WRITTEN OBSERVATIONS

submitted to the European Court of Human Rights
in the case

S.W. and Others v. Austria
(application no. 1928/19)

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1. In the case of *S.W. and Others v. Austria* (Application No. 1928/19), two Austrian women entered into a registered partnership. One of them (the first applicant) gave birth to a child (the second applicant) in 2014, which was adopted the same year by her registered partner (the third applicant). It was the Grand Chamber of the Court that imposed the possibility of such adoption by two same-sex partners, by sentencing Austria in 2013 for discrimination on the basis of sexual orientation, by only ten votes against seven.[1]

2. The applicants complain, on the basis of Articles 8 and 14 of the Convention, of the mention of the third applicant in the child's birth certificate as "Father / Parent", as the second parent of the child. According to the applicants, this form of birth certificate, reflecting the gendered nature of parentage, would suggest that the person registered in the "Father / Parent" box is not the biological mother of the child but her adoptive parent. This "revelation" would be detrimental to the applicants to the point of constituting a violation of their privacy and their right to informational self-determination. The applicants, although having acquired equal "parental" rights over the child, want to indicate in the birth certificate that the child was born from two "mothers" or two "parents". This request assumes that adoptive parentage is somehow "shameful" for the adoptive parent, contrary to biological parentage.

3. As in the case of *R. F. v. Germany*,[2] currently pending, they complain that they are not both recognized as mothers of the child and consider themselves victims of discrimination based on their homosexuality. They do not see an injustice on the other hand in the fact that the child is deprived of his father. In fact, what these women are challenging is the fact that nature – which is heterosexual – is still a reference for human standards.

4. The purpose of this application is to exploit the right to respect for private and family life for political, societal and militant purposes. In fact, the applicants wish to totally separate biological and legal filiations, by removing any reference to the sexual and biological character of human begetting and filiation. The birth certificate would no longer have any concrete connection with birth. The law would be separated from reality.

5. The 1st and 3rd applicants say that they act both on their behalf and on behalf of the child. From the outset, it must be emphasized that the birth certificate involved is that of the child, not of the adults. They have no right over the birth certificate of the child. The whole case should therefore be considered first and foremost from the point of view of the best interests of the child, which takes precedence over adults. In similar cases, the Court has recognized that the applicants' interests differ and must be weighed against the rights of the children and their best interests.[3] In this balance, "*it is even more important that the child's interests should prevail over those of the parents in the case of a relationship based on adoption*".[4] In the present case, it is obvious that it is not in the interest of the child to have his affiliation falsified, in addition to being deprived of his father. The desire of the third applicant to appear socially as the mother of the child cannot justify the infringement of the rights and interests of the child.

6. This case is also symptomatic of the concerning expansion of the scope of Article 8. Many, including among the judges of the Court, denounce this phenomenon. One of them ironically suggested that Article 8 be now written "Article ∞"[5] because its scope has become infinite.

[1] ECHR, *X and others v. Austria*, [GC], no. 19010/07, 19 February 2013.
[2] Application *R.F. and others v. Germany*, no. 46808/16.
[3] ECHR, *Fretté v. France*, no.36515/97, 26 February 2002, § 42: "*at issue here are the competing interests of the applicant and children who are eligible for adoption*."
[4] ECHR, *Pini and Bertani and Manera and Atripaldi v. Romania*, nos. 78028/01 and 78030/01, 22 June 2004, § 156.
[5] ECHR, *Erményi v. Hungary*, no. 22254/14, 22 November 2016, dissenting opinion of Judge Kuris.

Article 8 of the Convention cannot - and should not - justify a total subjectivization of family life, in this case of birth, by the erasure of any rest of reference to the sexual nature of human begetting and the filiation. This statement is based not only on the best interests of the child in the particular context of adoption (I) but also on the permanent and unavailable status of the civil status (II).

