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PUTATIVE FATHERS IN ENGLISH LAW

A Human Rights Perspective

Carmen Draghici

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1. INTRODUCTION

Although English family law has become increasingly sensitive to human rights issues,[1] putative fathers' right to respect for family life with their biological children remains insufficiently protected.[2] This observation rests on the law's approach to several key aspects of family life: first, the hurdles to the recognition of paternity, which is a prerequisite for the exercise of parental rights; in particular, the judicial treatment of applications for a declaration of parentage, and the issue of whether genetic tests should uncover biological truth; second, the failure to assign parental responsibility to fathers who re-register the birth unilaterally, relying on the declaration of parentage, by contrast with the automatic acquisition of parental responsibility following registration with the mother's consent; finally, the absence of a statutory duty for the mother to

1 See, generally, S. Choudhry and J. Herring, *European Human Rights and Family Law*, Hart, Oxford 2010.

2 A putative father is 'a person thought to be the father albeit paternity has not been formally confirmed': C. Bridge, 'Adoption: Paternity' [2020] (Jul) *Family Law* 826, 827.

identify the putative father, and for local authorities to make inquiries when mothers request the confidential placement of babies for adoption without notice being given to the natural fathers. I will argue that, in all these respects, the law interferes with putative fathers' enjoyment of their rights in a manner that cannot be deemed 'necessary in a democratic society … for the protection of the rights and freedoms of others', within the meaning of Article 8 of the European Convention on Human Rights (ECHR).

2. MEANING OF 'RESPECT FOR FAMILY LIFE' AND THE IMPORTANCE OF GENETIC LINKS

According to well-established Strasbourg jurisprudence,[3] Article 8 'makes no distinction between the "legitimate" and the "illegitimate" family',[4] '[t]he family life of the parents with their children is not absolutely linked with marriage',[5] and '[t]here … exists between the child and his parents a bond amounting to family life even if at the time of his or her birth the parents are no longer co-habiting or if their relationship has then ended'.[6] Significantly, Article 8 extends to the relationship between a father and his biological child even in the absence of effective ties, which is frequently the consequence of the birth occurring after the breakdown of the parents' relationship; in fact, the European Court of Human Rights (ECtHR) has recognised that 'potential' family life is also entitled to protection:

> Intended family life may, exceptionally, fall within the ambit of Article 8, notably in cases in which *the fact that family life has not yet fully been established was not attributable to the applicant*. In particular, 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*.[7]

As regards the scope of the ECHR obligations, Article 8 requires states to act in a manner calculated to allow 'the normal development of the natural family ties';[8] to that end, 'legal safeguards must be created that render possible as from the

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3 See C. Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law: 'Living Instrument' or Extinguished Sovereignty?*, Hart, Oxford 2017, pp. 26–30, for a discussion of the array of family situations covered by Art. 8.

4 *Marckx v. Belgium*, no. 6833/74, 13 June 1979, §31.

5 *X. v. Germany*, no. 7770/77, 2 May 1978.

6 *Keegan v. Ireland*, no. 16969/90, 26 May 1994, §44.

7 *Tóth v. Hungary*, no. 48494/06, 12 February 2013, §27 (emphasis added).

8 *Johnston v. Ireland*, no. 9697/82, 18 December 1986, §74, consolidating *Marckx*, above n. 4, §31 in relation to both parents.

moment of birth the child's integration in his family'.[9] It is also well established that 'the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, even if the relationship between the parents has broken down'.[10] Laws permitting the placement of a child for adoption shortly after birth, without the father's knowledge, 'jeopardis[e] the proper development of [his] ties with the child' and 'set in motion a process which [i]s likely to prove to be irreversible' (the child having bonded with the prospective adopters); absent compelling child welfare reasons, this amounts to an unlawful interference with his family life.[11]

For the ECtHR, 'family life' is not engaged when there are no social ties between the putative father and the child, and the birth resulted from a casual relationship with no plans to found a family.[12] However, the decision to reject the putative father's request to establish his paternity interferes with his right to respect for his private life under Article 8, 'which encompasses important aspects of one's personal identity'.[13] A better view might be that, whenever proceedings concern the recognition (as opposed to the disavowal) of paternity, the 'family life' limb of Article 8 is also engaged. In fact, legal parenthood is the critical gateway to any measure of family life with the child; courts' refusal to order genetic tests deprives fathers of any opportunity to develop normal family ties and enjoy contact with the child. Moreover, even if the pregnancy was unplanned, the father's initiative to bring proceedings allowing him to contribute to the care of the child demonstrates 'intended family life', albeit after conception. Whether paternity proceedings concern private or family life, the interference requires justification under Article 8(2).

