



## RIGHT TO FAMILY LIFE UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

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### **Abstract**

*Right to family life i.e. (the right to respect for family life) is one of the rights guaranteed by European Convention on Human Rights. The European convention on Human Rights was signed by the Member states of the Council of Europe in 1950, but came into force in 1953. Article 8 of the Convention makes provision for the right. The right to family life is a person's right to respect for his family. It protects the integrity and privacy of families. The nature of right as contemplated by the Convention is the protection of existing family, not necessarily the right to find a family. This work which adopted the doctrinal method of research inquired into the components of this right, the traditional and emerging concept of family, the exceptions to the right guaranteed by the Convention. The history, structure and practices in the European Court of Human Right (ECtHR) created under the Convention were also treated. The court's attitude on same sex person or partners right to adopt children to have a family life and their rights to marry have also been considered in the work. The work is summarized by stating the effectiveness of protection of Human rights in the European continent, while stressing the need to be consistent in its rules of interpretation if the Contracting states will continue to respect and honour its decisions and for provisions of the Convention and the Court created there under to remain relevant. The work concluded that the stance of the ECtHR refusing pleas to apply the new and emerging concepts of family on all the convention States is commendable. This shows sagacity in the interpretation of Article 8 of the Convention. The work recommended that the ECtHR should continue to hold tenaciously on the insistence that the socio-cultural value of every covenant State is critical, whilst applying the provisions of the Convention.*

**Keywords:** *Family life, Human Rights, European Convention on Human Rights, European Courts on Human Rights, Same-Sex*

### **Introduction**

The term family life under the European Convention of Human Right (ECHR) means the right to respect or family integrity. The concept of family life entails that a child born of a de jure family and de facto family is from the moment of the child's birth and by the very fact of it there exists between him and his parents a bond amounting to family life. Even if the parents are not living together.

Broadly speaking, the European Court has included the relationship between brothers and sister and relationship between grand-parents in the meaning of family life. It includes right to have and maintain a family and respect for same. It contemplates one's right not to be separated from his family. The concept involves the right to have and maintain relationship with family members as children who are separated become vulnerable in the hands of rights violators. Family life is not just about the legal aspect and implications. It goes beyond that. It bothers on ones biological, social and emotional relationship.

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Right to family life is a fundamental right. The right protects the family from State actors (government and its agencies) interference which is the main jurisprudence inherent in the concept of family life.

The right to family life is the right of all humans to have an established family. This right includes having such family life respected. It also includes having and maintaining family relationships. These rights are guaranteed in a number of International human right Instruments such as the European Convention on Human Rights,<sup>2</sup> Universal Declaration on Human Rights<sup>3</sup> and International Convention on Civil and Political Rights.<sup>4</sup>

Generally, family entails husband and wife<sup>5</sup> (including unmarried persons)<sup>6</sup>, parents and children, siblings, near relatives such as between grand-parents and grand-children. However, the evolving concept of family now requires a subjective definition of what family entails. This is because the modern concepts of family no longer fit into the above generic concept of family. The existence of family life therefore becomes a matter of fact that is to be decided subjectively under each factual scenario.<sup>7</sup>

The European Court on Human Rights has stated that when considering what constitutes family relationships the court must necessarily take into account developments in society and changes in the perception of social, civil status and relational issues including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life.<sup>8</sup> On the basis of the foregoing, European Court on Human Rights recognized (first in the History of the Court) that same sex relationships (not necessarily same sex marriage) fall under the Rights to family life in the case of *Schalk and Kopf v Austria*.<sup>9</sup>

### 1.0. European Convention on Human Rights (ECHR)

The Convention<sup>10</sup> protects the human rights of people in countries that belong to the Council of Europe formed in 1949. The Council of Europe is completely different from the European Union (EU) and much larger. The Council of Europe consists of 47 member states as against the European Union which has 28 members.<sup>11</sup> The Convention consists of numbered Articles protecting basic rights.