I- The best interests of the child, the primary consideration of adoption

A- The conciliation of adoption with the rights of the child

7. The ideal for the child is, at least in European societies, to be able to combine the three components of parentage - biological, social and educational, and legal.[6] This ideal is in line with the 1989 International Convention on the Rights of the Child (CRC), which states: "*The child shall be registered immediately after birth and shall have the right from birth … to know and be cared for by his or her parents*" (Article 7 §1). In fact, most of the time, the parent raises his children and has the status of "parent"; in other words, the parent, the educator and the "legal" parent of a child are in general and in principle one and the same person. Atypical family situations that disrupt this unity are rarely in the interest of the child and therefore cannot necessarily be imposed on society. As the Court noted in *X, Y and Z v. the United Kingdom*: "*the community as a whole has an interest in maintaining a coherent system of family law which places the best interests of the child at the forefront*".[7] The child has the right "*to a 'normal family life' (...) (including) the establishment of his double maternal and paternal affiliation*".[8] The Court has already emphasized "*the importance of biological parentage as a component of identity*".[9] Indeed, if the desire to have a child is profoundly human, the human nature that gives birth to the desire to become a parent has also placed in the child the need to be raised and loved by his real parents.

8. According to the ECHR, "*the Convention does not guarantee the right to adopt as such*".[10] The CRC requests that, for States that admit or authorize adoption, the best interests of the child be "the paramount consideration" (article 21). The adoptability of a child, that is to say the fact that he is in a position to be adopted, must be pronounced exceptionally. The State must consider beforehand all possible alternative measures and evaluate the impact of such a decision on the child.[11] In the present case, it is surprising that there is no mention in the application of a biological father of the child, even unknown, and that it is not specified whether the circumstances required or justified the absence or the removal of his relationship of filiation with the child.
The adoption of a child is granted to provide with a home a child who has been deprived of it (because he is an orphan or was abandoned), namely in his interest, and not to satisfy the desire of adults. States must take into account that "*primary importance should be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parents*".[12] In particular, where possible, it is important to maintain a link between a child

[6] Dominique Schnapper, « Le pur et l'impur », *Commentaire*, no. 146, 2014, p. 330.
[7] ECHR, *X, Y and Z v. The United Kingdom*, [GC], no. 21830/93, 22 April 1997, § 47.
[8] Nathalie Bettio, Le « Droit à l'enfant » nouveau droit de l'Homme, *Revue du droit public et de la science politique en France et à l'Étranger*, 2010-2-008, 0301 no. 2, p. 473. See ECHR, *Marckx v. Belgium*, no. 6833/74, 13 June 1979 (maternal filiation); *Johnston v. Ireland*, no. 9697/82, 18 December 1986 (paternal filiation).
[9] ECHR, *Mennesson v. France*, no. 65192/11, 26 June 2014, § 100.
[10] ECHR, *Fretté v. France*, no. 36515/97, 26 February 2002, § 32.
[11] ECHR, *S.H. v. Italy*, no. 52557/14, 13 October 2015, §§ 38 and 43.
[12] See notably: *Ibid*, § 39.

and both biological parents, in this case the first applicant and the potential biological father of the second applicant.[13] For this reason, simple adoption tends to be favored by the Court, rather than "plenary" adoption. Indeed, simple adoption makes it possible to reconcile a stable and protective (adoptive) filiation with the right of the child to know his biological parents and to maintain relations with them.[14]
In this case, the adoption practiced is not a simple adoption because the links with the biological parents are broken, in particular the right of custody, the right of access and the right to be consulted and informed.[15] The child keeps only two links: rights in the inheritance of his biological parents, when they are known, and the possibility of receiving alimony from them if his adoptive parents are deficient.[16]

9. In Austria, adoption is conceived as a kind of second birth. As a matter of fact, it results in the deletion of the original birth certificate and its replacement by another birth certificate.[17] The new adoptive filiation replaces the original filiation of the child and produces the same effects. This type of adoption complicates a possible subsequent recognition of the biological filiation of the child. In the present case, no case of revocation of the adoption provided for by Austrian law could concern this child.[18] In addition, the termination of an adoption depends either on the consent of adults or their lifestyle choices, or on a demonstration that the continuation of adoption seriously jeopardizes the well-being of the adopted child.[19] As a result, the child will not have herself enough liberty, if she wishes one day, to seek and have her paternal affiliation recognized. The adoption of the second applicant by her mother's partner is therefore a significant obstacle to an action seeking paternity and will most likely prevent that child from having her parentage recognized towards her father.

