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*Published in:*

International Journal of Law, Policy and the Family

*DOI:*

[10.1093/lawfam/ebae002](https://doi.org/10.1093/lawfam/ebae002)

Published: 07.02.2024

*Document Version*

Publisher's PDF, also known as Version of record

*Citation for published version (APA):*

Koivula, T. (2024). What makes a father: Differentiation of unmarried and divorced fathers in the context of custody under the jurisprudence of the European Court of Human Rights. *International Journal of Law, Policy and the Family*, 38(1), 1-19. Article ebae002. <https://doi.org/10.1093/lawfam/ebae002>

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# What makes a father: differentiation of unmarried and divorced fathers in the context of custody under the jurisprudence of the European Court of Human Rights

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## ABSTRACT

While marriage has traditionally served as the connective tissue between fathers, mothers, and their children before the law, the increasing commonality of cohabitation-based relationships without marriage has led to many children being born outside of the marriage union. This has complicated the legal understanding of fatherhood in particular, which has traditionally relied on the contractual nature and stability of the marital union to be legally defined and understood. States are often ill-equipped to handle parental separation and child custody in the case of civil unions, and unmarried fathers tend to have fewer venues of legal protection compared to divorced fathers in that regard. The purpose of this article is to identify the legal challenges surrounding unmarried fathers and parental rights in the context of the jurisprudence of the European Court of Human Rights. It examines the elements of what constitutes legal fatherhood, identifies the main human rights issues surrounding unmarried fathers, and assesses the reasons for legal differentiation between divorced and unmarried fathers. Importantly, conclusions are drawn as to whether and why these differences are justified from a legal perspective. This article contributes to the need for more research in the area of father–child relationships and aims to provide guidance for policy and law-making with regard to unmarried parents in the context of children’s rights.

## I. INTRODUCTION

The family is recognized worldwide as a fundamental unit of society, and the Convention on the Rights of the Child (CRC) describes it as ‘the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly

children'.<sup>1</sup> It is also widely known that the involvement of both parents and close parent-child bonds are important for children's development and health.<sup>2</sup> European family law systems have originally been built on the foundation of marriage – yet, family dissolutions have become common place in Europe, and biological families increasingly fragmented due to rising divorce rates and the prevalence of non-married cohabitation. This has led to more and more children being born outside of the marriage union,<sup>3</sup> and has majorly affected the landscape of legal fatherhood.<sup>4</sup> These changes place unmarried parents and their children in relatively new and challenging legal categories, especially from the point of view of custody and access rights. Fathers, in particular, tend to be legally understood through their marriage to or relationship with their spouse,<sup>5</sup> and as such unmarried fathers tend to have fewer venues of legal protection. For the purposes of this article, what is meant by 'unmarried fathers' is men with biological children who were never married to the mother of their child and have recognized their paternity.

This article will provide a perspective on how and why the European Court of Human Rights (ECtHR) differentiates between unmarried and divorced fathers in the context of child custody and Article 8 of the European Convention on Human Rights (ECHR). To this end, factors pertaining specifically to unmarried fathers before the ECtHR (as opposed to divorced fathers) will be looked at from the perspective of 'family life' as provided for in Article 8 ECHR, and the relevant human rights issues will be analysed. The rationale behind examining the presented research question ultimately rests on the best interests of the child (BIC), and the child's right to be taken care of by both parents. The research is relevant from an academic, as well as a practical perspective. Academically, there is a need for more research in the area of father-child relationships in general,<sup>6</sup> while practically, the results of this research can help guide policy and law-making with regard to unmarried parents in the context of children's rights.

The particular specifications of this research have been selected due to the growing number of unmarried fathers in modern Western societies, and the need to analyse the rights and issues that come along with it. The article will focus on situations involving parental separation – comparisons are made between unmarried fathers who have cohabited but separated from the mother (either before or following the birth of their children) and divorced fathers who were married to the mother before or at the time of their children's birth. Case law has been selected through the online database of the ECtHR, HUDOC, on the basis of whether they relate to unmarried fatherhood in the context of custody, access rights or adoption. The selection of cases is not meant to be exhaustive, as the intention is mainly to identify trends and developments within the practice of the ECtHR. Assessment and comparisons between the legal status of unmarried and divorced fathers are contained within the case law.

<sup>1</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) (1577 UNTS 3) Preamble [5].

<sup>2</sup> E. Meland, H.J. Breidablik and F. Thuen, 'Divorce and Conversational Difficulties with Parents: Impact on Adolescent Health and Self-Esteem' (2020) 48 (7) *Scandinavian Journal of Public Health* 743–751; C. Panter-Brick and others, 'Practitioner Review: Engaging Fathers—Recommendations for a Game Change in Parenting Interventions Based on a Systemic Review of the Global Evidence' (2014) 55 (11) *Journal of Child Psychology and Psychiatry* 1187–1212; J. Lansford, 'Parental Divorce and Children's Adjustment' (2009) 4 (2) *Perspectives on Psychological Science* 140–152.

<sup>3</sup> R. Emery, R. Otto and W. O'Donohue, 'A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System' (2005) 6 (1) *Psychological Science in the Public Interest* 1–29.

<sup>4</sup> A. Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (Cambridge University Press, 2019), p. 6.

<sup>5</sup> R. Collier, 'Law and the Making of Fatherhood in Late Modernity: Reflections on Family Policy in England and Wales 1997–2010' in M. Oechsle, U. Müller and S. Hess (eds.), *Fatherhood in Late Modernity—Cultural Images, Social Practices and Structural Frames* (Verlag Barbara Budrich, 2012), p. 301; N. Dowd, *Redefining Fatherhood* (New York University Press, 2000), p. 182; B. Simpson, J. Jessup and P. McCarthy, 'Fathers after Divorce' in A. Bainham and others (eds.), *Children and Their Families: Contact, Rights and Welfare* (Hart Publishing, 2003), p. 210.

<sup>6</sup> Meland, Breidablik and Thuen (n 2).

The article will begin with an examination of the legal framework regarding unmarried fatherhood in European human rights law. Then, some of the most prevalent elements and criteria of “family life” under Art 8 ECHR will be looked at, with a focus on unmarried fathers. This will be followed by an examination of some of the human rights issues arising from the aforementioned criteria, and finally an assessment will be given on the differences between unmarried and divorced fathers, the issues surrounding unmarried fatherhood, and whether unmarried fathers should be considered equally or similarly to divorced fathers in European human rights law in the future.

## II. LEGAL BACKGROUND

### 1. Framework

Although the present research question concerns unmarried fathers, it must be emphasized that the rights of the child should take precedence over the interests of adults when in conflict. The importance of prioritizing the child’s interests has a human rights basis in the CRC, which came into force in 1990 and remains the most widely ratified treaty worldwide, with 196 States Parties.<sup>7</sup> The importance of this convention to the protection of children’s rights cannot be understated. The BIC, a legal concept forming the backbone of children’s rights protection, is laid out in Article 3(1) CRC. It provides:

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.<sup>8</sup>

This provision is commonly referred to by national courts and legislators with regard to cases involving children. The provision recognizes that the interests of the child should be considered with great care due to their need for special protection. The determination of the BIC can be done on a national and collective level, as well as individual cases.<sup>9</sup> All decisions concerning the child’s welfare must be evaluated on this basis.

Further, Article 18 CRC refers to the parents preferably having ‘common responsibilities for the upbringing and development of the child’.<sup>10</sup> However, ‘common responsibilities’ does not necessarily mean equal or the same responsibilities,<sup>11</sup> meaning that one of the parents can justifiably have more responsibilities than the other.<sup>12</sup> Therefore, it cannot be said that the parents have a right, as such, to equally share the caretaking duties.<sup>13</sup>

In the ECHR, the BIC is not directly mentioned, but has been organically incorporated into practice through ECtHR case law, as the Court applies it in the context of child-related adjudication.<sup>14</sup> In *Neulinger and Shuruk v Switzerland*, the Court stated that:

<sup>7</sup> ‘Convention on the Rights of the Child’ (*United Nations Treaty Collection*, 2023) <[https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg\\_no=IV-11&chapter=4](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-11&chapter=4)> accessed 22 June 2023.

<sup>8</sup> CRC (n 1) Art 3(1).

<sup>9</sup> Lapsiasiavaltuutetun toimisto [Office of the Ombudsman for Children], *Eriarvoistava Lapsuus: Lasten Hyvinvointi Kansallisten Indikaattorien Valossa* (Helsinki: Aksidenssi Oy, 2014) 17.