Domestic case law has also acknowledged the need to safeguard biological ties; indeed, it has gone further, by emphasising the importance of such ties even in cases of split motherhood, where the genetic mother is not the gestational/legal mother, by virtue of section 33 of the Human Fertilisation and Embryology Act (HFEA) 2008.[14] This effaces any differentiation between parents based on the mother's gestational bond. Moreover, the natural parent presumption, i.e. the fact that 'the rearing of a child by his or her biological parent can be expected

9 *Keegan*, above n. 6, §50.

10 *Elsholz v. Germany*, no. 25735/94, 13 July 2000, §43; see also *Eriksson v. Sweden*, no. 11373/85, 22 June 1989, §58 (in the context of child removal into State care).

11 *Keegan*, above n. 6, §55.

12 *Ahrens v. Germany*, no. 45071/09, 22 March 2012, §§58–59. The 'potential relationship' between parent and child appears to be contingent upon 'intended family life', i.e. planned pregnancy, which is often not the case, even with married couples.

13 ibid., §60; see also *Novotný v. Czech Republic*, no. 16314/13, 7 June 2018, §41.

14 *Re G (Children)* [2014] EWCA Civ 336, para. 52: the lower court 'failed to give weight to the fact that [the appellant] is the biological mother of the children'.

to be in the child's best interests',[15] is a deep-rooted principle in English law.[16] Courts have further recognised, in line with ECHR jurisprudence and Articles 7 and 9 of the UN Convention on the Rights of the Child (UNCRC), that 'contact with a parent is a fundamental right of a child, save in wholly exceptional circumstances', and that judges have 'a positive duty' to order contact 'despite the obduracy of the mother'.[17] Nevertheless, these principles are not fully reflected in the current regime for putative fathers created by statute and case law; the main elements of concern are discussed below.

3. THE JUDICIAL APPROACH TO DECLARATIONS OF PARENTAGE

In an age where DNA testing is widely available, and can ascertain parentage uncontrovertibly, the view that '[t]he father is too uncertain a figure for the law to take any cognizance of him'[18] ought to be firmly relegated to the past. Although the modern notion of 'parent' includes the father of a child born out of wedlock, and science can equalise the position of mothers and fathers as to the certainty of affiliation, the law does not adequately support putative fathers' efforts to establish paternity.

Admittedly, when hearing applications for a declaration of parentage under section 55A of the Family Law Act (FLA) 1986, and deciding whether to order DNA testing pursuant to section 20(1) of the Family Law Reform Act (FLRA) 1969, the welfare of the child is not the courts' paramount consideration,[19] and the rights of adults can be accommodated. The case law also suggests that, unless clearly detrimental to the child subject of the proceedings, DNA tests are ordered so as to uphold the child's own interest in knowing his or her genetic origins.[20] However, there are two potential obstacles to establishing legal fatherhood.

Firstly, courts sometimes prioritise the avoidance of disruption to the family unit formed by the child, the mother and her new partner. In *Re F (A Minor)*

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15 *Re G* [2006] UKHL 43, para. 2; see also paras. 3 and 44.

16 Only extreme circumstances may rebut that presumption: see, e.g. *Re R (Minors) (Custody)* [1986] 1 FLR 6, 11 (the father's criminal record and drink problem posed grave risks to the children).

17 *Re W (A Minor) (Contact)* [1994] 2 FLR 441, 447. See also *Re L (A Child: Contact: Domestic Violence)* [2000] 4 All ER 609, 637, citing the 'universal judicial recognition of the importance of contact to a child's development'.

18 *Re M (An Infant)* [1955] 2 All ER 911 (per Lord Denning), cited as the authority for defining a 'parent' in *R v. Secretary of State for the Home Department, ex parte Crew* [1982] Imm AR 94.

19 *Re H (A Minor) (Blood Tests: Parental Rights)* [1996] 2 FLR 65, 77.

20 *Re T (Paternity: Ordering Blood Tests)* [2001] 2 FLR 1190, 1197–98; *Re H (Paternity: Blood Test)* [1996] 2 FLR 65, 80.

(Blood Test: Parental Rights), the decision not to order tests cited, as justifications, the harm to the welfare of the family unit, and the risks to the mother's ability to care for the child if the putative father could assert claims to have a share in the child's upbringing.[21] This effectively sanctions the mother's disingenuous introduction of another man as the father, instead of restoring biological reality and recognising that other man as a stepfather/social parent.