10. For this reason, a total change of the birth certificate should remain an exception only when the best interests of the child so require. Since the child's new birth certificate does not mention his biological origins, some specialists even consider that this type of practice is contrary to the right of the child to know his origins.[20] In particular, the ECHR has already enshrined the right to establish "*some roots of [one's] history*"[21] and "*the circumstances in which a child is born*"[22] as well as "to know and to have one's ancestry recognized".[23] In this case, the adoption of the applicant child makes it impossible for her to exercise her rights, and therefore violates them.

11. If the birth certificate of a child adopted through the Austrian procedure fails to indicate that his legal parents are not biological, this must not be intended to lie about the child's origins. The purpose of an adoption is to establish a strong and protective parentage for the child, and therefore in his best interests, by preventing the child from being subject to litigation between his biological parents of his adoptive family. In Austrian law, adopted children also have the

[13] ECHR, *Zhou v. Italy*, no. 33773/11, 21 January 2014, §§ 54 et 61.
[14] *Ibid*, §§ 59 à 61.
[15] Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*), article 197. See also: website of the Austrian Government, Public Service, Adoption, Adoption Process
[16] Austrian Civil Code, article 198.
[17] Law on the civil status, Personenstandsgesetz, (hereafter PStG), 2013, article 4 § 1. See also: website of the Austrian Government, Public Service, Adoption, Adoption Process
[18] Austrian Civil Code, article 200.
[19] *Ibid*, articles 201 and 202.
[20] See for example: Clotilde Brunetti-Pons, « Existe-t-il un droit de connaître ses origines ? », *Le don de gamètes*, Colloque Evry 2013 (dir: Aude Mirkovic), Bruylant, 2014, p. 107.
[21] ECHR, *Godelli v. Italy*, no. 33783/09, 25 September 2012, § 68.
[22] ECHR, *Odièvre v. France*, [GC], no. 42326/98, 13 February 2003, § 29.
[23] ECHR, *Pascaud v. France*, no. 19535/08, 16 June 2011, § 59 (free translation).

possibility to access information about their biological origins from the age of fourteen.[24] The mention of the adoption cannot be deleted from civil status registers.[25]

12. In the present case, the applicants consider that the fact that it is possible to guess from the reading of the birth certificate which of the two is the adoptive mother "*constituted a violation of the family's strictly personal sphere (...) and infringed their right to informational self-determination*".[26] This is simply because, in the case of adoption by a same-sex couple, the adoptive character of filiation cannot be hidden from the child or society. Indeed, a double maternal affiliation does not imitate natural procreation. It is thus obvious that the adoptive character of filiation with the third applicant can be guessed by the birth certificate, without having to consult the complete extract of the civil status records concerning the child. This difference in treatment is the necessary consequence of a difference between two situations, one imitating natural procreation, the other denying it. The Court has already recognized in this regard that, regarding procreation, same-sex and heterosexual couples are not in the same situation.

B- Nature, the reference standard of adoption

13. More generally, the total change in the birth certificate reveals that adoption is a double legal fiction. On the one hand, the parent-child link is denied, in this case the link between the biological father and the second applicant. On the other hand, a filiation link is created with an adoptive parent, by the establishment of a new birth certificate.[27] This double fiction founds an adoptive filiation, which is not actual filiation, but corresponds to a reality, since adoption is traditionally organized according to a "pseudo-procreative model".[28]