<sup>10</sup> CRC (n 1) Art 18.

<sup>11</sup> N. Nikolina, ‘The Influence of International Law on the Issue of Co-Parenting: Emerging Trends in International and European Instruments’ (2012) 8 (1) *Utrecht Law Review* 122–144.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Jeunesse v The Netherlands* (2014) App. No. 12738/10 (ECtHR) [109]; C. Smyth, ‘The Best Interests of the Child in the Expulsion and First-Entry Jurisprudence of the European Court of Human Rights: How Principled Is the Court’s Use of the Principle?’ (2015) 17 (1) *European Journal of Migration and Law* 70–103.

[...] 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.<sup>15</sup>

The key provision in child- and family-related matters before the ECtHR is Article 8 ECHR. Its first paragraph provides that '[e]veryone has the right to respect for his private and family life, his home and his correspondence.'<sup>16</sup> Though not comparable with Article 3 (1) CRC, this provision is repeatedly invoked in connection with children's rights and the BIC. Moreover, it serves a key function with regard to the rights of parents and encompasses many of the legal issues concerning unmarried fathers. While the welfare of the child has to remain at the centre of child-related decision-making, it should be understood that not giving parenting enough attention in legal assessments can work against the interests of both the child and the parents.<sup>17</sup> It is therefore significant from both viewpoints to understand the legal implications of unmarried fatherhood.

## 2. Unmarried fatherhood in law

Marriage is the most significant factor in the determination of legal rules regarding filiation, as it derives from the recognition of a natural phenomenon.<sup>18</sup> The biological connection between mother and child has long been the basis for the legal regulation of motherhood<sup>19</sup>; however, with fatherhood, the equally real biological reality does not manifest itself as concretely,<sup>20</sup> which is why marriage has long played an intrinsic role in legally connecting the father to his children. Furthermore, while motherhood tends to be more commonly associated with the interests of the child (for example, motherhood and childhood are given special attention in the Universal Declaration of Human Rights<sup>21</sup>), fatherhood has not been as distinctly associated with children.

Rights relating to parenthood mainly exist to benefit the child. Being born within a marriage setting has been shown to generally contribute to child welfare more positively than cohabitations or single-parent households,<sup>22</sup> which likely has to do with the higher degree of stability – the rate of family dissolution is generally higher among cohabitating than married partners.<sup>23</sup> Nevertheless, it is the task of decision-makers and legal professionals to apply the existing human rights principles in the changing landscape of family formation and to safeguard the rights of the child and parents to the greatest extent possible. Unmarried fathers form a challenging category due to the fact that separations with their spouses often do not make it into statistics like divorces do.<sup>24</sup> However, although they tend to quite often be

<sup>15</sup> *Neulinger and Shuruk v Switzerland* (2010) App. No. 41615/07 (ECtHR) [135].

<sup>16</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) Art 8(1).

<sup>17</sup> R. Rosen and C. Faircloth, 'Adult-Child Relations in Neoliberal Times: Insights from a Dialogue across Childhood and Parenting Culture Studies' (2020) 9 (1) *Families, Relationships and Societies* 7–22; J. Bristow, 'Who cares for children? The problem of intergenerational contact' in E. and others, *Parenting Culture Studies* (Palgrave Macmillan, 2014), pp. 102–104; T. Koivula, 'Parental Equality in the European Human Rights Regime: Does European Human Rights Law Allow for Mothers and Fathers to Be Evaluated by Different Standards in the Context of Custody Disputes?' (2023) *Family & Law* 1–20. <https://www.familyandlaw.eu/tijdschrift/fenr/2023/02/FENR-D-22-00002>.

<sup>18</sup> C. Valsecchi, 'Fathers by Law, Fathers by Choice. Paternity and Illegitimacy Between Ancien Régime and Codification in Western Countries' in M.G. Renzo Villata (ed.), *Family Law and Society in Europe from the Middle Ages to the Contemporary Era* (Springer, 2016), pp. 229, 231.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*, 230.

<sup>21</sup> Universal Declaration of Human Rights (adopted 10 December 1948) Art 25(2); E.L. Onnismaa, 'Lapsi, Lapsuus ja Perhe Varhaiskasvatusasiakirjoissa 1967–1999' (University of Helsinki, 2010), p. 52.

<sup>22</sup> J. Artis, 'Maternal Cohabitation and Child Well-Being among Kindergarten Children' (2007) 69 (1) *Journal of Marriage and Family* 222–236.

<sup>23</sup> L. Flaquer, 'Shared Parenting after Separation and Divorce in Europe' (International Scientific Conference on Best Interest of the Child and Shared Parenting, Málaga, 3 December 2019); G. Insabella, T. Williams and M. Pruett, 'Individual and Co-Parenting Differences between Divorcing and Unmarried Fathers: Implications for Family Court Services' (2003) 41 *Family Court Review* 290–306.

<sup>24</sup> Flaquer (n 23).

overlooked with regards to parental rights, their involvement or non-involvement in the lives of their children have inevitable implications, meaning that their role in fulfilling the rights of the child must be understood.

Legally, the position of unmarried fathers is a turbulent one. Although only the birth of children within a marital union would confer full parental rights until the 20th century,<sup>25</sup> many European States, along with the ECtHR, increasingly view parenthood as more distinctly separate from the marriage union. The complexities of family life brought about by cultural shifts have been noted by the ECtHR, which stated in *Schneider v Germany* that due to these realities, the BIC in contact cases could not be fully determined by general legal assumptions.<sup>26</sup> The Court has also referred in *Zaunegger v Germany* to the need to take into account the changing culture and the growing number of unmarried parents in the interpretation of Article 8 ECHR.<sup>27</sup> The ECtHR is willing to set aside stereotypes regarding unmarried fathers, acknowledging their potential interest in their children, and the importance of their care to the BIC.<sup>28</sup> Yet, the ECtHR has also been criticized for some degree of inconsistency in its approach to unmarried fatherhood.<sup>29</sup>

### III. REQUIREMENTS FOR UNMARRIED FATHERS TO ESTABLISH FAMILY LIFE

The concept of ‘family’ is not strictly limited to the marriage union even in the CRC. Article 5 CRC obligates States to ‘respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community’, meaning that it does not limit the concept of family to just the parents and their children. Article 8 ECHR provides that family life should be respected,<sup>30</sup> but the term ‘family life’ itself is not defined. This has sometimes proved to be problematic, as will be demonstrated below. While the definition of family should be broadly interpreted in international law, some minimum requirements are necessary, such as life together, economic ties, and a ‘regular and intense relationship’.<sup>31</sup>

Establishing a ‘right’ under Article 8(1) before the ECtHR can be a difficult task for unmarried fathers. In order for a case to fall within the scope of Article 8, the applicant must first establish the existence of ‘family life’, which is not always straightforward, particularly when the parents in question are not married.<sup>32</sup> While the ECtHR has held in the past that Article 8 protects both ‘legitimate’ and ‘illegitimate’ families equally with regards to unmarried mothers and their children,<sup>33</sup> the Court has not stated anything similar with respect to unmarried fathers and their children; specifically, it has not presumed the existence of family life between them on the basis of a biological bond.<sup>34</sup> Ironically, this can be argued to make it easier for grandparents to establish ‘family life’ than the child’s father, as the ECtHR has assumed automatic ‘family life’ between the child and their grandparents in its past jurisprudence.<sup>35</sup>

<sup>25</sup> Valsecchi (n 18) 231.

<sup>26</sup> *Schneider v Germany* (2011) App. No. 17080/07 (ECtHR) [100].

<sup>27</sup> *Zaunegger v Germany* (2010) App. No. 22028/04 (ECtHR) [43], [60].

<sup>28</sup> *Margaria* (n 4) 106.

<sup>29</sup> *Ibid*, 77.

<sup>30</sup> ECHR (n 16) Art 8(1).

<sup>31</sup> Human Rights Committee, ‘Balaguer Santañana v Spain, Communication No. 417/1990’ (1994) UN Doc CCPR/C/51/D/417/1990 [10.2].

<sup>32</sup> S. Harris-Short, J. Miles and R. George, *Family Law: Texts, Cases, and Materials* (Oxford University Press, 2015) 559.

<sup>33</sup> *Marckx v Belgium* (1979) App. No. 6833/74 (ECtHR (Plenary)) [31].