By the foregoing, it is to be said that the Convention does not regulate and/or bind the entire Europe but those States that are members of the Council of Europe which was founded after the World War II to protect human rights and Rule of law and to promote democracy. The Convention was originally proposed by Winston Churchill and drafted mainly by the British lawyers. The Convention was based

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<sup>2</sup> ECHR, art. 8

<sup>3</sup> UDHR art. 16

<sup>4</sup> ICCPR art. 23

<sup>5</sup> G Cvetic, 'Immigration Cases in Strasbourg: The Right to Family Under Article 8 of the European Convention' (1987) *International and Comparative Law Quarterly* 650

<sup>6</sup> *Johnson v Ireland* (9697/82) ECHR 18 December, 1986

<sup>7</sup> M Nadia, 'The Right to Family Life Free from Discrimination on the Basis of Sexual Orientation: The European and Inter-American Perspectives' (2014) *American University International Law Review* 954

<sup>8</sup> C S Lucy, 'Marriage, Family, Discrimination and Contradiction: An Evaluation of the Legacy and Future of European Court of Human Rights Jurisprudence on LGBT Rights', (2011) *German Law Journal* 1746 - 1763

<sup>9</sup> (29381/09 & 32684/09) (2013) ECHR (7 November, 2013) 84

<sup>10</sup> As amended by Protocols Nos 11, 14 and 15 ; supplemented by Protocols Nos 1, 4, 6, 7, 12, 13 and 16

<sup>11</sup> <https://www.equalityhumanrights.org> Accessed 22<sup>nd</sup> October, 2022



on the United Nation Universal Declaration of Human Rights. It was first signed in Rome 1950 and came into force in 1953.<sup>12</sup>

The Convention guarantees specific rights and freedom and prohibits unfair and harmful practices. The rights therein covered are right to life,<sup>13</sup> freedom from torture,<sup>14</sup> freedom from slavery,<sup>15</sup> right to liberty,<sup>16</sup> the right to fair trial,<sup>17</sup> the right not to be punished for something that was not against the law at the time,<sup>18</sup> the right to respect family and private life,<sup>19</sup> freedom of thought, conscience and religion,<sup>20</sup> freedom of expression,<sup>21</sup> freedom of assembly,<sup>22</sup> the right to marry and start a family,<sup>23</sup> the right not to be discriminated against in respect of these rights,<sup>24</sup> the right to protection of property,<sup>25</sup> right to education,<sup>26</sup> right to participate in free elections,<sup>27</sup> the abolition of death penalty.<sup>28</sup>

The Ratification of the provisions of the Convention is a pre-condition for joining the organization i.e. (the Council of Europe). The Convention is the corner stone of the activities of the Council.<sup>29</sup> The Convention was made in order to prevent atrocities like the ones committed during the World War II from ever happening again and to achieve a greater unity between the Member States, promote the development of democracy in Europe and thereby bring lasting peace to the Continent.<sup>30</sup>

The Convention, by its provisions, establishes the rules of conduct of state towards any person and thus offers such person's protection from arbitrariness. The ECHR is therefore a unique legal instrument. In terms of civilization, it is considered as one of the most important achievements in the history of Europe after World War II.<sup>31</sup>

Though, as aforesaid, the Convention was made based on the Universal Declaration of Human Rights by the United Nations of 1948, the Convention takes human right protection a step further by it not being a mere Declaration as the UN's, but a legally binding Treaty.<sup>32</sup>

All countries across Europe (including Turkey and Ukraine) are members of the Council of Europe which made the Convention except Belarus and Russia. The UK was the first country to ratify the Convention in 1957 after it was signed in 1950.<sup>33</sup> Since its coming into force in 1953, it has been