14. However, a birth certificate with two parents of the same sex amounts to transforming adoption into a triple fiction, because even the natural model is denied. In the present case, in the established birth certificate there are two women and no room for a father.[29] Through such an adoption, adoption becomes a mere "*legal tool allowing a couple to access parenthood*".[30] This then prevents the child from having her real affiliation recognized with her father.
In addition, the applicant adoptive "mothers" surprisingly ask for a quadruple fiction. Not only does their adoption deny nature by indicating two women as parents on the birth certificate, but they also demand that this negation of nature become invisible.
Thus, in the *Boeckel and Gessner-Boeckel v. Germany* case, the ECHR also considered that there was no "factual foundation" to extend the principle of the presumption of paternity to the biological mother's partner, for "*in cases where one partner of a same-sex partnership gave birth to a child, it could be ruled out on biological grounds that the child descended from the other partner*."[31] In the present case, therefore, it is not the birth certificate form but basic biological

[24] PStG, 2013, article 52.
[25] See also: Official website of the Austrian Government, Public Service, Adoption, Research of biological parents
[26] ECHR, application *S.W. and others v. Austria*, no. 1928/19, communicated on 12 February 2019.
[27] Christine Biquet, « Les fictions en droit », *Revue de la Faculté de Droit de l'Université de Liège*, 2013, p. 283-284.
[28] Irène Théry, Anne-Marie Leroyer, *Filiation, origines, parentalité - Le droit face aux nouvelles valeurs de responsabilité générationnelle*, Paris, Odile Jacob, 2014, p. 42.
[29] Note also that the acceptance of this third fiction confirms the idea that the goal of adoption is not to lie about the origins of the child. See: French Constitutional Council, Decision no. 2013-669 DC, Law to Open Marriage to Same-Sex Couples, March 17, 2013: "There is no constitutional requirement that (...) adoptive parenthood be concealed", full adoption for same-sex couples was considered constitutional in France.
[30] Clotilde Brunetti-Pons, « Existe-t-il un droit de connaître ses origines ? », *op. cit.*, p. 93.
[31] ECHR, *Boeckel and Gessner-Boeckel v. Germany*, declaration of inadmissibility, no. 8017/11, 7 May 2013.

considerations that infer that at least one of the two women is not the biological mother. Facts and nature are a reality that cannot be considered discriminatory.

15. The Grand Chamber of the Court, in *S.H. and others v. Austria*, considered it legitimate that "*the Austrian legislature was guided by the idea that medically assisted procreation should take place similarly to natural procreation, and in particular that the basic principle of civil law – mater semper certa est – should be maintained by avoiding the possibility that two persons could claim to be the biological mother of one and the same child*".[32]. This judgment of the Grand Chamber allows us to conclude that "*nature can (...) remain the norm of reference, an objective reference point and external to the man*" and to his individual will.[33]
In the present case, it is therefore legitimate for the Austrian legislature to maintain a birth certificate "*as close as possible*" to nature, while tolerating an extension of adoption to same-sex couples, since it has been constrained to it by the ECHR. The birth certificate is adapted to such an adoption, not by a negation of nature, but by boxes taking into account these couples ("Mother / Parent" and "Father / Parent"). Given that the mother is in principle the woman who gives birth,[34] it is logical that the woman who gave birth to the child is included on the birth certificate as a mother and that the woman who adopted the child is listed as the second parent.

II- Civil status, both place of memory and means of identification

A- The inalienability of the civil status, based primarily on facts

16. Civil status has a double function, as a place of preservation of the past and as a proof and means of identifying people in the *present*.[35] It corresponds to "*facts*" and "*events*".[36] The birth certificate, which forms part of it, first responds to the first of the civil status functions and its content therefore flows directly from reality. Indeed, it is done to attest to the birth of a legal personality. It contains elements that essentially correspond to a historical event and will not be modified during the child's life. Among these indications, there is usually "*the name of the child, the names of the parents, the sex of the child, the date of birth too, the place of birth of the child*".[37]
The fact that the birth certificate aims primarily to document factually the birth with objective characteristics on the child and his parentage is the subject of a certain consensus. Thus, according to the United Nations Children's Fund (Unicef), "*The term 'birth certificate' can refer either to the original document certifying the circumstances of the birth, or to a certified copy or representation of the registration of that birth, depending on the practices of the country issuing the certificate*."[38]