Secondly, courts are prepared to uphold the child's objections to uncovering the biological truth, albeit the product of a situation created by the mother's deception, at the expense of the child's and father's rights to identity and family life. In *Re D (Paternity)*, while recognising that, in cases of disputed paternity, the truth should be known, the court decided that it was not in the child's best interests to press the issue at that time, given the child's resistance to it.[22] *MS v. RS and BT (Paternity)* has consolidated this approach, privileging the right of *Gillick*-competent children 'not to know' their paternity.[23]

This line of jurisprudence allows social relationships created by paternity fraud (or at least the mother's negligence) to trump biological reality and fathers' and children's Article 8 rights. It unjustly benefits mothers who prevent the natural father's access to the child, and register another man as the father, sending the message that it pays to face courts with a fait accompli. Moreover, since the children never had an opportunity to connect with their biological fathers, following children's views may deprive them of a meaningful relationship that they cannot value beforehand. It is unsatisfactory to conclude that '[t]here is *no cogent evidence* … that [the children's] views on testing are being influenced by their mother';[24] those views can be more subtly influenced, or a mere product of the attachment to the status quo. There are essential policy reasons against the law's bowing to the mother's preferences and putting its stamp of approval on the result of her deceit. In the same way that children's objections to being returned to the country of habitual residence under the Hague Convention on International Child Abduction 1980 are given little or no weight if they emanate from a mere desire to remain with the abducting parent,[25] in recognition, inter alia, of the importance of deterring abduction,[26] objections to DNA tests based on children's attachment to the carers they consider their relatives should not be decisive.

Eekelaar has argued that the unfairness arising from the interpretation of the welfare principle as requiring courts and other public bodies to give weight

21 [1993] 3 All ER 596, 601–02.
22 [2007] 2 FLR 26, 32–33.
23 [2020] EWFC 30 at paras. 92–98.
24 Ibid. at para. 91 (emphasis added).
25 *S v. S (Child Abduction) (Child's Views)* [1992] 2 FLR 492, 501.
26 *Re M (Abduction: Zimbabwe)* [2008] 1 FLR 251, para. 42.

exclusively to the child's interests is compounded by the application of the paramountcy principle to matters affecting the child indirectly (for example, relocation), as opposed to those affecting the child directly (for example, medical treatment).[27] There is yet a further risk: although courts have held that the decision whether to order tests does not concern the child's upbringing, and is not governed by the paramountcy principle, in practice the weight afforded to the child's welfare comes close to that standard. Problematically, the child's welfare is equated to the welfare of their family unit, or with the child's views.

Given the alternative legal mechanisms available to secure the position of the social father, for example a child arrangements order, and parental responsibility under section 12(2) of the Children Act (CA) 1989, maintaining a legal fiction of parenthood that entirely ousts the natural father from the child's life is neither 'necessary' in order to safeguard the child's interests nor proportionate to that aim.

4. PARENTAL RESPONSIBILITY: THE LESSER EFFECT OF COURT-APPROVED REGISTRATION ON THE BIRTH CERTIFICATE

The law's treatment of natural fathers as second-class parents is further evidenced by the different effects of registration on the birth certificate, depending on whether it occurs with the mother's consent, under section 10(1) of the Births and Deaths Registration Act (BDRA) 1953, or by virtue of section 14A of that Act, following paternity tests. While registration agreed with the mother confers parental responsibility, unilateral re-registration based on a declaration of parentage does not. This is the unambiguous result of section 4(1)(a) CA 1989, which lists only joint consensual registration by unmarried parents as an enactment conferring parental responsibility, and this was confirmed in *M v. F and another*.[28]

The rationale for treating registration pursuant to section 14A BDRA 1953 differently is mystifying (and somewhat ironic, considering that joint registration does not require genetic proof, whereas court-approved registration verifies parentage). The lesser effect of unilateral re-registration is inconsistent with the criteria governing applications for parental responsibility under section 4(1)(c) CA 1989, as framed in *Re H (Minors) (Local Authority: Parental Rights) (No. 3)*: 'the degree of commitment which the father has shown towards the child'[29] is demonstrated by the institution of proceedings allowing him to

27 J. Eekelaar, *Family Law and Personal Life*, 2nd ed., OUP, Oxford 2017, pp. 57–60.
28 [2013] EWHC 1901 (Fam), para. 31.
29 [1991] 2 WLR 763, 768.

play a part in the child's life; as to the 'reasons of the father for applying for the order',[30] seeking access to the child is a legitimate reason. The lack of previous contact does not preclude an order under section 4(1)(c) CA 1989, especially if caused by the mother's actions.[31] As acknowledged in *Re D (Lesbian Mothers and Known Father)*, the reality of biological parenthood is, in itself, a reason to grant parental responsibility,[32] and 'it is not appropriate to refuse to grant it because of a feared misuse which should more properly be controlled by s. 8 orders'.[33] Indeed, applications for parental responsibility normally fail in extreme circumstances.[34] Moreover, if the father obtained a declaration of parentage, the court, using its discretion to order tests, will have already determined that his involvement in the child's life poses no threat to the child or the mother.