<sup>34</sup> *L v The Netherlands* (2004) App. No. 45582/99 (ECtHR) [37]; Harris-Short, Miles and George (n 32) 559.

<sup>35</sup> *Marckx v Belgium* (n 33) [45]; Harris-Short, Miles and George (n 32) 560.

## I. Elements and criteria of ‘family life’ with regard to unmarried fathers

The ECtHR has extended the protection of Article 8 ECHR to a wide range of parent–child relationships, including unmarried persons with or without a biological link to the child, divorced persons with or without a biological link to the child, unmarried couples with biological children, and married couples with foster children.<sup>36</sup> As stated by the ECtHR,

[t]he existence or non-existence of “family life” for the purposes of Article 8 is essentially a question of fact depending upon the real existence in practice of close personal ties.<sup>37</sup>

When establishing ‘family life’ between a child and an unmarried father in the context of Article 8, certain elements and criteria can be identified that measure the parent–child bond against the standard of the married family. However, while divorced fathers have an easier time establishing the following elements by virtue of their past marriage, unmarried fathers must fulfil them without the same basis, thus requiring a higher burden of proof.

### A. Relationship between father and mother

The relationship between the biological parents is very important for the ECtHR when assessing the existence of family life.<sup>38</sup> It is clear from the practice of the Court that it does not consider the ‘lack of a marital bond’ to ‘preclude the existence of family life’, and if the biological parents of the child live together at the time of the child’s birth, the child effectively becomes part of the familial unit.<sup>39</sup> By extension, the Court considers the bond between the child and both parents to already constitute family life within the meaning of Article 8.<sup>40</sup> Thus, the relationships of unmarried fathers and their children are considered ‘extensions’ of the relationship between the parents,<sup>41</sup> mimicking marriage in that regard.

However, though it may be claimed that ‘family life’ therefore does not make a distinction between married and unmarried families, the case is far from settled in European human rights jurisprudence. This can be seen, eg in the Joint Concurring Opinion of Judges De Gaetano, Pinto de Albuquerque, Wojtyczek, and Dedov in *Paradiso and Campanelli v Italy*, where the marriage between a man and a woman was explicitly recognized as the primary foundation of ‘family’.<sup>42</sup> The Court has expanded on rights traditionally conferred as part of the marriage union to situations outside of it, but mostly to those situations that either resemble or otherwise reproduce characteristics of the traditional marital family.<sup>43</sup> The ECtHR has also seemed to accept a ‘prioritization’ of the marital family,<sup>44</sup> a fact demonstrated by the heterosexual married family automatically falling within the scope of Article 8.<sup>45</sup> Furthermore, the Court has made clear that since marriage is an institution conferring a special status on the spouses, the privileges exclusive to it are not discriminatory to others under Article 14 (prohibition of

<sup>36</sup> *Babiarz v Poland* (2017) App. No. 1955/10 (ECtHR), Dissenting Opinion of Judge Pinto Dealbuquerque [6].

<sup>37</sup> *K & T v Finland* (2001) App. No. 25702/94 (ECtHR) [150]; *L v The Netherlands* (n 34) [36].

<sup>38</sup> *Margaria* (n 4) 76.

<sup>39</sup> *Keegan v Ireland* (1994) App. No. 16969/90 (ECtHR) [44].

<sup>40</sup> *Ibid* [44]; A.N. Koukoulis, ‘The Exercise of Parental Care of Children Born out of Wedlock and the ECtHR: Reflections on *Paparrigopoulos v. Greece*’ (2023) 0 (0) *Maastricht Journal of European and Comparative Law* 1–7.

<sup>41</sup> *Margaria* (n 4) 76.

<sup>42</sup> *Paradiso and Campanelli v Italy* (2017) App. No. 25358/12 (ECtHR), Joint Concurring Opinion of Judges De Gaetano, Pinto de Albuquerque, Wojtyczek and Dedov [3].

<sup>43</sup> *Margaria* (n 4) 107; R. Collier and S. Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Hart Publishing, 2008), p. 203.

<sup>44</sup> R. White, C. Ovey and F.G. Jacobs, *Jacobs, White and Ovey: The European Convention on Human Rights* (Oxford University Press, 2014), p. 337; C. O’Mahony, ‘Irreconcilable Differences? Article 8 ECHR and Irish Law on Non-Traditional Families’ (2012) 26 (1) *International Journal of Law, Policy and the Family* 31–61; S. Choudhry and J. Herring, *European Human Rights and Family Law* (Hart Publishing, 2010) 167.

<sup>45</sup> *Berrehab v The Netherlands* (1988) App. No. 10730/84 (ECtHR) [21]; *Abdulaziz, Cabales & Balkandali v United Kingdom* (1985) App. Nos. 9214/80, 9473/81, 9474/81 (ECtHR) [62].

discrimination).<sup>46</sup> The source of the strength of marriage as an institution does not, according to the Court, come from the length or quality of the relationship, but the ‘existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature’.<sup>47</sup> Even biological considerations have not managed to usurp marriage as the main basis for legal fatherhood in ECtHR jurisprudence, as the marriage union is considered important even where a father is not the biological father of the child.<sup>48</sup> Even so, as *Söderbäck v Sweden* shows, the ECtHR has taken some distance from a mere marital understanding of fatherhood by assessing competing father figures on an individual basis.<sup>49</sup>

Where the parents are not married, the assessment of their Article 8 rights and the existence of ‘family life’ becomes more complicated. Close personal ties are sometimes considered enough to constitute family life, meaning that non-married cohabitation can qualify.<sup>50</sup> However, proof of stability and long-term planning or commitment are often required by the ECtHR for this assessment.<sup>51</sup> Even so, while cohabitation often is a prerequisite for family life under Article 8, this is not always the case: the ECtHR has acknowledged that there may be exceptional cases in which this element is not needed.<sup>52</sup> With regards to unmarried parents, the duration of their relationship is relevant to the ECtHR when assessing the situation of the father.<sup>53</sup> Semblance to marriage can help constitute family life in a given situation, but may not be a sufficient basis for residence rights – those must be based on a BIC assessment.<sup>54</sup>

### *B. Relationship between father and child*

The father–child bond factors into the assessment of the existence of ‘family life’. For example, while the ECtHR considers measures that involve breaking a child’s bonds with his or her family to be reserved for exceptional circumstances, a particularly weak parent–child bond may overrule this.<sup>55</sup> However, particularly interesting for the purposes of this article is the concept of a ‘potential relationship’ between an unmarried father and his child. In the case *Anayo v Germany*, the ECtHR held that the protection of Article 8 could extend to such a ‘potential relationship’, even if a relationship does not presently exist.<sup>56</sup> The same reasoning was held in *Schneider v Germany*, in which German courts had not allowed the father to have contact with his alleged son, who was living with the mother and her husband (the legal guardian). The ECtHR stated that:

where the circumstances warrant it, “family life” must extend to the potential relationship which may develop between a child born out of wedlock and the natural father.<sup>57</sup>

In *Keegan v Ireland*, a landmark case concerning the adoption of a child without the knowledge or consent of the (unmarried) father, the ECtHR found that the secret placement of the child for adoption amounted to an interference with the right to family life, as it jeopardised the

<sup>46</sup> *Van der Heijden v The Netherlands* (2012) App. No. 42857/05 (ECtHR) [69]; *Burden v United Kingdom* (2008) App. No. 13378/05 (ECtHR (GC)) [63].

<sup>47</sup> *Van der Heijden v The Netherlands* (n 46) [69].

<sup>48</sup> *Margaría* (n 4) 107.

<sup>49</sup> *Söderbäck v Sweden* (1998) App. No. 24484/94 (ECtHR) [22]–[35].

<sup>50</sup> *K & T v Finland* (n 37) [150]; *L v The Netherlands* (n 34) [36].

<sup>51</sup> *Margaría* (n 4) 76.

<sup>52</sup> *Anayo v Germany* (2011) App. No. 20578/07 (ECtHR) [56]; *Berrehab v The Netherlands* (n 45) [21]; *Harris-Short, Miles and George* (n 32) 560.

<sup>53</sup> *Keegan v Ireland* (n 39) [45]; *Schneider v Germany* (n 26) [88].

<sup>54</sup> *Margaría* (n 4) 87.

<sup>55</sup> *SH v Italy* (2016) App. No. 52557/14 (ECtHR) [40].