[32] ECHR, *S.H. and others v. Austria*, [GC], no. 57813/00, 3 November 2011, § 104.
[33] L'affaire *S. H. et autres c. Autriche* ECHR, [GC], n° 57813/00, 3 novembre 2011. Commentaire par Claire de La Hougue et Grégor Puppinck, docteurs en droit, *European Centre for Law and Justice*, 1st January 2012.
[34] Austrian Civil Code, article 143.
[35] Irène Théry, Anne-Marie Leroyer, *Filiation, origines, parentalité - Le droit face aux nouvelles valeurs de responsabilité générationnelle*, *op. cit.*, p. 69.
[36] See official definitions of "civil status": United Nations, Department of Economic and Social Affairs, Statistics Division, 2001, p. 50; United Nations, Department of Economic and Social Affairs, Statistics Division, 1998, p. 9.
[37] PStG, 2013, article 54.
[38] United Nations Children's Fund, *A Passport to Protection, a Guide to Birth Registration Programming*, UNICEF, New York, 2013, p. 138.

17. If the birth certificate, in some countries, indicates adoptive parents as "parents", as if the woman had given birth to the child and the man was presumed biological father, it usually keeps at least a trace of the child's gendered character of filiation, and thus a certain link with reality. Indeed, a child is necessarily born of a man and a woman, and it is logical that the form of the birth certificate keeps this origin. Thus, UNICEF offers a "standard" form indicating the "mother" and "father" of the child, without any location to indicate the sex or gender of each parent.[39] In this case, Austria provides a "Mother / Parent" box and a "Father / Parent" box; while adding "/ Parent" is a political choice, maintaining the words "father" and "mother" stem from the reality of birth and filiation.

18. The registration of civil status records serves objectives of general interest. In *A.P., Garçon and Nicot v. France,* the Court "*fully accepts that safeguarding the principle of the inalienability of civil status, ensuring the reliability and consistency of civil-status records and, more generally, ensuring legal certainty, are in the general interest*".[40] Indeed, in providing "*legal records of such events*",[41] it promotes good democratic governance.[42] More particularly, the birth certificate has a purpose both legal and statistical.[43]
For this reason, the total change of the birth certificate in case of adoption is criticized, because international surveys show that it creates an identity uncertainty in the child.[44] This is why specialists suggest always keeping only the original birth certificate and only mentioning the name of the adoptive parents, on the sidelines of the birth certificate.[45] In any case, as Irene Théry and Anne-Marie Leroyer remind us, "*we cannot erase what we want. It is only necessary to recall here the practice of the totalitarian states which do not hesitate to "retouch the pictures" to erase what bothers them*".[46]

19. The right to "*a form of informational self-determination*", as enshrined by the Court, entitles individuals to invoke their right to privacy in the collection and dissemination of data.[47] However, it does not involve being able to change the content of one's data to lie about reality, by deciding to be considered as the "biological mother" of a child. Such a possibility would be contrary to the objectives of general interest to which the registration of the civil status facts is related. In this case, the two applicant women must be aware that they cannot dispose of the child's civil status to conform her to their individual desire for maternity.

20. The Court's case-law shows the importance of childbirth for maternity and that it is not legitimate to erase every trace of biological parentage or every difference between biological and adoptive filiations. These principles make it possible to respond to the "dissatisfaction" movement of applicants regarding the civil status of their children. This is for example the case