The different legal effects of registration under sections 10(1) and 14A BDRA 1953 betoken the law's unuttered prejudice against unmarried fathers. The only difference between the two routes to establishing parenthood is the mother's willingness to accept the father's input in the child's life, which is not a logically connected justification, insofar as it depends on the dynamics of the adults' relationship rather than objective child welfare criteria. This distinction operates a discriminatory gender-based hierarchy between parents: the suitability, as carers, of fathers who, having sought a declaration of parentage, have demonstrated commitment and readiness to contribute to the children's upkeep, does not invite greater suspicion. The law also sends a problematic message by requiring the natural father (but not the natural mother) to undertake the additional hurdle of bringing proceedings under section 4(1)(c) CA 1989 in circumstances where *pater certus est*. This double standard can have significant practical disadvantages for the father, especially if he only becomes aware of the fact that formal registration does not confer parental authority after a traumatic event, such as the child's removal from the jurisdiction.

The general rules on the acquisition of parental responsibility have been criticised for similarly unverified assumptions. Clifton has aptly queried the 'merit test' set only for unmarried fathers, especially against the background of over 40% of births in the UK taking place outside of marriage, since the start

30 Ibid.

31 See, however, *Re J (Parental Responsibility)* [1999] 1 FLR 784, 789–90 (the father was a stranger to the child, aged 12 at the time of the application).

32 [2006] EWHC 2 (Fam), para. 89: 'I am considerably influenced by the reality that Mr B *is* D's father. … that aspect of nature cannot be overcome.'

33 Ibid.

34 See, e.g. *Re T (Minor) (Parental Responsibility)* [1993] 2 FLR 450, 456 ('taking the child at a very young age away from her primary caretaker … was cruel and callous behaviour in respect of a young child, with no thought for her welfare'); *Re H (Parental Responsibility)* [1998] 1 FLR 855, 860 (due to his cruel and sadistic behaviour, deliberately injuring the son, his lack of remorse and the risk posed to his son, the father 'was not fit to have parental responsibility').

of the millennium:[35] 'A minority of unmarried fathers are unlikely to become responsible parents. But the same is true for some mothers and married fathers who have parental responsibility for which they were never tested for suitability'.[36] He also pointed out that the 'characterisation of the "mass" of unmarried fathers as unsuited for parenthood, potentially meddlesome and marginal', which underlies the opposition to their automatic parental responsibility, is not borne out by empirical research.[37]

The ECtHR has accepted that the difference in treatment between mothers and married fathers, on the one hand, and unmarried fathers, on the other, is objectively justified in that 'the relationship between unmarried fathers and their children varies from ignorance and indifference to a close stable relationship'.[38] However, the situation of fathers having successfully applied for a declaration of parentage and re-registered the birth is neither one of ignorance nor indifference. Where the child was the product of rape or incest, the section 55A FLA 1986 application is unlikely to be granted. Those proceedings act as a sufficient filter for socially objectionable fatherhood; further obstacles to unmarried fathers' acquisition of parental responsibility are not necessary. If the law bestowed automatic parental responsibility on all parents having proved genetic affiliation, it would remain open to the mother to oppose the making of a declaration of parentage, or to seek the revocation of the father's parental responsibility in cases warranting it.

The proportionality of the interference with the father's rights is further called into question by the availability of statutory mechanisms to prevent frivolous section 8 CA 1989 applications, such as restrictions on filing further applications without leave of the court under section 91(14) CA 1989. Consequently, the fact that registration under section 14A BDRA 1953 does not confer parental responsibility goes beyond the minimum necessary interference, as required by Article 8(2) ECHR. It also constitutes unjustified discrimination contrary to Article 8 read in conjunction with Article 14: parental responsibility is a means through which family life is protected, and should not be withheld from one category of parents without compelling reasons.