<sup>56</sup> *Anayo v Germany* (n 52) [57]; *Pini v Romania* (2004) App. Nos. 78028/01, 78030/01 (ECtHR) [143].

<sup>57</sup> *Schneider v Germany* (n 26) [81].



development of the father's ties with the child and began a likely irreversible process in that regard.<sup>58</sup> This demonstrates the particular importance 'potential relationship' to unmarried fatherhood, as a divorced father would have an easier time relying on his parental rights. Something similar to *Keegan* can be seen in *Görgülü v Germany*, where the ECtHR recognized that:

[...] the possibilities of reunification will be progressively diminished and eventually destroyed if the biological father and the child are not allowed to meet each other at all, or only so rarely that no natural bonding between them is likely to occur.<sup>59</sup>

The aforementioned cases suggest that 'potential relationship' may serve as an avenue of protection for unmarried fathers, which is reinforced by the fact that the relationship between a child born out of wedlock and the biological father has been considered to be within the scope of Article 8 ECHR as long as prior lack of contact was due to factors not attributable to the father.<sup>60</sup> This approach can be assumed to be reflected more broadly in the legislation of Council of Europe (CoE) Member States, given the lack of similar cases coming before the ECtHR more recently.<sup>61</sup> Having said that, the possibility of 'potential relationship' can only apply in exceptional circumstances,<sup>62</sup> which renders it a somewhat unreliable recourse for fathers. These exceptional circumstances are largely left to a case-by-case analysis and are assessed on the basis of factors such as the nature of the relationship between the natural parents, a demonstrable interest in and commitment by the father to the child,<sup>63</sup> and the parent-child bond, along with other factors linking them together.<sup>64</sup>

### C. Intentionality and commitment

Intentionality to form a family, and the commitment to that family, are significant elements to the ECtHR in the determination of 'family life' for unmarried fathers. This is an element already ingrained into the marriage union, and its separate assessment in the case of unmarried fathers represents efforts to extend the protection of Article 8 to them outside of the marriage union. Consequently, while 'family life' of fathers is not exclusively dependent on marriage,<sup>65</sup> unmarried fathers possessing characteristics of the 'conventional' father still tend to be considered to have a stronger claim for parental rights than 'unconventional' fathers.<sup>66</sup>

Intended family life may sometimes be enough to establish 'family life' under Article 8, though not always.<sup>67</sup> For example, in *Keegan*, the planned nature of having a child and the intention to get married was considered relevant for the establishment of 'family life' to an equivalent degree with marriage,<sup>68</sup> even though the couple in question had only been engaged by the time they separated. The ECtHR has considered that the right to respect for private life under Article 8 ECHR 'incorporates the right to respect for both the decisions to become and not to become a parent'.<sup>69</sup> From this it could be inferred that even when the parents are not married, both retain their right to be a parent by choice. Whether this

<sup>58</sup> *Keegan v Ireland* (n 39) [55].

<sup>59</sup> *Görgülü v Germany* (2004) App. No. 74969/01 (ECtHR) [46].

<sup>60</sup> B. De Hart, 'Superdads: Migrant Fathers' Right to Family Life before the European Court of Human Rights' (2015) 18 (4) *Men and Masculinities* 448–467.

<sup>61</sup> L. Nieminen, *Perus-Ja Ihmisoikeudet Ja Perhe* (Talentum Media Oy, 2013) 189.

<sup>62</sup> *Anayo v Germany* (n 52) [57].

<sup>63</sup> *Schneider v Germany* (n 26) [81].

<sup>64</sup> *Anayo v Germany* (n 52) [57], [60].

<sup>65</sup> *Marckx v Belgium* (n 33) [31]; *Johnston and Others v Ireland* (1986) App. No. 9697/82 (ECtHR) [55]; *Keegan v Ireland* (n 39) [44]; *L v The Netherlands* (n 34) [35].

<sup>66</sup> *Margarita* (n 4) 106–107.

<sup>67</sup> *Pini v Romania* (n 56) [143].

<sup>68</sup> *Keegan v Ireland* (n 39) [45].

<sup>69</sup> *Evans v UK* (2007) App. No. 6339/05 (ECtHR) [71].

encompasses situations where the child was conceived without the intention to have a child is not clear, but it could be assumed that becoming a parent is not temporally fixed.

Although the relationship between the father and mother matters in establishing ‘family life’, there has been a decreased emphasis on the mother–father relationship in the context of the parent–child bond; instead, the unmarried father’s commitment (in addition to biological considerations) has become one of the most relevant factors in establishing ‘family life’ under Article 8.<sup>70</sup> Unmarried fathers are generally expected to prove their abilities as caregivers before having equal standing with married or divorced fathers in terms of legal fatherhood.<sup>71</sup> The ECtHR has referred to a standard of concrete care in *Söderbäck*, while in *Görgülü* the Court assessed the father’s willingness and ability to care for his child, which demonstrates something of a sufficiency of intention.<sup>72</sup> The father’s behaviour towards his children is of utmost relevance and serves as a baseline:<sup>73</sup> what matters is the ‘demonstrable interest in and commitment by the father to the child both before and after birth’.<sup>74</sup>

It should be noted that the element of intention and commitment has similar importance regardless of the marital status of the father, meaning that it is similarly applicable in cases with divorced parents. In both *G.B. v Lithuania* and *Ilya Lyapin v Russia*, the lack of proactivity of a divorced parent to exercise their parental rights led to the ECtHR finding (though not unanimously) the revocation of those rights compatible with Article 8.<sup>75</sup> In *G.B.*, the national court’s decision had been based on the combination of a BIC assessment, the wishes of the children, and the fact that the father took proper care of his daughters, in addition to the mother’s passivity.

The importance of intentionality as a component of ‘family life’ for unmarried fathers is understandable, given the fact that it follows a decision by the father to not get married, and thus establish his commitment through legal means. However, given that the same decision has been made by the mother, a question of equality is raised, both as a matter of privilege and detriment concerning the mother. On one hand, the father and child may suffer from the lack of the father’s right to custody or access – on the other hand, the status quo tends to easily lay the full burden of care on the mother alone.

## 2. Role of biology

The role of the biological connection between an unmarried father and his child before the ECtHR is a complicated one. As stated by the Court in *L v The Netherlands*,

[ ... ] mere biological kinship, without any further legal or factual elements indicating the existence of a close personal relationship, should [not] be regarded as sufficient to attract the protection of Article 8.<sup>76</sup>

The implication is clear: biology alone is not sufficient to establish ‘family life’. However, the biological link does seem to have an important connection to the child’s best interests,<sup>77</sup> indicating a unique significance of the biological parent–child bond as an element of the BIC. Despite being insufficient on its own to establish ‘family life’, the biological link is not

<sup>70</sup> *Margaria* (n 4) 85–86.

<sup>71</sup> *Ibid.*, 77; *Collier and Sheldon* (n 43) 196.

<sup>72</sup> *Margaria* (n 4) 90.

<sup>73</sup> *O’Mahony* (n 44) 36.

<sup>74</sup> *L v The Netherlands* (n 34) [36]; *Rózański v Poland* (2006) App. No. 55339/00 (ECtHR) [64]; *Anayo v Germany* (n 52) [61]; *Schneider v Germany* (n 26) [89]; *Kautzor v Germany* (2012) App. No. 23338/09 (ECtHR) [61].

<sup>75</sup> *GB v Lithuania* (2016) App. No. 36137/13 (ECtHR) [95]–[97], [102], [107]; *Ilya Lyapin v Russia* (2020) App. No. 70879/11 (ECtHR) [59]–[60].

<sup>76</sup> *L v The Netherlands* (n 34) [37].

<sup>77</sup> *Margaria* (n 4) 87.

irrelevant – rather, it needs to be accompanied by other factors, as demonstrated in *Keegan* and *Görgülü*. In both of these cases, additional factors to the biological link were significant in how the unmarried father was seen before the law. In *Keegan*, that factor was a sufficiently long and stable relationship between the parents,<sup>78</sup> while in *Görgülü*, the biological link was coupled with caring intentions of the father and the potential father–child relationship.<sup>79</sup> Additionally, in *Keegan*, the relationship between the biological parents had ‘the hallmark’ of family life, and this extended to the father–child relationship by virtue of the birth of the child.<sup>80</sup> This meant that the State had a positive obligation ‘to act in a manner calculated to enable that tie to be developed’ and introduce ‘legal safeguards [ ... ] that render possible [ ... ] the child’s integration in his family’.<sup>81</sup> Meanwhile, in *L v The Netherlands*, the ECtHR found the lack of recognition and cohabitation between the parents to mean that a ‘family unit’ had not been formed, and the biological father–child connection itself was not sufficient to constitute ‘family life’.<sup>82</sup> However, the Court also said that the relationship in which the child had been born had been genuine, and several other factors demonstrated ties besides biological ones between the father and child, including auxiliary guardianship and regular visitation.<sup>83</sup> Thus, the father could rely on the protection of Article 8.