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<sup>12</sup> *Ibid*

<sup>13</sup> ECHR, art 2

<sup>14</sup> ECHR, art 3

<sup>15</sup> ECHR, art 4

<sup>16</sup> ECHR, art 5

<sup>17</sup> ECHR, art 6

<sup>18</sup> ECHR, art 7

<sup>19</sup> ECHR, art 8

<sup>20</sup> ECHR, art 9

<sup>21</sup> ECHR, art 10

<sup>22</sup> ECHR, art 11

<sup>23</sup> ECHR, art 12

<sup>24</sup> ECHR, art 14

<sup>25</sup> Protocol 1, art 1

<sup>26</sup> Protocol 1, art 2

<sup>27</sup> Protocol 1, art 3

<sup>28</sup> Protocol 13

<sup>29</sup> <https://www.europewatchdog.info> Accessed 22<sup>nd</sup> October, 2022

<sup>30</sup> *Ibid*

<sup>31</sup> *Ibid*

<sup>32</sup> *Ibid*

<sup>33</sup> <https://www.ukandeu.ac.uk> Accessed 22<sup>nd</sup> October, 2022



amended a number of times in the form of Protocols. The amendment through the Protocols brought more rights such as right to education, right to free elections, and prohibitions on the use of death penalty. However, not all member States are bound by all the protocols. States choose whether or not to ratify or give consent to Protocols.<sup>34</sup> For example, the UK has not ratified Protocol 4 which protects the right not to be expelled from or refused entry to the country of one's Nationality.

The point was made earlier that it is not an European wide Convention (since European countries such as Belarus and Russia are not Member States of the Council of Europe which made the Convention). However, it has been hinted that the European Union is preparing to sign the Convention, thereby creating a common European legal space.<sup>35</sup>

Any person who feels his rights have been infringed upon under the convention by a State-party can take the case to the court created under the convention.<sup>36</sup> The States are bound by the judgment of the court against them and are obliged to execute them. Council of Europe has a Committee of Ministers which monitors the execution of the judgments, particularly to ensure payments awarded by the court.<sup>37</sup>

Member States that have signed up the ECHR have made a legal commitment to abide by certain standards of behavior and to protect the basic rights and freedom of ordinary people. The commitments are made stronger by the ratification of the Convention by the Member States.

## **2.0. Family Life and Right to Same**

Family life includes the right to have and maintain family relationships. It contemplates ones' right not to be separated from ones family. Right to family life entails the right of all individuals to have their established family life respected. It includes the right to have and maintain relationship with family members. As stated earlier, the right is recognised in some International and Regional human rights Instruments.<sup>38</sup>

The Right to marry is clearly related to the Right to family life. However, the two rights are not the same. The Right to marry is explicitly provided in various Human Right instruments<sup>39</sup> which essentially provide that all individual have the right to marry and find a family life. However, the right to family life is inherent in the individual's right to create, have and maintain their family relationship.<sup>40</sup> This distinction was elucidated in the case of *XYZ v United Kingdom*<sup>41</sup> wherein it was held that where a spouse has been deported from their partner's state due to their nationality, there is no infringement on their right to marry as they are already married. However, the right to family life in the circumstance must be considered.

Following the decision in the above case, suffice it that a lawful and proper step or action which affect a couple's cohabitation or living together does not mean an infraction to their right to marry. This is

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<sup>34</sup> *Ibid*

<sup>35</sup> <https://www.coe.int> Accessed 22<sup>nd</sup> October, 2022

<sup>36</sup> ECtHR

<sup>37</sup> (n.)

<sup>38</sup> <https://www.papers.ssm.com> accessed 31<sup>st</sup> October, 2022

<sup>39</sup> *Ibid*

<sup>40</sup> <en.m.wikipedia.org> accessed on the 21<sup>st</sup> October, 2022

<sup>41</sup> (1997) (75/1995/581/607) ECHR



because as in the case above, the couple were already married but the spouse was then deported due to their nationality. However, the circumstance cannot in law<sup>42</sup> be concomitant to infringement of the couple's right to family life. The European Convention on Human Rights,<sup>43</sup> Universal Declaration of Human Rights<sup>44</sup> and the International Convention on Civil and Political Rights<sup>45</sup> make the right to family life as a FUNDAMENTAL HUMAN RIGHT.<sup>46</sup> The above provisions of the said instruments show the quality and nature of the said right as being fundamental as other Fundamental Human Rights as enshrined in various laws, particularly, the Constitution of the Federal Republic of Nigeria 1999 (as amended).<sup>47</sup> Being so, it therefore places on all relevant authorities the burden to observe and enforce same.