Eekelaar has suggested that registration 'should be merely a recording exercise … and not a mode of conferring legal rights'.[39] Indeed, the distinction between the results of sections 10(1) and 14A BDRA 1953 is even less defensible: the scheme conditions parental responsibility not just upon registration, but

35 J. Clifton, 'The Long Road to Universal Parental Responsibility: Some Implications from Research into Marginal Fathers' (2014) 44 (6) *Family Law* 858.

36 Ibid., 861.

37 Ibid.

38 *B v. United* Kingdom, no. 39067/97, 14 September 1999.

39 J. Eekelaar, 'Rethinking Parental Responsibility' (2001) 31 *Family Law* 426, 430.

upon registration vetted by the mother, to the exclusion of registration through a court process demonstrating the father's commitment and sifting out cases of incest, rape or violent history.

5. THE APPROACH TO PUTATIVE FATHERS' CONSULTATION ON A PROPOSED ADOPTION

One area of great vulnerability for putative fathers is the involuntary loss of the chance to establish paternity if the mother decides to place the child for adoption secretively, soon after the birth. Section 19 of the Adoption and Children Act (ACA) 2002 requires only the consent of parents with parental responsibility to the placement of a child for adoption. If the mother identifies the father, he is normally given notice of the proceedings under the Family Procedure Rules Practice Direction 12A, and enabled to apply to become a party.[40] There is also scope, under section 1(4)(f) ACA 2002, for courts to consider the 'wishes and feelings' of the child's relatives, and their 'ability and willingness … to provide the child with a secure environment'.

These mitigations do not, however, assist unregistered fathers whom the mothers refuse to identify, following an acrimonious separation, or because the child was the product of an extramarital or otherwise socially inconvenient relationship. The mother is not legally bound to disclose the father's identity, and there are no positive duties for local authorities and courts to locate and assess putative fathers. The case law has only in part alleviated the impact of the statutory lacunae. In *Re H; Re G (Adoption: Consultation of Unmarried Fathers)*, it was held that the father should be informed of the proceedings in cases where the parents had a substantial relationship, whereas no Article 8 issue arises in situations of insufficient constancy.[41] According to *Re C (A Child)*, if the pregnancy resulted from a fleeting relationship, there is no duty on the local authority to make inquiries about the father, with a limited exception:

> [T]here is no duty to make enquiries which it is not in the interests of the child to make, and enquiries are not in the interests of the child simply because they will provide more information about the child's background: they must genuinely further the prospect of finding a long-term carer for the child without delay.[42]

Regrettably, courts remain ambivalent on the issue of fathers' rights per se, and the value of the father-child relationship. Admittedly, Article 8 rights feature

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40 See A. Bainham, 'Paternity, the Paternal Family and Care Proceedings' [2020] (Sept) *Family Law* 1180, 1182.

41 [2001] 1 FLR 646, paras. 44, 48, 51–53.

42 [2007] EWCA Civ 1206, para. 3.

amongst the nine principles listed in *Re A, B and C (Adoption: Notification of Fathers and Relatives)*, where the Court of Appeal systematised the authorities.[43] However, *Re A, B and C* 'makes it clear there is no obligation on a local authority to make inquiries in every case and the issue of notification is a matter of discretionary judgment'.[44] On the strength of Convention rights, a presumption could have been established in favour of inquiries and notification of the father, rebuttable only in the presence of compelling reasons pertaining to public policy or the rights of others. Indeed, a duty for public authorities to make reasonable inquiries and impose sanctions (for example, fines) for the mother's lack of cooperation (unless relieved by a court from the obligation to name the father, in extraordinary circumstances) would better reconcile the interests at stake.

Additionally, the Article 8 analysis can be very cursory in the case of newborn babies; in *A Local Authority v. A Mother and Another*, the High Court swiftly dismissed Article 8 concerns on the grounds that there was no *existing* relationship with the child:

> It is, of course, also necessary to consider the rights of the father … and of the wider maternal and paternal families, including their rights under Article 8 [ECHR]. There is, in fact, *no psychological relationship at all between this child and any members of either the maternal or paternal family* since none of them even know of the child's existence and none of them have ever met the child. *What legal relationship may exist between the child and the father is speculative*.[45]

This approach does not reflect important ECHR principles: potential family life deserves protection in circumstances where the father has not yet had a chance to bond with the child through no fault of his own, and the absence of avenues to establish paternity affects his privacy rights.

Furthermore, although English case law suggests that 'the maintenance of confidentiality is exceptional',[46] the threshold for what constitutes an exceptional circumstance appears to be low. Jaganmohan and Whelan noted that 'the "exceptional circumstance" in *Re C* was the total lack of relationship between the parents'.[47] While most would agree that a risk of violence towards the mother or evidence of non-consensual intercourse are legitimate grounds for withholding the information from the father, the quality of the parents' relationship bears no logical connection with the quality of the potential relationship between father

43 [2020] EWCA Civ 41, at para. 89(6).