Interestingly, biological considerations seem to have similarly reduced importance when looking at divorced men. The case of *Nazarenko v Russia* concerned the complete exclusion of the applicant’s father from his child’s life after divorce, once it was established that he was not actually the biological father. Because of this, he lost all parental rights with regard to the child, as Russian law did not provide any form of legal relationship between them in the absence of a biological link. The ECtHR considered that the child had been born within a marriage union and the father had raised and cared for her with no doubts about his paternity. As a result, a close emotional bond between them had formed, amounting to family life within the meaning of Article 8(1), and not negated by the absence of a biological link.<sup>84</sup> The ECtHR was concerned by the fact that the lack of a biological link had prevented a full BIC assessment under Russian law, and stated that the BIC in the sphere of contact rights could not truly be determined by a general legal assumption, instead requiring a fair balancing of the rights of all persons involved.<sup>85</sup> The Court stated that:

[Art 8] can be interpreted as imposing on member States an obligation to examine on a case-by-case basis whether it is in the child’s best interests to maintain contact with a person, whether biologically related or not, who has taken care of him or her for a sufficiently long period of time.<sup>86</sup>

The ECtHR’s finding of a violation of Article 8 in *Nazarenko* demonstrates a diminished role of biology in post-divorce child custody matters, at least in comparison to well-established care and commitment, similarly to how the factors are balanced with regards to unmarried fathers.

<sup>78</sup> *Ibid.*, 88.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Keegan v Ireland* (n 39) [45].

<sup>81</sup> *Marckx v Belgium* (n 33) [31].

<sup>82</sup> *L v The Netherlands* (n 34) [37].

<sup>83</sup> *Ibid.* [38].

<sup>84</sup> *Nazarenko v Russia* (2015) App. No. 39438/13 (ECtHR) [57]–[58].

<sup>85</sup> *Ibid.* [66].

<sup>86</sup> *Ibid.* [66].

### 3. Summarized observations

While the approach to unmarried fatherhood by the ECtHR has changed over time, the marriage union still holds a special place in the determination of legal fatherhood. Even so, characteristics of a ‘conventional’ father have increasingly been used separately from the marriage union in order to determine ‘family life’ under Article 8 ECHR. Three factors are essential in this regard: (i) characteristics of the relationship between the unmarried father and mother, (ii) the relationship between the father and the child, including a ‘potential relationship’, and (iii) the intentionality and commitment of the father to participate in the care of the child. Biology is also a relevant factor – however, it seems that other considerations are required alongside a mere biological bond, although the biological bond contains independent significance as well. Overall, the point of the aforementioned factors is their effort to ‘mimic’ qualities of fatherhood generally associated with married fathers, where commitment is ‘built in’ to the contractual nature of the marriage union. In a societal climate where cohabitation and childbirth outside of marriage are becoming more common, the ECtHR is trying to expand the scope of Article 8 to find ways to apply the rights conferred by marriage to unmarried parents. However, this approach has limitations, as will be discussed below.

## IV. HUMAN RIGHTS ISSUES SURROUNDING UNMARRIED FATHERHOOD

### 1. Establishing a breach of Article 8 ECHR for unmarried fathers

After establishing a right under Article 8, an applicant must then establish a breach of that right. Article 8 imposes an obligation on States to respect the ‘mutual enjoyment by parent and child of each other’s company’,<sup>87</sup> which the ECtHR has described as a ‘fundamental element of family life’.<sup>88</sup> Any State action in the public or private sphere which prevents or hinders the parent and child from exercising this right, such as refusing an order for a parent to spend time or have contact with their child, or taking a child into State care, constitutes a violation of Article 8(1).<sup>89</sup>

Article 8 also imposes positive obligations,<sup>90</sup> meaning that States must take specific actions to safeguard the right. One of these is the obligation to give legal recognition to family ties,<sup>91</sup> which refers to affiliation and means that the recognition must be established in legislation without the need of a parent to take legal proceedings to obtain it.<sup>92</sup> Another obligation is to preserve family life.<sup>93</sup> The essential aspect of these positive obligations is to ensure the integration of a child into his or her family.<sup>94</sup> However, it should be borne in mind that the positive obligations resulting from Article 8 are subject to a wide margin of appreciation, and its extent and requirements may differ on a case-by-case basis.<sup>95</sup> For example, while in *Johnston and Others* the ECtHR advocated a ‘wide margin of appreciation’ with regards to

<sup>87</sup> *KA v Finland* (2003) App. No. 27751/95 (ECtHR) [92]; *Venema v Netherlands* (2003) App. No. 35731/97 (ECtHR) [71]; Harris-Short, Miles and George (n 32) 560.

<sup>88</sup> *KA v Finland* (n 87) [92]; *Venema v Netherlands* (n 87) [71]; Harris-Short, Miles and George (n 32) 560.

<sup>89</sup> *KA v Finland* (n 87) [45]; Harris-Short, Miles and George (n 32) 560.

<sup>90</sup> *Marckx v Belgium* (n 33) [31]; *Diamante and Pellicioni v San Marino* (2012) App. No. 32250/08 (ECtHR) [173]; A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, 2004), p. 127; J.F. Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights* (Council of Europe, 2007), p. 36.

<sup>91</sup> *Marckx v Belgium* (n 33) [31], [36]; Mowbray (n 90) 151; Akandji-Kombe (n 90) 41.

<sup>92</sup> Akandji-Kombe (n 90) 41.

<sup>93</sup> *Pla and Puncernau v Andorra* (2004) App. No. 69498/01 (ECtHR) [45]–[46]; Akandji-Kombe (n 90) 41.

<sup>94</sup> *Marckx v Belgium* (n 33) [31]; Harris-Short, Miles and George (n 32) 560.

<sup>95</sup> *Sheffield and Horsham v United Kingdom* (1998) App Nos. 22985/93, 23390/94 (ECtHR) [52]; Mowbray (n 90) 153; Akandji-Kombe (n 90) 36.

recognition of paternal affiliation,<sup>96</sup> in *Kroon and Others* it referred to a ‘certain margin of appreciation’,<sup>97</sup> with a seemingly reduced amount of discretion.<sup>98</sup>

The positive obligations deriving from Article 8 are not applied to all family relationships uniformly by the ECtHR.<sup>99</sup> A relationship between an adoptive father and the mother appears to influence the application of positive obligations – if a new man has a relationship with the mother and the biological father has not expressed sufficient commitment to the child, Article 8 seems to only impose negative obligations.<sup>100</sup>

## 2. Difficulties for unmarried fathers to protect their custody and access rights

### A. Consent of the mother

An issue particular to unmarried fathers in European human rights jurisprudence is the role of the mother’s consent in custody matters. This has been a prevalent element in several cases before the ECtHR.

In Germany, automatic custody is granted to the unmarried mother of a child born out of wedlock, in order to guarantee a legal guardian and representative for the child from birth. However, this is not the case with unmarried fathers. Until legal reforms, even their ability to request for custody or access rights used to be dependent on the consent of the mother. In 2003, two important cases regarding this situation were decided by the ECtHR. In *Sahin v Germany*, the practice was found discriminatory against unmarried fathers. National authorities had justified the requirement of consent from the mother to not grant the unmarried father parental rights, and had furthermore argued that ‘in the past, fathers of children born out of wedlock had frequently shown no interest in their children’.<sup>101</sup> The ECtHR was not convinced by this argument, and found a violation of Article 14 in conjunction with (coj) Article 8, as unmarried fathers were being treated differently than divorced fathers, who did receive automatic contact rights and were thus more favourably treated.<sup>102</sup> *Sommerfeld v Germany* was a case with similar facts, with the addition of a stepfather. Factors such as the child’s established relationship with the new step-father, the child’s refusal of contact with the biological father,<sup>103</sup> and decisively, the lack of consent from the mother was used to deny the father access rights. The ECtHR found the latter, in particular, to place a heavier burden on the unmarried father than it would have a divorced father, which constituted a violation of Article 14 coj Article 8.<sup>104</sup>

In 2010, another significant ECtHR case dealt with the issue. In *Zaunegger v Germany*, the unmarried father of a child born out of wedlock had been denied the opportunity to apply for joint custody without the consent of the mother. As with *Sahin*, this made his position weaker than if he had been a divorced father. Consistent with *Sahin*, the Court found this to be a violation of Article 14 coj Article 8, stating that the denial of joint custody was disproportional, since the father had taken good care of the child,<sup>105</sup> once again demonstrating the strength of intentionality and commitment in the determination of the rights of unmarried fathers. The Court also did not agree with the idea that the consent of the mother would be needed for joint custody to be in the BIC.<sup>106</sup> However, it should be noted that a Dissenting

<sup>96</sup> *Johnston and Others v Ireland* (n 65) [55], [75].