[39] *Ibid*, p. 13-18.
[40] ECHR, *A.P., Garçon and Nicot v. France*, nos. 79885/12, 52471/13 and 52596/13, 6 April 2017, § 132. See also: United Nations Children's Fund, *A Passport to Protection, op. cit.*, p. 21; United Nations, Department of Economic and Social Affairs, Statistics Division, 1998, p. 9.
[41] *Ibid*, p. 139.
[42] United Nations Children's Fund, *A Passport to Protection, op. cit.*, p. 12.
[43] *Ibid*, p. 122.
[44] See on this subject: F. R. Ouellette et J. Saint-Pierre, « Parenté, citoyenneté et état civil des adoptés », Enfance, Famille, Générations no. 14, 2011, p. 51-76.
[45] Irène Théry, Anne-Marie Leroyer, *Filiation, origines, parentalité - Le droit face aux nouvelles valeurs de responsabilité générationnelle, op. cit.*, p. 70.
[46] *Ibid*, p. 69.
[47] ECHR, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, 27 June 2017, § 137 : "*Article 8 of the Convention thus provides for the right to a form of informational self-determination, allowing individuals to rely on their right to privacy as regards data which, albeit neutral, are collected, processed and disseminated collectively and in such a form or manner that their Article 8 rights may be engaged.*"

in the cases *R.F. and Others v. Germany*[48] and *O.H. and G.H. v. Germany*,[49] in which the ECLJ intervened.

Indeed, the Austrian birth certificate is in line with the 'Report on Principles Concerning the Establishment and Legal Consequences of Parentage – "The White Paper"' written by the European Committee on Legal Co-operation (CDCJ) and adopted in May 2004, of which Principle 1 concerning the establishment of maternal affiliation states: "*The woman who gives birth to the child shall be considered as the mother.*" [50] Only one woman, in this case the woman who gave birth, can claim to be recognized as a mother by birth. The CDCJ explains that this principle 1 "*is in the line with the interpretation given by the European Court of Human Rights in the Marckx judgment according to which it is a fundamental right for a mother and her child to have their link of affiliation fully established as from the moment of the birth*."[51] It is further stated that "*any subsequent modification of the legal parentage (e.g. adoption by another person) will not affect the legal maternal affiliation at the moment of birth*."[52]

More recently, the ECHR confirmed in surrogacy cases that states were not obliged to transcribe the birth certificate of a child born of a surrogacy to establish a relationship of filiation with the intended mother, adoption being a way of recognizing this link.[53] The Court thus recognizes the legitimacy of differentiating maternal filiation by childbirth and adoptive maternal parentage. In this case, Austria can therefore maintain a birth certificate from which it would be possible to deduce which of the two women is the biological mother.

B - A reasonable use of the civil status by the State

21. Although the Court recognized in this case the existence of an interference with the applicants' right to respect for private and family life, it appears to be proportionate. Indeed, Austria enjoys a wide margin of appreciation and has not exceeded the limits since it has struck a fair balance between the rights and interests involved.

The existence of a wide margin of appreciation for the protection of children

22. One ought first to point out that, in the absence of a right to adoption and a right to become a parent,[54] the Court regularly recalls the State's jurisdiction over adoption and filiation.[55]

23. In addition, a "*margin of appreciation (is) entrusted to the State in the regulation of relations of filiation*"[56] and its extent may vary according to various factors, as the Court regularly

[48] ECHR, *R.F. and others v. Germany*, application no. 46808/16, communicated on 13 January 2017.
[49] ECHR, *O.H. and G.H. v. Germany*, applications nos. 53568/18 and 54741/18, communicated on 6 February 2019.
[50] European Committee on Legal Co-operation, 'Report on Principles Concerning the Establishment and Legal Consequences of Parentage – "the White Paper"', May 2004, CJ-FA (2006) 4 f, p. 7.
[51] *Ibid*, 4 f, p. 7, § 12.
[52] *Ibid*, 4 f, p. 7, § 14.
[53] See in particular: ECHR, Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, requested by the French Court of Cassation, Request no. P16-2018-001, 10 April 2019, § 53.
[54] *Fretté v. France*, *op. cit.*, § 32; *Paradiso and Campanelli v. Italy*, [GC], no. 25358/12, 24 January 2017, §§ 141 and 215.
[55] See *Paradiso and Campanelli v. Italy*, [GC], *op. cit.*, § 177 ("*The Court regards as legitimate under Article 8 § 2 the Italian authorities' wish to reaffirm the State's exclusive competence to recognise a legal parent-child relationship – and this solely in the case of a biological tie or lawful adoption – with a view to protecting children*.") and § 197 ("*having regard to the prerogative of the State to establish descent through adoption*"). See also *Shavdarov v. Bulgaria*, no. 3465/03, 21 December 2010, § 55 ("*The Court observes that the discretionary power of the domestic authorities to legislate in the area of parentage and relations between parents and their children has been used to ensure the protection of children's interests.*" Free translation)
[56] *Shavdarov v. Bulgaria*, *op. cit.*, § 56. (Free translation)