44 T. Rahman, 'Concealed Pregnancies: Should Fathers or Family Be Told?' [2020] (Oct) *Family Law* 1385, 1386.

45 [2017] EWHC 1515 (Fam), para. 8 (emphasis added).

46 *Re A, B and C*, above n. 43, at para. 89(7).

47 M. Jaganmohan and M. Whelan, 'Relinquishing a Baby for Adoption: The Legal Framework for Local Authorities' [2020] (Aug) *Family Law* 1084, 1089, discussing *Re C*, above n. 42.

and child. There is no basis to assume that, in cases of unplanned pregnancy, a father's interest in playing a part in his child's life varies with the length or depth of the relationship with the mother. Nor are the family ties between a man and his biological child less worthy of protection depending on the quality of the relationship with the child's mother.

Unless exceptions from the principle that fathers should be informed of the relinquishment are construed narrowly, mothers are allowed to make that decision for both parents, thereby depriving fathers of any procedural justice. According to Strasbourg case law, the procedural aspect of Article 8 is closely linked to interests protected by Article 6, which guarantees the right to a court in the determination of one's rights and obligations; this includes the father's right to participate in any administrative or judicial proceedings capable of ensuring proper respect for his established or potential family life.[48]

The recent *L (Adoption: Identification of Possible Father)* judgment has further debilitated the protection available to unmarried fathers in relinquishment cases, by introducing a distinction between a 'putative father' ('a person thought to be the father, although paternity has not been formally confirmed') and a 'possible father' ('someone who may or may not be the father').[49] According to the Court of Appeal, '[t]he weaker the possibility, the less likely the court will be to direct an investigation of paternity that compromises the mother's wish for privacy'.[50] Since the degree of uncertainty about paternity depends on how forthcoming the mother is with information, this added distinction arguably benefits the mother's right to privacy at the expense of the father's right to family life.

It is also problematic that, according to *Re A, B and C*, the first factor considered by courts when deciding whether the father should be informed in cases of requests for confidential adoption is whether he has parental responsibility. While this reflects sections 19 and 20 ACA 2002 (the consent, of each parent with parental responsibility, to adoption must either be forthcoming or dispensed with by a court), the enhanced protection of putative fathers with parental responsibility is indirectly discriminatory on the ground of civil status. In fact, possessing parental responsibility at the time of the child's birth presupposes being married to (or being the civil partner of) the mother; unmarried fathers unaware of the birth will not have had an opportunity to apply for a section 4 or a section 8 CA 1989 order. This is not dissimilar to the situation lamented in *Taddeucci and McCall v. Italy*: although family reunification rules treated all unmarried partners in the same way, the refusal to issue a residence

48 See *McMichael v. United Kingdom*, no. 16424/90, 24 February 1995, §91: 'not only does the procedural requirement inherent in Article 8 (art. 8) cover administrative procedures as well as judicial proceedings, but it is ancillary to the wider purpose of ensuring proper respect for, inter alia, family life'; see also *Bianchi v. Switzerland*, no. 7548/04, 22 June 2006, §112.

49 [2020] EWCA Civ 577, para. 21.

50 Ibid.

permit to a same-sex foreign partner breached Article 8 read together with Article 14, insofar as it did not take into account that same-sex couples could not opt into marriage to acquire legal recognition.[51] Moreover, as Oren argued in the US context, adoption laws privileging the married father, by entitling him to oppose the adoption, convey the belief that marriage 'makes a constitutional difference to parentage', which does not necessarily reflect social reality: not all married fathers will have been supportive during the pregnancy or after, and the link between marriage and parentage has weakened dramatically.[52]

Additionally, Bainham has highlighted 'the problem of late emergence of putative fathers' caused by the absence of a robust approach to the mother's and local authorities' obligations vis-à-vis the identification of the father, leading to adoption orders based on misrepresentations to the court (the mother's claim that she ignores the father's identity and whereabouts) being set aside for serious procedural irregularity.[53] What compounds this problem, in light of *Webster v. Norfolk County Council*,[54] is the difficulty in reversing orders, other than in-family adoptions,[55] both on policy grounds (it would deter future adoptions, reducing the pool of potential adopters for children in need), and because of child welfare concerns: the child has bonded with the adopters and removal would be traumatic, whereas the revocation of the order granted to the stepfather does not change the factual care arrangements.