Part of the fundamental nature of the right to family life stems from the need to protect children from being disconnected from their family history and against the violation of their rights.<sup>48</sup> This is because children become vulnerable and easy prey in the hands of Rights violators when separated from their families.

Wholesomeness in family life also makes the right more critical and fundamental as families with wholesome attribute are considered as those families where the parents or guardian strive to instill values, security, morals and open communication.<sup>49</sup> Children disconnected from their parents or guardians are sure not to benefit from their values. Our family members are the ones usually close to us. They are the ones we care about most. Family life is not just about the legal aspect and implications, it goes beyond that. It bothers on our biological, social and emotional relationships.

The right to family life is at the root of the Fundamental human rights to respect for same (family life). Part of the essence of the right to family life is to ensure that families are kept together. The right protects families from states and governmental interferences such as removing children into care or deporting a family member. Where deportation takes place, at least the family members' right to stay in contact should not be affected.

As aforesaid, intrusive state interference is one of the major disruptions in the jurisprudence of family life and right to same. In a certain situation in the UK, a local authority decided to carry out surveillance on a family because it thought the parents were lying about living in a particular school's catchment area. Public officials monitored the family at home. They even trailed the family on the school run.<sup>50</sup> This is clearly a case of breach of their right to respect their private and family life. This is contrary to the ECHR which provides thus:

There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interest

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<sup>42</sup> (n.19)

<sup>43</sup> (n.19)

<sup>44</sup> ECHR, art 9

<sup>45</sup> (n.21)

<sup>46</sup> <https://www.humanium.org> Accessed 21<sup>st</sup> October, 2022 ( no author, title and publication)

<sup>47</sup> CFRN 1999, Chapter 4

<sup>48</sup> <https://www.humanium.org> Accessed 21<sup>st</sup> October, 2022

<sup>49</sup> <https://www.yourssocialworker.org> Accessed 21<sup>st</sup> October, 2022

<sup>50</sup> <https://www.eachother.org/UK/right-family-life> Accessed 22<sup>nd</sup> October, 2022



of national security, public safety or economic well-being of the country for the prevention of disorder or crime for the protection of health or morals or for the protection of the rights and freedom of others.<sup>51</sup>

The right to family life is inherent in the protection of the family integrity.

### **3.0. The Court and Right to Respect for Family Life**

The part of the European Convention on Human Rights (ECHR) relevant to the right to respect for family life, that is, the right to get married and find a family is Article 8 thereof. It provides thus:

Paragraph 1: Everyone has the right to respect for his private and family life, his home and his correspondence:

Paragraph 2:

There shall be no interference by a public authority with the exercise of this right except such as in accordance with the laws and is necessary in a democratic society in the interest of national authority, public safety or the economic well-being of the county, for the prevention of disorder or crime for the protection of health or morals, or for the protection of rights and freedom of others.

For Article 8 of the Convention to be invoked, the Applicant must show that his or her complaint falls within at least one of the four (4) interests covered in the Article. The interests include; private life, family life, home and correspondence.

The catchment area of this work is right to family life, that is, a person's right to get married and/or find a family. Therefore, this aspect of the work will centre on the court's attitude on matters bothering on individual's right to marry and/or to find a family in the contracting States. However, before proceeding as hinted above, it is important to state that there are conditions on which the State may interfere with the enjoyment of the right, such as where such right is not in the interest of national security, public safety or the economic wellbeing of the country, or the prevention of disorder or crime, or for the protection of health or morals, or for the protection of the rights and freedom of others or necessary in a democratic society or in accordance with the law or prescribed by law.<sup>52</sup> In determining what is necessary in a democratic society, the court often needs to balance the applicant's interest protected by the Article and a third party's interest protected by other provisions of the Convention and its Protocols.<sup>53</sup>

