L v Luxembourg* (ECtHR, 2007), paragraph 133.

54 *Kearns v France* (ECtHR, 2008), paragraph 79.

55 *Harroudj v France* (ECtHR, 2012), paragraph 49.

56 *Fretté v France*, (ECtHR, 2002), paragraph 36. This decision will be further explored.

57 The best interests of the child is not even mentioned in the Court's assessment.

58 ECtHR, 2008, 2012 and 2013, respectively. In *X and others v Austria* (ECtHR, 2013) the child is also an applicant and his sexual orientation is not considered in the analyses.

59 Benvenisti, Eyal, 'Margin of appreciation, consensus and universal standard', p. 851 in International Law and Politics, 31, 1999.

60 Idem p. 852.

61 Helfer, Laurence, 'Finding a Consensus on Equality: The Homosexual Age of Consent and The European Convention on Human Rights', p. 1056 in New York University Law Review, 65, 1990.

62 Johnson, Paul, Homosexuality and the European Court of Human Rights, p. 77, New York: Routledge, 2013.

63 *Schalk and Kopf v Austria* (ECtHR, 2010), paragraph 93.

64 *ABC v Ireland* (ECtHR, 2010).

65 Letsas, George, 'The ECHR as a living instrument: It meaning and its legitimacy', Abstract in Andreas Follesdal, Birgit Peters, Geir Ulfstein, Studies on Human Rights Convention, Cambridge: Cambridge University Press, 2, 2013.

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

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

68 Van Bueren, Geraldine, European and their Rights, Child rights in Europe, Convergence and divergence in judicial protection, .p. 31, fn. 66, Strasbourg: Council of Europe Publishing, 2007. However, the term "*margin of appreciation*" had already been used by the Commission in *Lawless v Ireland,* (ECtHR, 1961), paragraphs 28-30.

69 Greer, S., The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights, p. 8, Strasbourg: Council of Europe Publishing, 2000.

70 *Handyside v UK* (ECtHR, 1976), paragraph 48.

71 *Rasmussen v Denmark* (ECtHR, 1984), paragraph 40.

72 *Evans v UK* (ECtHR, 2007), paragraphs 77-81.

73 R.St.J. MacDonald, R., 'The Margin of Appreciation', p. 83-85 in R.St.J MacDonald, F. Matscher and H Petzold, The European System for the Protection of Rights, p. 123, Alphen aan den Rijn: Kluwer, 1993.

74 Kavanaugh, Kathleen A., 'Policing the margins: rights protection and the European Court of Human Rights', p. 422, in European Human Rights Law Review, 11, 2006.

75 Dzehtsiarou, Kanstantsin, European consensus: a way of reasoning, University College Dublin Law Research, Paper n. 11, introduction, 2009.

76 Johnson, Paul, Homosexuality and the European Court of Human Rights, p. 69, New York: Routledge, 2013.

77 Singh, R., 'Is there a role for the Margin of Appreciation in National law after the Human Rights Act?', p. 20, in European Human Rights Law Review, 1999.

78 Lord Lester of Herne Hill, 'Universality versus Subsidiarity: a Reply', p. 75, in European Human Rights Law Review 1, 1998.

79 Kratochvil, Jan, 'The inflation of the Margin of Appreciation by the European Court of Human Rights', p. 354, in Netherlands Quarterly of Human Rights, 29/3, 2011.

80 Letsas, George, A theory of Interpretation of the European Convention on Human Rights, p. 11, Oxford: Oxford University Press, 2007.

81 *Kerkhoven and Hinke v The Netherlands,* (European Commission of Human Rights, 1992).

82 Given the fact that there are still 38 member states in the CoE that haven't recognised same-sex adoption, and that 75% of the gay adoption cases were against France, one could infer that these complaints were an indication of the population's dissatisfaction on how same-sex people were being treated in that country, and a way of pressuring authorities to change

practices and legislation.

83 *Fretté v France* (ECtHR, 2002) and *EB v France* (ECtHR, 2008).

84 *Fretté v France* (ECtHR, 2002), paragraph 11.

85 Idem, paragraph 36.

86 Idem.

87 Idem, paragraph 42.

88 Idem, paragraph 41.

89 Idem, paragraph 42.

90 Idem, paragraph 41.

91 Helfer, Laurence, 'Consensus, Coherence, and the European Convention on Human Rights', p. 135, in Cornell International Law Journal, 26, 1993.

92 Commission report, *X v UK*, (ECtHR, 2012), paragraph 174.

93 Johnson, Paul, Homosexuality and the European Court of Human Rights, p. 78, New York: Routledge, 2013.

94 *EB v France* (ECtHR, 2008), paragraph 41.

95 Idem, paragraph 38.

96 Johnson, Paul, Homosexuality and the European Court of Human Rights, p. 77, New York: Routledge, 2013.

97 Idem, p. 82.

98 *EB v France* (ECtHR, 2008), paragraph 38.

99 Idem, paragraph 98.

100 Idem, paragraphs 30 and 77.

101 *Gas Dubois v France* (ECtHR, 2012) and *X and Others v Austria* (ECtHR, 2013).

102 *Gas Dubois v France* (ECtHR, 2012), paragraph 49.

103 Idem, paragraph 73.

104 *X and Others v Austria* (ECtHR, 2013), paragraph 153.