The lack of a statutory obligation for local authorities to make inquiries about the birth father has been widely criticised for its inconsistency with the mandate of the adoption panel's decision-making about alternative carers (whether the father or a member of the paternal family would be a better option than adoption by strangers).[56] Bainham also noted the under-recognition of the value, for the child, of the 'potential family losses' (birth siblings and other relatives).[57] Furthermore, Anning and Wilce lamented the scarcity of information available to the child about the birth family in adulthood (affecting identity rights) if the local authority is not required to investigate the father when the mother is uncooperative.[58] While these are important concerns, the autonomous rights of putative fathers, as worthy of protection in themselves, deserve equal attention.

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51 *Taddeucci and McCall v. Italy*, no. 51362/09, 30 June 2016, §§94–96.

52 L. Oren, 'Thwarted Fathers or Pop-Up Pops?: How to Determine When Putative Fathers Can Block the Adoption of Their Newborn Children' (2006) 40(2) *Family Law Quarterly* 153, 189.

53 A. Bainham, above n. 40, 1187, discussing *Re J (Adoption: Appeal)* [2018] EWFC 8.

54 [2009] EWCA Civ 59, para. 204, underlining the 'vast social importance of not undermining the irrevocability of adoption orders'.

55 *Re J*, above n. 53, reversed the adoption order granted to the stepfather.

56 M. Jaganmohan and M. Whelan, above n. 47, 1087. See also the reference in A. Bainham, above n. 40, 1188 to the 'plethora of statutory provisions and guidance which emphasise the priority the law gives to family care over care by unrelated others'.

57 A. Bainham, above n. 40, 1188.

58 S. Anning and C. Wilce, 'Relinquished Babies: Decisions and Long-Term Impact' [2020] (Jul) *Family Law* 875, 882.

Overall, the treatment of relinquishment cases appears inconsistent with ECHR principles. Article 8 protects the potential family life between a natural father and his child, especially where the lack of effective ties is not attributable to the father. Adoption is the most extreme form of interference with Article 8 rights, as it severs legal ties and all future contact (save for the rare case of open adoptions). Far-reaching measures, entirely depriving a parent of their family life with the child, 'should only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests'.[59]

The procedural safeguards afforded to putative fathers also fall short of the special diligence required of public authorities in circumstances where their decisions are irreversible, such as the termination of parental access and the placement of children with alternative carers (since it will not be in the children's best interests to disturb the new bonds by reversing an incorrect decision).[60] The distinction drawn in *Re A, B and C* between non-consensual adoption, governed by section 52(1) ACA 2002, and relinquishment cases, governed by sections 19 and 20 ACA 2002, is an inaccurate depiction of reality. For putative fathers unaware of the birth, this is, for all intents and purposes, a case of non-consensual adoption; the same high threshold for dispensing with consent – the 'nothing else will do' test[61] – should apply to the decision not to inform the father of the proceedings, which is tantamount to excluding him from the child's life permanently and irreversibly.

6. CONCLUSIONS

Although courts have confirmed that decisions concerning genetic tests and the notification of natural fathers of adoption plans are not governed by the paramountcy principle, both proceedings remain child-centric, rather than seeking to reconcile all the rights at stake. The father's interests are protected to the extent that they advance the child's interests: DNA tests are ordered in paternity disputes to promote the child's right to know his or her genetic origins, and inquiries in relinquishment cases aim to secure long-term carers, whether this is the father or someone within the wider paternal family.

The law permits disproportionate interferences with fathers' substantive and procedural rights under Article 8, by not requiring mothers to disclose the

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59 *Johansen v. Norway*, no. 17383/90, 7 August 1996, §78. See also *Söderback v. Sweden*, no. 24484/94, 28 October 1998, §§32–34: the adoption was a proportionate interference with Art. 8 rights given the father's infrequent contact with the child and the latter's strong bonds with her stepfather.

60 *B v. United Kingdom*, no. 9840/82, 8 July 1987, §§63–65.

61 M. Jaganmohan and M. Whelan, above n. 47, 1089.

father's identity (thereby preventing fathers from acting expeditiously to obtain recognition and take over the care of the child), and by leaving the decision whether to notify putative fathers of adoption proceedings at the discretion of local authorities. Unlike restrictions on contact or the ability to make decisions about the child's upbringing, adoption terminates every aspect of family life. So does courts' refusal to issue a declaration of parentage.