### **4.0. The Court and The Right to Marry and Find a Family**

As stated earlier, the notion of family in the European jurisdiction has been broadened to accommodate the increase in the various emerging forms of sexual orientation. It was also stated that the courts in

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<sup>51</sup> Art 8, para 2

<sup>52</sup> ECHR, Para 2 Art 8

<sup>53</sup> <https://gegevenbeschermingsrecht.nl> accessed 25<sup>th</sup> October, 2022



applying the provisions of the Convention<sup>54</sup> has adopted the Living Instrument doctrine which empowers the court to interpret the provisions in line with the present-day realities in the jurisdiction.

The foregoing is clear to the extent that the regular opposite sex marriages are not of concern in this discourse. The reason is that, obviously, there are no issues concerning the opposite sexes right to marry and find a family as contemplated in the Convention. At this juncture, specific cases decided by the court<sup>55</sup> on the same-sex individual's right to marry and find a family shall be considered.

In the case of *Frette v France*<sup>56</sup> French authorities rejected a man's application for adoption due to the fact that he was homosexual. The court held that the decision taken by the domestic authorities pursued a legitimate aim which is to protect the health and rights of children. The court noted that the scientific community was divided on the possible consequences of the receipt of a child by one or more homosexual parents, especially given the number of limited scientific studies on the subject that were available at the time. The court held that the national authorities had been legitimately and reasonably entitled to consider that the right to be able to adopt was limited by the interest of the children eligible for adoption. The court therefore found no violation of Article 8 of the Convention.

In the case of *Gas and Duboi v France*<sup>57</sup> the court found there was no violation of Article 8 of the Convention as under the French law as second parent adoption was only open to married couples, that unmarried couples do not have adoptive rights. That since homosexuals were not allowed to marry under the French law, the national court was not wrong in refusing a partner in a same-sex relationship to adopt the child of the other partner as the partners were not in a relevantly similar situation to a married couple. So that it did not find any difference in treatment based on sexual orientation since the French law does not allow partners of same-sex relationships to get married, they are therefore (either of them) not eligible for adoption under the French law as the ECHR does not impose an obligation on States to grant same-sex couples access to marriage. The court went further to hold that there was no obligation under Article 8 of the Convention to extend the right of second parent adoption to unmarried couples. However, in the case of *X and Others v Austria*<sup>58</sup> the court held that the impossibility of second parent adoption in a same-sex relationship is discriminatory when such adoption is possible for unmarried opposite sex couple.

### **5.0. Same-Sex Partners and Their Right to Marry and Find a Family**

In a key judgement,<sup>59</sup> the court<sup>60</sup> in the case of *Schalk v Kopf*<sup>61</sup> ruled on a complaint of a homosexual couple in Austria who were denied the right to marry. Although, in 2010, Austria created the possibility to enter into a registered partnership for same-sex couples, but marriage is still not possible.<sup>62</sup> The applicants in the case complained under Article 12 of the Convention on right to marry and Article 8, right to private and family life. The court held thus; that Article 12 enshrined the traditional concept of

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<sup>54</sup> ECHR

<sup>55</sup> ECtHR

<sup>56</sup> (2002) ECR 36515/97

<sup>57</sup> (2012) ECHR 25951/07

<sup>58</sup> (2013) ECHR 19010/07

<sup>59</sup> www.theguardian.com accessed 30<sup>th</sup> October, 2022

<sup>60</sup> ECtHR (Grand Chamber)

<sup>61</sup> Supra

<sup>62</sup> www.theguardian.com accessed 30<sup>th</sup> October, 2022



marriage as being between a man and a woman. The court acknowledged that a number of contracting States had extended marriage to same-sex partners, but went on to say that this reflected their own vision of the role of marriage in their societies and did not flow from an interpretation of the fundamental right as laid down in Article 12 of the Convention by the contracting States in the Convention in 1959. That in 1950s, marriage was clearly understood in the traditional sense of being a union between partners of different sex.<sup>63</sup>

