

## UNMARRIED FATHERS AND CHILD ABDUCTION IN EUROPEAN UNION LAW

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### A. THE QUESTION OF CUSTODY IN EUROPEAN UNION LAW

The judgment of the Court of Justice of the European Union (CJEU) in the *McB* case<sup>1</sup> has reopened the issue of custody rights of unmarried fathers. Determining who is entitled to custody is one of the most controversial issues due to the differences between the laws of the Member States,<sup>2</sup> mainly regarding the rights of fathers who have not married the mothers. It is important to emphasise the consequences that the different regulations of the Member States have on cases of child abduction. Child removal will be considered wrongful if such removal is in breach of custody rights. Therefore, it is essential to define what rights of custody are and who is entitled to such rights.

With reference to this matter, the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (“the 1980 Hague Convention”) and the Brussels IIa Regulation<sup>3</sup> follow the same structure; they both establish an autonomous concept of custody, based particularly on the right to determine the child’s place of residence (Article 2(9) of Brussels IIa; Article 5(a) of the Hague Convention), and refer to the law of the (Member) State where the child habitually resided immediately before the wrongful removal or retention with reference to the holder of said right (Article 2(11) of Brussels IIa; Article 3(a) of the Hague Convention).

Under various national laws unmarried mothers are automatically granted custody of their child but unmarried fathers must carry out further acts to acquire such rights (eg to be granted such custody by means of a court order).<sup>4</sup>

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<sup>1</sup> Case C-400/10 PPU *McB v LE*, judgment of 5 October 2010.

<sup>2</sup> See the report by N Lowe, “A Study into the Rights and Legal Status of Children Being Brought Up in Various Forms of Marital or Non-Marital Partnerships and Cohabitation”, Council of Europe, Strasbourg, 25 September 2009; CJ-FA, 2008.

<sup>3</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ L338/1).

<sup>4</sup> Lowe, *supra* n 2, 15. A significant number of jurisdictions (eg Austria, Denmark, England and Wales, Finland, Germany, Ireland, Netherlands, Norway, Portugal, Sweden and Switzerland) still maintain a distinction between married and unmarried fathers such that unmarried fathers do not automatically have parental responsibility unless they acquire it. They can do this in

These differences have their immediate consequences at the time of deciding on the child's removal to another state: removal carried out by the mother will be lawful and, therefore, the father will have no right regarding the child's return as he has no custody rights over the child at the time preceding removal. However, removal carried out by the father will be considered wrongful as it violates custody rights recognised by operation of law as belonging to the mother since the child's date of birth.

The question that arises is the following: if Article 2(11) of Brussels IIa leads to the application of the law of a Member State that does not automatically give custody rights to unmarried fathers, is this a violation the Charter of Fundamental Rights of the European Union ("the Charter")?<sup>5</sup> This issue has already been analysed in the controversial case of *McB*.

There is no doubt about the importance that international conventions on human rights have within all fields of law and, specifically, within private international law. This influence has now taken on a new perspective with the approval of the Charter, which introduces a new control on EU law from the point of view of fundamental rights and freedoms.<sup>6</sup> The Charter does not in any way extend the competences of the EU (Article 6(1) of the Treaty on European Union (TEU)). It must be considered that, at present, the matter of custody is neither included within the competence of the EU nor can it be considered to be a harmonised topic among the different Member States. This is the reason for the reference in Article 2(11) of Brussels IIa to the laws of the Member States. Insofar as competence on the matter of custody is not included within the scope of EU law, control over national laws should be carried out by the European Court of Human Rights (ECtHR) applying the European Convention on Human Rights (ECHR). The Charter coexists alongside the ECHR. When the EU accedes to the ECHR, the CJEU will have to ensure the compliance of EU law with the Charter and the ECHR. This is the consequence of the judgment pronounced by the CJEU in the *McB* case and, clearly, of the position upheld by the Advocate General.<sup>7</sup>

The response would, however, be different if it could be demonstrated that the application of the Brussels IIa Regulation, in and of itself, implies a violation of the Charter. In fact, the reference by Article 2(11) to national

a variety of ways, for example, as an automatic consequence of subsequent marriage to the mother (as in Austria, Denmark, England and Wales, Finland, Germany, Ireland, Sweden and Switzerland) or commonly by agreement with the mother (though agreements can take a variety of forms) or in the case of England and Wales, Ireland and Sweden, by court order.