reminds.[57] If the affiliation of an individual can be regarded as a particularly important aspect of his existence or identity, which would restrict the margin of appreciation left to the State, this should be broader, however, as long as the Court considers adoption as one of the "*ethically sensitive issues (…) in which member States enjoy a wide margin of appreciation*."[58]

24. Moreover, there is a genuine consensus among the Council of Europe member States on considering that the woman who gives birth is the legal mother, the marital status of the latter being of little importance, which is based on the adage of Roman law *mater semper certa est*.[59] On the contrary, Austria is one of the only 18 (out of 47) Council of Europe member states that allow adoption by a second parent in the case of same-sex couples (Second-parent adoption).[60] Considering this fact, caution should be imposed because "*there are areas in which the national legislature is better placed than the European Court to bring about change in institutions concerning the family, relations between adults and children, and the concept of marriage*."[61] However, it is likely that a decision that would condemn Austria in this case would not be accepted by many States that could react by initiatives similar to those visible in the constitutionalization movement of the definition of marriage, as the union of a man and a woman, currently at work in countries of Central and Eastern Europe. It should be remembered that at the beginning of April 2019, Italy reinstated on the official forms the words "father" and "mother" instead of the mentions "parent 1" and "parent 2" that had been introduced in 2015. In the end, the fair balance that the State must assess between the competing interests of the private (those of the two adults, those of the child) and public (general interest) interests in the case also contributes to extend the margin of appreciation it enjoys.

A balanced position in view of the extreme weakness of the alleged interference

25. Assuming that there be an interference with the applicants' rights, it is proportionate because Austria has struck a fair balance between the various interests at stake.

Regarding the protection of the rights and freedoms of others, it has indeed taken into account the interests of the child (see I) which, as has been said, does not coincide in this case with that of the applicant adults: in this case, what is at stake is not only about the protection of the interest of the child of the current case (the first concerned with regard to her own civil status), but also the interest of every future children, the Court having admitted the relevance of measures aimed at the "*the legitimate aim of (…)protecting children – not merely the child in the present case but also children more generally – having regard to the prerogative of the State to establish descent through adoption and through the prohibition of certain techniques of medically assisted reproduction*".[62] Secondly, Austria's defense of the order took into account the general interest in the integrity of the registers and civil status documents (see II.A). As for the interests of the applicant adults, they were in no way misunderstood because the third applicant obtained what she wanted, namely the establishment of a relationship of filiation with the child of her partner through adoption; it is also included in the child's birth certificate as a "parent" and the three applicants are not prevented from living together. Moreover, they do not explain why the

[57] See *Dickson v. The United Kingdom*, [GC], no. 44362/04, 4 December 2007, § 78; *S.H. and others v. Austria*, *op. cit.*, § 94; *Paradiso and Campanelli v. Italy*, [GC], *op. cit.*, § 182.

[58] *Paradiso and Campanelli v. Italy*, [GC], *op. cit.*, § 194.

[59] Nigel Lowe, « A study into the rights and legal status of children being brought up in various forms of marital or nonmarital partnerships and cohabitation », 2008, CJ-FA (2008) 5, p. 28.

[60] ILGA, *10th Rainbow Index*, May 2019.