105 *Gas Dubois v France* (ECtHR, 2012), paragraph 44.

106 Idem, paragraph 68.

107 Idem, paragraph 66.

108 Idem, paragraph 46.

109 Idem, paragraph 9.

110 CRC/C/GC/14, 2013, paragraph 83.

111 The CRC promotes the importance of family environment in its preamble. The European Court has already pointed out the importance of recognising family ties in de facto situations (*Kroon and others v The Netherlands* (ECtHR, 1994), paragraph 40).

112 Smart and Sevenhuijsen, Child Custody and the Politics of Gender, NewYork: Routeledge, 1989, p. 110.

113 Buchanan and Brock, Deciding for Others: The Ethics of Surrogate Decision Making, Cambridge: Cambridge University Press, 1989, p. 10.

114 Archard, David William, Children, Family and State, Aldershot: Ashgate Publishing, 2003, p. 53.

115 - Radford, Jill, 'Lesbian Parenting: Past, Present and Future', p. 21-25 in Rights of Women Bulletin,Winter, 1995, p. 24.

116 Van Bueren, Geraldine, European and their Rights, Child rights in Europe, Convergence and divergence in judicial protection, p. 37, Strasbourg: Council of Europe Publishing, 2007.

117 Dissenting opinion of Judge Loucaides in *EB*.

118 Johnson, Paul, Homosexuality and the European Court of Human Rights, p. 76, New York: Routledge, 2013.

119 *X and others v Austria* (ECtHR, 2013), paragraph 56-57.

120 Idem, paragraph 151.

121 CRC/C/GC/14, V, A, 1.

122 CRC/C/GC/14, paragraph 4.

123 CRC/C/GC/14, paragraph 6.

124 CRC/C/GC/14, paragraph 32.

125 CRC/C/GC/14, paragraph 38.

126 CRC/C/GC/14, IV, B.

127 CRC/C/GC/14, V, A, 1, paragraphs 52-79.

128 CRC/C/GC/14, paragraphs 89-99.

129 Joint partly dissenting opinion of judges Sir Nicolas Bratza and judges Fuhrmann and Tulkens in *Fretté v France* (ECtHR, 2002).

130 The same concern was raised in the joint partly dissenting opinion of Judges Casadevall, Ziemele, Kovler, Jociene, Sikuta, De Gaetano e Sicilianos, in *X and Others v Austria* (ECtHR, 2013).

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

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

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

134 Dissenting opinion of Judge Villiger, in *Gas Dubois. v France* (ECtHR, 2012).

135 *Mazurek v France* (ECtHR, 2000), paragraph 54: "*an adulterine child cannot be blamed for circumstances for which he or she is not responsible. It is an inescapable finding that the applicant was penalised on account of his status as an adulterine child...*"

136 Ruth Bader Ginsburg, Remarks on Writing Separately, 65 WASH. L. REV. 133, 144 (1990) (quoting Charles Evans Hughes, the Supreme Court of the United States 68 (1936)).

137 See CRC, General Comments 14: Geneva, CRC/C/GC/14, 2003, available at http://www2.ohchr.org/english/bodies/crc/comments.htm (consulted on 10 June 2013).

138 Information based both ECtHR Parental Rights factsheet and Sexual Orientation.

139 *Boeckel and Gessner-Boeckel v Germany*, (ECtHR, 2013).

140 Idem, paragraph 21.

141 Idem.

142 Idem, paragraph 31.

143 Idem, paragraph 28.

144 As in *Schalk and Kopf v Austria* (ECtHR, 2010).

145 *Salgueiro da Silva Mouta v Portugal* (ECtHR, 1999).

146 Idem, paragraph 34.

147 Idem, paragraph 36.

148 Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, Preamble, 2006 at Gadjah Mada university in Yogyakarta (Indonesia).

149 Idem.

150 Oxford dictionary.

151 Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, Preamble, 2006 at Gadjah Mada university in Yogyakarta (Indonesia).

152 Oxford dictionary.

153 Idem.

154 See Sexual Policy Watch, 2008, "Position paper on the language of 'sexual minorities' and the politics of identity", p. 1, at http://www.sxpolitics.org/wp-content/uploads/2009/03/sexual-minorities1.pdf (consulted on 1 July 2013). The author prefers to use the term "sexual and gender minorities" though. At http://www.sxpolitics.org/wp-content/uploads/2009/03/sexual-minorities1.pdf (consulted on 1 July 2013).

155 In 2011, the UN Human Rights Council adopted a resolution to fight against violence and human rights violation based on sexual orientation and gender identity. (A/HRC/RES/17/19).

156 FRA survey, available on http://fra.europa.eu/DVS/DVT/lgbt.php (consulted on 8 June 2013).

157 For instance, see *H v Finland* (ECtHR, 2012).

158 *PV v Spain*, (ECtHR, 2010).

159 Idem, paragraph 32.

160 Idem, paragraph 30.

161 Idem, paragraph 36.

162 *X, Y and Z v UK* (ECtHR, 1997).

163 Idem, paragraph 23.

164 Idem, paragraph 17.

165 Idem, paragraph 37.

166 Idem, paragraph 51.

167 Idem, paragraph 45.

168 Van Bueren, Geraldine, European and their Rights, Child rights in Europe, Convergence and divergence in judicial protection, p. 121, Strasbourg: Council of Europe Publishing, 2007.