The applicant in the above prayed the court to adopt living instrument doctrine in deciding the case. However, the court noted that the principle does not apply in the case as there is no European consensus on same-sex marriage. To be precise, the court stated that at the time it was only 6 out of the 47 member States to the convention allowed such marriages. The court went on to say that marriage has its deep root in societies and differs from one place to another. Considering this, it found it should not rush to substitute its own judgment in place of that of the contracting States. That Article 12 of the Convention does not oblige the convention member States to allow same-sex couples to marry. The court reasoned that the applicant's plea of infringement of their right under Article 8 of the Convention i.e. (right to respect for family life) is an attempt at achieving through the backdoor what was impossible normally. Recall, it was stated earlier that the right under Article 8 envisages the existence of a family and does not include the power to compel the convention States to accept the nature of marriage not in line with their domestic laws.

However, in *Fedotova and Others v Russia*<sup>64</sup> same-sex couples presented application before the court complaining of the Russia's authority's refusal to allow same-sex marriage in Russia. The Russian's Government defence was that the amendment in the Russian's Constitution banned same-sex marriage.

The ECtHR gave its decision citing lack of legal framework to recognize same-sex relationship (not necessarily for the purpose of marriage). Thus, that Art. 8 of the Convention have been violated. The court dismissed the Russian Government's assertion that recognizing same-sex unions would be inconceivable considering the massive proportion of Russians who condemn this union. The court concluded in its judgment that much as States have right to choose the most appropriate form of registration of same-sex unions taking into account its specific social and cultural context. But that Russia had outstripped that right as no legal framework protecting the applicant's relationship under the Russian domestic law. Russian Government insisted that acknowledging same-sex union contradicts the foundations of her rule of law and morality. Insisting the institution of marriage is a union between a man and a woman.<sup>65</sup> The court took same decision in the case of *Bayev and Others v Russia*.<sup>66</sup>

## 6.0 Conclusion

The fundamental nature of the right to have a family, family life and to protect same is at the root of Article 8 of the ECHR. As seen earlier, the convention is a fall out of series of rights violation during the World War II with a view to forestalling future violation of such rights. All over the world (Nigeria inclusive), this right is very fundamental and critical. It is because without the protection of the right to

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<sup>63</sup> *Ibid*

<sup>64</sup> (2021) ECR 43439/14

<sup>65</sup> [www.humanrightplus.com](http://www.humanrightplus.com) accessed 30<sup>th</sup> October, 2022

<sup>66</sup> (2017) ECR 56717/12



find a family by marriage or otherwise (for States which have countenanced the new concept of marriage as seen in the body of the work), have the family life protected, the society is not sure of progression and perpetual existence.

However, as seen in the body of the work, this right is circumscribed and not allowed to be taken too far in Europe (particularly in the convention States jurisdiction). This is indeed commendable. It is said that a person's right ends where someone else's begins. A right not checked will be masqueraded to the extent that will affect law and order, value, security, morals in the society.

It is against this backdrop that the ECtHR vehemently refused to interpret the provision of ECHR in a manner that erodes its spirit and letters. By ensuring that norms and practices not countenanced by a member State is foisted on such State under any guise. This was seen in the cases cited in the body of the work and it is highly commendable.

The essence is to ensure that the socio-cultural values of the member States are respected and protected in line with the provisions of the Convention by ensuring that what was not intended in making the convention is not introduced into it on account of current and emerging new concept of family. By this stance of the court, the jurisprudence behind the making of the convention will continue to thrive.

## 7.0 Recommendations

1. As the conclusion of the work commended the stance of the ECtHR in ensuring that the provisions of the Convention on family life and protection of same is not arbitrarily construed, it is recommended that the court continues to hold tenaciously to the said stance.
2. It is further recommended that the United Nations (UN) creates this kind of legal framework that will be binding on all States. However, member States of UN should be allowed to subscribe or refuse the purport and implication of the judgment in the case of *Fedotova and Others v Russia* on same sex unions or relationships.