<sup>97</sup> *Kroon and Others v The Netherlands* (1994) App. No. 18535/91 (ECtHR) [31].

<sup>98</sup> Mowbray (n 90) 153.

<sup>99</sup> U. Kinkelly, ‘Protecting Children’s Rights under the ECHR: The Role of Positive Obligations’ (2010) 61 (3) *Northern Ireland Legal Quarterly* 245–262.

<sup>100</sup> *Margarita* (n 4) 90.

<sup>101</sup> *Sahin v Germany* (2003) App. No. 30943/96 (ECtHR) [83].

<sup>102</sup> *Ibid* [88], [92], [94].

<sup>103</sup> *Sommerfeld v Germany* (2003) App. No. 31871/96 (ECtHR) [72]–[75].

<sup>104</sup> *Ibid* [91]–[94].

<sup>105</sup> *Zaunegger v Germany* (n 27) [57].

<sup>106</sup> *Ibid* [43].

Opinion was issued, emphasizing that, without a previous marriage or joint declaration, the unmarried father cannot be said to have equivalent rights to divorced fathers, as the rights of the latter flow from the previous commitment, in which the consent of the mother through the marital bond or joint declaration is also required to give birth to the father's parental rights.<sup>107</sup>

Before the aforementioned cases, the father could not even rely on judicial review in Germany without the mother's consent, even if based on the well-being of the child.<sup>108</sup> In 2010, the German Supreme Court deemed this unconstitutional, as it disproportionately interfered with the rights of unmarried fathers and made them subsidiary to those of mothers, while ignoring the BIC.<sup>109</sup> The Supreme Court consequently stated that parental responsibility should be awarded on request of a parent, without need for consent of the other, if it corresponds to the child's well-being.<sup>110</sup>

The Austrian Civil Code contained rules similar to the aforementioned German law before legal reforms in 2013.<sup>111</sup> The same issues were addressed by the ECtHR in *Sporer v Austria*, a case where a child had been born out of wedlock to a mother and father living in the same building. Once the mother moved out, the father requested sole custody, arguing that the mother was not capable of taking care of the child. The mother opposed the transfer of custody, and the end result was that the mother retained sole custody, with the father having the right of access – the result of Section 166 of the Austrian Civil Code, which guaranteed the mother of a child born out of wedlock sole custody unless the BIC were at risk. The ECtHR noted that the Austrian courts did not have even the possibility of assessing whether joint custody would have been in the BIC since the law required agreement from the mother,<sup>112</sup> effectively blocking any kind of custody evaluation. Furthermore, the Austrian government had not submitted sufficient reasons to justify why the situation of the father should allow for less judicial scrutiny than with divorced fathers.<sup>113</sup> The ECtHR thus found a difference in treatment – not only between mothers and fathers but between unmarried and divorced fathers.<sup>114</sup>

While the ECtHR found the treatment of unmarried mothers and fathers differential under the Austrian Civil Code, it did not, in principle, object to laws that grant automatic sole custody of children born out of wedlock to the mother, in the interests of giving the child a legal representative from birth.<sup>115</sup> The Court emphasized the importance of proportionality,<sup>116</sup> and also stated that:

[ ... ], very weighty reasons need to be put forward before a difference in treatment on the ground of sex or birth out of or within wedlock can be regarded as compatible with the Convention. The same is true for a difference in treatment of the father of a child born out of wedlock as compared with the father of a child born of a marriage-based relationship.<sup>117</sup>

<sup>107</sup> Ibid, Dissenting Opinion of Judge Schmitt [6].

<sup>108</sup> Bundesverfassungsgericht, 'Ausschluss Des Vaters Eines Nichteheleichen Kindes von Der Elterlichen Sorge Bei Zustimmungsverweigerung Der Mutter Verfassungswidrig [Exclusion of the father of a child born out of wedlock from parental custody if the mother refuses consent is unconstitutional]' (*Bundesverfassungsgericht*, 2010) <<http://www.bverfg.de/pressmitteilungen/bvg10-057.html>> accessed 2 December 2020.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> Rechtsinformationssystem des bundes, 'Bundesrecht Konsolidiert: Allgemeines Bürgerliches Gesetzbuch § 166, Tagesaktuelle Fassung [Federal Law Consolidated: General Civil Code § 166, Current Version]' (*Rechtsinformationssystem des bundes*, 2023) <<https://www.ris.bka.gv.at/NormDokument.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622&Artikel=&Paragraf=166&Anlage=&Uebergangsrecht=>> accessed 17 November 2023.

<sup>112</sup> *Sporer v Austria* (2011) App. No. 35637/03 (ECtHR) [80], [81].

<sup>113</sup> Ibid [89].

<sup>114</sup> Ibid [77]–[78].

<sup>115</sup> Ibid [85].

<sup>116</sup> Ibid [73].

<sup>117</sup> Ibid [75]; *Zaunegger v Germany* (n 27) [51].

Legal reforms were enacted for a similar situation in Greece as well in 2021. The ECtHR *Paparrigopoulos v Greece* concerned the same issue as *Zaunegger* and *Sporer*, with the father of a child born out of wedlock having been unable to exercise parental responsibility without the mother's consent. The ECtHR found that the domestic law led to differences in treatment between unmarried and divorced fathers, as the Hellenic Civil Code required agreement between the parents for a determination of paternity and parental responsibility for the unmarried father, regardless of what the BIC might be.<sup>118</sup> The ECtHR disagreed with the Greek government's assumption that a mother's bond with the child differed from that of a father,<sup>119</sup> indicating the Court's consideration that father-child relationships are as important as mother-child ones (of course, this differs from the fact that the legal position of unmarried fathers and mothers are not equal, as fatherhood cannot automatically be established without the marriage union<sup>120</sup>). The Court upheld the wide margin of appreciation in matters of parental responsibility, but did point out the European consensus that the BIC should be the basis for such decisions,<sup>121</sup> and as such its assessment should be provided for. Finally, a violation of Article 14 coj Article 8 was found due to a lack of proportionality between the denial of parental responsibility and the aim pursued, that being the protection of the BIC in matters of children born out of wedlock.<sup>122</sup> Thus, the Court reiterated that different treatment of mothers and fathers with regards to children born in or out of wedlock need sufficient reasoning to be compatible with the ECHR and must be proportional with the aim of protecting children.<sup>123</sup> In 2021, Article 1515 of the Hellenic Civil Code was amended to give courts the possibility of awarding parental responsibility to the father of a child born out of wedlock by his request, if the BIC require it, consequently removing the requirement of the mother's consent.<sup>124</sup> Together with the earlier reforms in Germany and Austria, this seems to demonstrate something of a shift in European family law regarding unmarried fathers.

### *B. Reliance on the BIC and non-discrimination*

Parental rights largely derive from the interests of children and are therefore heavily reliant on the BIC. While this is true with regard to both married and unmarried parents, unmarried fathers are particularly dependent on the BIC in order to enjoy the protection of Article 8 ECHR. This is because of the need to fulfil certain criteria (as discussed in Section III.1) to establish 'family life' in the absence of a marriage union. The significance of these criteria is strongly linked to the BIC, and the ECtHR considers the BIC a highly important factor in whether an unmarried father's parental rights can be legitimately restricted.