While the *degree* of protection available under Article 8 may depend on the effectiveness of family ties, the availability of protection *tout court* should not. Moreover, a parent should not be penalised where the formation of such ties was precluded by the actions of a third party (the mother refusing to reveal the birth, or registering another man as the father). The secret placement of a newborn for adoption requires compelling reasons to satisfy Article 8(2), and the parents' fleeting relationship is not such a reason. Unmarried mothers' 'family life' with their newborn children is not contingent upon the quality of the relationship resulting in the pregnancy; setting that condition for unmarried fathers' enjoyment of Article 8 rights differentiates between parents unjustifiably. In addition, since the less favourable treatment of children born out of wedlock constitutes discrimination,[62] the law's inadequate efforts to safeguard the relationship with natural fathers also breach children's rights under Articles 8 and 14; they also run contrary to the fundamental principle that 'a child has, as far as possible, the right to know and be cared for by his or her parents'.[63]

Equality before the law dictates that all natural parents be afforded the same rights to acquire legal parenthood and parental responsibility by virtue of biology, and to oppose the adoption of their children. In child relinquishment cases, the failure to inform putative fathers of the birth, and to give them an opportunity to attain the status required by section 19 ACA 2002 to veto the adoption, is no different from dispensing with consent. The adoption regime should, therefore, be revised to align the decision-making process on whether to notify putative fathers (eligible for parental responsibility) with the approach to non-consensual placement/adoption. The exclusion of putative fathers from the proceedings should have to cross the section 52(1)(b) ACA 2002 threshold for orders dispensing with parental consent, i.e. be not just 'reasonable' or 'desirable', but 'imperative' insofar as 'required' by the child's welfare.[64] The refusal to order DNA tests allowing putative fathers to acquire parental status should be subject to a similarly stringent test, because it has the same far-reaching

62 See *Marckx*, above n. 4; *Johnston*, above n. 8; *Mazurek v. France*, no. 34406/97, 1 February 2000.

63 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Art. 7; see also *Keegan*, above n. 6, §50.

64 *Re P (Children) (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, para. 125. See also *Re B (A child) (FC)* [2013] UKSC 33, para. 48, finding the s. 31(2) CA 1989 threshold crossed because care plans were 'the only viable option'.

consequences. Finally, parental status obtained under section 14A BDRA 1953 should automatically confer parental responsibility, insofar as the criteria for section 4(1)(c) CA 1989 orders are impliedly met, and the different treatment of committed natural fathers when compared to mothers/married fathers discriminates arbitrarily on grounds of gender and civil status.

Bainham has convincingly argued that section 56/Schedule 6 of the Welfare Reform Act 2009, which would impose a general duty on mothers to disclose the identity of fathers (by inserting new sections 2A and 2B into BDRA 1953), should be implemented.[65] The absence of an obligation for mothers to provide parentage information, the fact that party status in public law proceedings depends on parental responsibility, and the discretion left to local authorities to decide whether to notify putative fathers can all have deleterious effects on the father's prospects of family life with the child and privacy (identity-related) rights. The father not having had a meaningful relationship with the mother should not be seen as an exceptional circumstance warranting interferences of this magnitude.

The law ought to uphold the inchoate rights[66] of putative fathers who have not yet had an opportunity to prove themselves as meritorious by applying for legal recognition and parental responsibility. Those rights should not be forfeited unless fathers were offered the chance to become effective parents and squandered this. As Eekelaar pointed out, the automatic conferral of parental responsibility to mothers and married fathers assumes that they will 'exercise social parenthood', whereas unmarried fathers may not (or may not be suited to doing so), and the validity of these assumptions is questionable.[67] There is no basis to surmise that unmarried fathers, if aware of the birth, are less interested in, or capable of, exercising social parenthood. This should no longer be the default position of the law; indeed, the burden of proof should be reversed, if Convention rights are to be adequately protected.

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65 A. Bainham, above n. 40, 1182. He suggested that the practice directions under the Family Proceedings Rules should require mothers to disclose the putative father(s) (ibid., 1188).

66 I use this term by analogy with the non-formalised rights recognised by English courts as 'rights of custody' under the Hague Convention on International Child Abduction 1980 (for an overview, see *Re K (A Child) (Northern Ireland)* [2014] UKSC 29, paras. 23–42). *Re B (A Minor) (Abduction)* [1994] 2 FLR 249, 261 defined 'inchoate rights' as '[rights] which, though not yet formally recognised or granted by law, a court would nevertheless be likely to uphold'.

67 J. Eekelaar, 'Parental Responsibility – A New Legal Status?' (1996) 112 *Law Quarterly Review* 233, 235.