[61] *Gas and Dubois v. France*, no. 25951/07, 15 March 2012, concurring opinion of Judge Costa joined by Judge Spielmann.

[62] *Paradiso and Campanelli v. Italy*, [GC], *op. cit.*, § 197. For comparison in scientific matters, the preamble to the Oviedo Convention affirms that "*progress in biology and medicine should be used for the benefit of present and future generations*"

possibility of deducing from the child's birth certificate that she was adopted by the third applicant, that is to say the strict truth, affects them: the damage is purely hypothetical.

26. Moreover, if it is humiliating for the third applicant to be identified (in rare circumstances) as an adoptive parent, how much more can it be for the child who can never hide the fact that she is an adopted child, since both her parents are of the same sex? This child will have much more to suffer from this situation.

27. Furthermore, in view of the confidentiality of Austrian law in relation to this type of act, if the act in question were to constitute an interference with the applicants' right to private and family life, its scope would be quite minimal since the mention as "parent / father" rather than "*mother* or *parent 1 or 2*" has no practical impact in the applicants' daily lives. The third applicant enjoys all the parental rights, just as the child's biological mother
Indeed, while "*the question of the conformity of the measures of publicity of the registers with the respect of the private life is a constant preoccupation of the International Commission of the Civil Satus which, in its recommendation No. 4, relating to the publicity of registers and of acts of civil status (adopted on 5 Sept. 1984), recalled that the rules of publicity of the acts must not infringe Article 8 of the European Convention on Human Rights*", [63] the ICCS has highlighted the existence of two systems according to the States: "*for some, such as the Netherlands and in general the countries of Napoleonic law, advertising is the rule - restrictions on this advertising have occurred only later and always as exceptions - for others, such as Austria, advertising does not exist and cases where it is possible to consult an act of civil status are limited*."[64] Austrian law provides (Article 54 § 2 PstG) that an extract of the birth certificate may be issued with only the data concerning the child (name, sex, time and place of birth); only the persons concerned by the information mentioned on the birth certificate can claim to have access to it, as well as any person having a legal interest (Article 52 PstG); in the case of an anonymous adoption, it may be provided by the adoptive parents that access to the complete extract of the civil status documents relating to the child provided for in Article 52 § 1 shall be limited until he has reached the age of 14 years (Article 52 § 2). This thus seems consistent with the recommendations of the ICCS.

Conclusion

28. The purposes and functions of adoption and marital status legitimize Austria's refusal to delete the reference "Father / Parent" from the birth certificate of the adopted child. Maintaining such a reference to the gendered nature of human begetting and parentage is in the best interest of the children and other legitimate social goals, without undermining the family life of the same-sex partners and of the child.

29. Complying with the applicants' request would lead to the conclusion that the individual will of adults is all-powerful not only to redefine filiation, but also to rewrite a historical event, the birth of a child. The Court must recall that the law of parentage and of civil status are rooted in the objective reality that every person is born, at a place and at a specific time, of a man and a woman.
More generally, human rights are not intended to satisfy individual desires and make them prevail over the interests of society and third parties, or even over the sexual reality of human nature. Neither law nor society are responsible for the fact that these two women cannot be both mothers of the child. It is nature that is heterosexual. To oblige the applicants' pretentions, would imply

[63] Irène Théry, Anne Marie Leroyer, *op. cit.*
[64] Recommendation (No. 4) on the publication of registers and civil status records adopted in Rome on 5 September 1984, Explanatory Report.

that all references to mothers and fathers, namely to the sexual nature of filiation, and finally to persons, should be deleted.

30. The function of human rights is to preserve our humanity, against every immoderation. Founded after the War to counter the ideological excess of totalitarian systems, they must today face the disproportion of individual desires increased and multiplied by new technologies. Human rights, rather than feeding this “transhuman” excess, should preserve us from it.

31. Considered from the point of view of the best interests of the child, this application should be rejected, either as manifestly ill-founded or as constituting an abuse of rights (art. 17) inasmuch as it aims at violating gravely the rights and interests of the child.