The BIC were a significant factor in *Zaunegger* – although the Court found the exclusion of an unmarried father from his biological child's life justifiable in certain situations,<sup>125</sup> it also stated that 'such an attitude is not a general feature of the relationship between unmarried fathers and their children',<sup>126</sup> and, in the end, it was the BIC that made the Court support joint custody in the case.<sup>127</sup> In *Schneider*, the importance of taking the BIC into account was reaffirmed,<sup>128</sup> and the Court found that because family situations vary

<sup>118</sup> *Paparrigopoulos v Greece* (2022) App. No. 61657/16 (ECtHR) [36]–[38].

<sup>119</sup> *Ibid* [39].

<sup>120</sup> *Zaunegger v Germany* (n 27) [48].

<sup>121</sup> *Paparrigopoulos v Greece* (n 118) [40].

<sup>122</sup> *Ibid* [42]–[43].

<sup>123</sup> *Koukoulis* (n 40).

<sup>124</sup> *Ibid*.

<sup>125</sup> *Zaunegger v Germany* (n 27) [55]–[56].

<sup>126</sup> *Ibid* [56].

<sup>127</sup> *Ibid* [61], [63].

<sup>128</sup> *Schneider v Germany* (n 26) [108].

considerably, refusing contact rights to the unmarried father without assessing the individual circumstances and the BIC constituted a violation of Article 8.<sup>129</sup>

Although reliance on the BIC is essential for unmarried fathers, an independent avenue of legal protection for them does exist in the form of Article 14 ECHR, which seeks to protect individuals from discrimination. In *Zaunegger*, Article 14 was invoked with the argument that there was a difference in treatment between unmarried mothers and fathers, and between divorced and unmarried fathers.<sup>130</sup> As held by the ECtHR,

[ ... ] a difference in treatment is discriminatory if it has no objective and reasonable justification, [ ... ] does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized.<sup>131</sup>

This is a significant avenue of legal protection for unmarried fathers since the Court has additionally held that ‘very weighty reasons’ are needed to justify differences in treatment ‘on the ground of sex or birth out of or within wedlock’.<sup>132</sup> In this context, proportionality is key: in *Zaunegger*, the lack of proportionality was a major reason as to why a violation of Article 14 coj Article 8 was found.<sup>133</sup> Meanwhile, in *Sommerfeld v Germany*, an unmarried father with a child born out of wedlock had cohabited with the mother until separation, and was denied contact by the mother. The father’s application for the right of access was denied on the basis of the child having established a relationship with the new stepfather. Due to the involvement and hearing of the child in question, who refused contact, the ECtHR found the reasons for refusing access justified.<sup>134</sup> With regards to enforced contact, German courts had tested the situation as they would have with a divorced father, explicitly referring to the BIC. However, they had given decisive weight to the lack of consent from the mother, placing a heavier burden on the father in question than a divorced father, which constituted a violation of Article 14 coj Article 8.<sup>135</sup>

Although unmarried fathers are reliant on the BIC, their rights under Article 8 include involvement in the decision-making. In *Elsholz v Germany*, the unmarried father had cohabited with the mother for a while and spent time with the child post-separation, but after the child began refusing contact, his access rights were denied on the predication that it would not serve the BIC. National courts justified the decision by the strained relationship of the parents, stating that enforcing contact against the mother’s consent would have detrimental effects on the child. The reasons for the strain were deemed irrelevant, and only the present situation was considered. While the decision of the national courts sought to protect the ‘health or morals’ and the ‘rights and freedoms’ of the child, the Court found that the father had not been adequately included in the proceedings, resulting in a violation of Article 8.<sup>136</sup> The fact that the national courts’ reasoning had been based primarily on the BIC, however, meant that the ECtHR did not find a violation of Article 14 coj Article 8, as a divorced father would likely not have been treated more favourably in the particular circumstances.<sup>137</sup>

From a non-discrimination perspective, the most problematic element is the difference in automatic custody despite the fact that unmarried parenthood is a matter of choice with regard to both the mother and father. However, it does need to be remembered that, while

<sup>129</sup> Ibid [100].

<sup>130</sup> *Zaunegger v Germany* (n 27) [43].

<sup>131</sup> Ibid [49].

<sup>132</sup> *Sporer v Austria* (n 112) [75]; *Zaunegger v Germany* (n 27) [51].

<sup>133</sup> *Zaunegger v Germany* (n 27) [63]–[64].

<sup>134</sup> *Sommerfeld v Germany* (n 103) [72]–[75].

<sup>135</sup> Ibid [91]–[94].

<sup>136</sup> *Elsholz v Germany* (2000) App. No. 25735/94 (ECtHR) [52]–[53].

<sup>137</sup> Ibid [60].



issues of non-discrimination are important, the ultimate driver of the analysis should still be the BIC, and the right of the child to be cared for by both of their parents. In the case of automatic custody being granted to the unmarried mother, the reasoning is not (or *should* not be) the ‘maternal presumption’, but rather the child’s interest in having a legal representative and at least one guardian.

### 3. Differentiation of divorced and unmarried fathers

As previously mentioned, several factors differentiate unmarried fathers from divorced fathers in European human rights law. While the differences are demonstrable, the question remains what their rationale is and, consequently, whether the two categories of fathers should be considered equivalent to a greater degree than in the current human rights practice.

#### *A. Legal significance of marriage*

As previously discussed, the ECtHR does appear to ‘prioritize’ the marital family in some ways,<sup>138</sup> considering it to be within the scope of Article 8 by default.<sup>139</sup> This approach follows the admittedly fundamental differences between married and unmarried parenthood. With regard to married parents, the foundation of legal joint custody over their children lies in ‘joint declarations manifesting themselves in the marital vows’.<sup>140</sup> Thus, even divorced fathers differ from unmarried fathers in that their parental rights serve as a continuation of the legal position initially established by the manifest commitment by both parents in the form of the marriage union.<sup>141</sup> This is reinforced by the fact that the husband of the child’s mother is legally presumed to be the father.<sup>142</sup> Unmarried couples can sometimes compensate for this by means of a joint declaration for joint custody,<sup>143</sup> which essentially constitutes an effort by legislators to equate or equalize married and unmarried parenthood by introducing an element of commitment to them that is typically reserved for marriage.<sup>144</sup>

As revealed in *Zaunegger* and *Sahin*, while the marriage union is still considered to warrant ‘stronger’ overall protection of Article 8, there is also a desire to bring greater equality between divorced and unmarried fathers, and Article 14 has been an avenue for this. Although invoking Article 14 may sometimes offer unmarried fathers some recourse, especially in the context of the mother’s consent in custody matters, the privileges exclusive to marriage have been explicitly stated to not be discriminatory to others,<sup>145</sup> meaning that the difference in treatment of married, divorced and unmarried fathers is ultimately considered justified, even if the specific circumstances may call for different responses with regards to unmarried fathers. The contractual nature of marriage confers rights and obligations to the spouses,<sup>146</sup> which is why intentionality and commitment are accounted for in such settings.

While the ECtHR has expanded rights traditionally conferred by marriage to situations outside of it, those situations are generally considered in light of how they resemble or otherwise reproduce characteristics of the traditional marital family.<sup>147</sup> As observed elsewhere, this approach is based on the significance of the married family as the foundational element of society, and many of the factors that accompany the contractual nature of the marriage

<sup>138</sup> O’Mahony (n 44); Choudhry and Herring (n 44) 167; White, Ovey and Jacobs (n 44) 337.

<sup>139</sup> *Abdulaziz, Cabales & Balkandali v United Kingdom* (n 45) [62]; *Berrehab v The Netherlands* (n 45) [21].

<sup>140</sup> Koukoulis (n 40).

<sup>141</sup> *Ibid.*

<sup>142</sup> *Kautzor v Germany* (n 74) [68].

<sup>143</sup> Koukoulis (n 40).

<sup>144</sup> *Zaunegger v Germany* (n 27) [53].

<sup>145</sup> *Burden v United Kingdom* (n 46) [63]; *Van der Heijden v The Netherlands* (n 46) [69].

<sup>146</sup> *Van der Heijden v The Netherlands* (n 46) [69].

<sup>147</sup> *Margarita* (n 4) 107; *Collier and Sheldon* (n 43) 203.

union, which, by its very nature, includes the factors that unmarried fathers must demonstrate individually.

### B. Circumstantial variation

Another problem of unmarried parenthood from a legal perspective is the large degree of variety between relationship arrangements outside of marriage. The situations of children in these arrangements likewise vary considerably. Unmarried parenthood ranges from situations where the father is unknown and/or absent, to arrangements resembling marriage in all but the official agreement and recognition.<sup>148</sup> In situations where the parents are unmarried at the time of childbirth, diminished father involvement is more likely than in a marriage setting.<sup>149</sup> This may have something to do with demographic factors, as unmarried fathers tend to be younger, less educated, and less wealthy than divorced fathers on average.<sup>150</sup> Their relationships with the mother are also usually shorter in duration.<sup>151</sup>

The ECtHR has considered automatic parental responsibility to mothers compatible with European human rights law, even when it constitutes a difference in treatment between mothers and fathers:<sup>152</sup> the certainty it can offer children, regardless of the type of family they were born in. Consequently, it may justify an automatic rejection of parental responsibility to fathers.<sup>153</sup> The variance between family arrangements outside of marriage makes it difficult to determine a consistent rule that would suit all situations, and the father's role in such settings is particularly susceptible to variety and change. However, the ECtHR does not consider this something to be assumed,<sup>154</sup> and even unmarried fathers should at least have the opportunity to apply for parental responsibility.

### C. Involvement and commitment

Proving the degree of father involvement and commitment is problematic with regards to cohabitations. In the absence of marriage or joint declaration, it may be a reasonable assumption for judges that the parents either did not intend for joint custody or have not shown sufficient levels of commitment for it.<sup>155</sup> Because of the nature of cohabiting relationships, the 'feel' of fatherhood may already be compromised,<sup>156</sup> which then affects the outcomes of separation. Although the ECtHR is explicitly willing to set aside stereotypes regarding unmarried fathers, acknowledging their potential interest in their children and the importance of their care to the BIC,<sup>157</sup> it is also the case that unmarried mothers tend to be more resistant to father involvement in the life of their child than divorced mothers,<sup>158</sup> which creates challenging legal scenarios that pit the rights of mothers and fathers against each other.

<sup>148</sup> *Zaunegger v Germany* (n 27) [54].

<sup>149</sup> J. Kelly, 'Paternal Involvement and Child and Adolescent Adjustment After Separation and Divorce: Current Research and Implications for Policy and Practice' (2014) 2 (1) *International Family Law, Policy and Practice* 5–23; P. Amato, C. Meyers and R. Emery, 'Changes in Non-Resident Father Contact between 1976 and 2002' (2009) 58 (1) *Family Relations* 41–53.

<sup>150</sup> M. Kalland et al., 'Married and Cohabiting Finnish First-Time Parents: Differences in Wellbeing, Social Support and Infant Health' (2022) 11 (4) *Social Sciences* 181–194; J. Su and A. Emory, 'Repackaging Fatherhood: Father Engagement and Cooperative Coparenting in Mid-Pregnancy Marriages and Cohabitations' (2020) 82 *Journal of Marriage and Family* 1625–1636; Kelly (n 149); Insabella, Williams and Pruett (n 23).

<sup>151</sup> Kelly (n 149); Insabella, Williams and Pruett (n 23).

<sup>152</sup> *Zaunegger v Germany* (n 27) [55].

<sup>153</sup> *Ibid* [56].

<sup>154</sup> *Ibid* [56].

<sup>155</sup> *Ibid*, Dissenting Opinion of Judge Schmit [6].

<sup>156</sup> Insabella, Williams and Pruett (n 23).

<sup>157</sup> Margaria (n 4) 106.

<sup>158</sup> Kelly (n 149); Insabella, Williams and Pruett (n 23).

The stronger legal position of mothers in the context of children born out of wedlock is a result of their manifest biological connection to the child, as well as the fact that they often *de facto* live with and raise the child in such a scenario. While this is a generalization, it is also true that the level of commitment demonstrated by marriage cannot be automatically assumed in cases of unmarried parenthood, and is particularly difficult with regards to the father.

#### 4. Summarized observations

Although Article 8 ECHR imposes positive obligations on States regarding the facilitation of contact between children and their parents, it is also obvious that unmarried fatherhood falls into a difficult legal category, both from the perspective of States and the fathers themselves. Unmarried fathers face great difficulties in protecting their custody and access rights, with some States having required the consent of the mother (though this appears to be changing), and any claims of the unmarried fathers falling under the strict scrutiny of the BIC. The best recourse for unmarried fathers in the protection of their rights is Article 14, which has sometimes brought results before the ECtHR.

Although the legal difficulties faced by unmarried fathers carry problematic elements, it is equally clear that the basis for these considerations lies in the underlying societal facts and the legitimate interest in upholding the important functions of marriage. While the contractual nature and commitment behind the marriage union bring together the different elements of fatherhood and link fathers to their children, unmarried fathers cannot be assumed to automatically fulfil the same criteria, resulting in their need to demonstrate them on a separate basis. The wide degree of variety between unmarried relationships makes a blanket comparison between them and marriages impossible and unintuitive, meaning that equating the two is not legally practical, especially due to the strict requirements of the BIC.

### V. CONCLUSION

Due to societal changes in family formation in Europe, the issue of unmarried fathers has become increasingly relevant for European human rights law. Decision-makers and courts have struggled to adapt to these rapid changes, leaving unmarried fathers in ambiguous legal categories. From the point of view of the BIC, the involvement of fathers in the upbringing of children is essential, but unmarried fatherhood also remains problematic from a legal perspective.

Although fatherhood is strongly connected to marriage, it has begun to be increasingly seen as separate from the marital union in European human rights jurisprudence. In a societal climate where cohabitation and childbirth outside of marriage are becoming more common, the ECtHR is trying to expand the scope of Article 8 ECHR to find ways to apply the rights conferred by marriage to unmarried parents. This is seen particularly in the way the Court has assessed unmarried fathers by the individual criteria that are readily assumed in a marriage setting. The most significant of these are: (i) the relationship between the unmarried father and mother, (ii) the relationship between the father and the child, including a 'potential' relationship, and (iii) the intentionality and commitment of the father to participate in the care of the child. Additionally, the biological connection matters, although it mainly serves a supplemental role.

The requirement for unmarried fathers to prove that their paternal characteristics sufficiently align with the concept of the married father makes the protection of their custody and access rights more difficult than with divorced fathers. Some of the unique challenges they face include their reliance on the consent of the mother to apply for custody and access

rights in some legal systems, and their reliance on the BIC. While legislation and practice concerning the need for the mother's consent has been adapted in countries like Germany and Greece to make it easier for unmarried fathers to gain custody and access rights, there is no doubt that the BIC inevitably make unmarried fathers subject to increased scrutiny, even compared to divorced fathers. Article 14 coj Article 8 ECHR has been used as an avenue of protection for unmarried fathers – however, though the non-discrimination factor has been a major driver in this regard, and carries importance, it should never override the BIC, so as to take away its weight.

Furthermore, the amount of scrutiny unmarried fathers face is at least somewhat warranted, given that they cannot rely on the previously established commitment that marriage demonstrates in the legal context. Numerous differences between unmarried and divorced fathers make the equalizing of their positions under Article 8 ECHR unintuitive. The legal significance of marriage reflects biological and societal realities and serves a powerful legal function in regulating parenthood. It also sets a 'standard' with regard to the BIC, as the greater stability of the marriage union compared to cohabitations can generally be said to serve the BIC. Variance among different arrangements among unmarried parents is also legally problematic, as these range from completely uninvolved fathers to those who practically resemble married fathers in their commitment and involvement. This makes standardized approaches to unmarried fatherhood extremely difficult, and even impossible. The marriage union, in this respect, allows for more predictability through the formalizing of relationships and the inclusion of commitment as part of its contractual nature. The commitment of the father is key in the aforementioned analysis and serves an essential role in the context of the BIC.

While the practice of the law must adapt to the changing society, it is not – nor should it be – obliged to conform to it without discretion. The discussion about unmarried fatherhood must be rooted in the BIC, the welfare of children, and the child's right to be cared for by both parents. The difficult position of unmarried fathers does raise questions of equality (with fathers and mothers facing different issues in that regard), and especially the child's right to both parents, which is typically beneficial for their development. However, the analysis in this article reveals problematic elements with regard to unmarried fatherhood in the context of Article 8 ECHR, as well as justifiable reasons for why unmarried and divorced fathers are regarded so differently before human rights law. Ultimately, the reasons for differences in the human rights protection of divorced and unmarried fathers come from a place of practicality, societal and biological realities, and support of the institution of marriage.