<sup>5</sup> OJ C83/379.

<sup>6</sup> Art 6(1) first subpara TEU: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."

<sup>7</sup> See the view of AG Jääskinen, *McB*, Case C-400/10 PPU, 22 September 2010, [51]–[55].

laws cannot preclude control over these laws on custody in accordance with the fundamental rights mentioned in the Charter. Moreover, Recital 33 in the preamble to the aforementioned Regulation emphasises that the Regulation recognises fundamental rights and observes the principles of the Charter, ensuring, in particular, respect for the fundamental rights of the child as set out in Article 24 of the Charter. It should be noted that the Brussels IIa Regulation is one of the instruments used to facilitate the mutual recognition of judicial decisions regarding parental responsibility. Specifically, in cases of child abduction, Article 42 establishes a system for immediate enforcement of the decision accompanied by a certificate issued by the state of origin which prevents any essential control by the authorities of the Member State of enforcement, including public policy.<sup>8</sup> In these cases, a serious problem may arise if, apart from the fact that the Member State of enforcement cannot carry out public policy control, it may be derived from the Brussels IIa Regulation that this Member State must recognise decisions which could violate fundamental rights. In this respect, the systems for the recognition and enforcement of judgments established by the Regulation

“are based on the principle of mutual trust between Member States in the fact that their respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights, recognised at European Union level, in particular, in the Charter of Fundamental Rights.”<sup>9</sup>

In any case, it is solely for the national courts of the Member State of origin to review the conformity of its judgments with the Charter.<sup>10</sup>

Thus, the lack of competence of the EU regarding custody laws cannot be used to protect discriminatory laws from the reach of the Charter because the purpose of the control is not to regulate custody. The control of such national laws, from the Charter’s perspective, only pursues the purpose of establishing limits to such laws when they lead to judgments which have to be recognised and enforced by virtue of an EU Regulation.

The analysis will focus on determining to what extent the Charter should influence the interpretation of Brussels IIa with respect to the position of unmarried fathers in cases of child abduction between the EU Member States. This does not exhaust the list of issues that may arise regarding the holder of

<sup>8</sup> Case C-195/08PPU *Rinau* [2008] ECR I-5271 [84]–[85]; Case C-211/10PPU *Povse v Alpagó* [2011] ILPr 1 [70]; Case C-491/10 PPU *Aguirre Zarraga v Simone Pelz*, judgment of 22 December 2010, [54].

<sup>9</sup> *Aguirre Zarraga, ibid.*, [70].

<sup>10</sup> *Ibid.*, [69]. See S Álvarez González, “Desplazamiento ilícito de menores dentro de la UE. Supresión del exequátur y derechos del niño a ser oído” (2011) 7578 *Diario La Ley: Unión Europea*, <http://diariolaley.laley.es> 1. See also L Walker and P Beaumont, “Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice” (2011) 7 *Journal of Private International Law* 231, 239–49.

custody in cases of child abduction. Indeed, as shown in the study by Lowe, there are other situations in which determining who holds custody is also problematic: cases of non-biological maternity, same-sex couples or the position of those caring for the child.<sup>11</sup> The analysis of all such possible cases is not the object of this article for reasons of length and because many of these situations give rise to the preliminary question of establishing legal parentage.<sup>12</sup> The object of this article is limited to assessing, from the perspective of the Charter, the validity of the existence of different conditions for obtaining custody for the father and mother according to marital status.

## B. THE *MCB* JUDGMENT

### 1. The Facts

The applicant in the main proceedings, Mr McB, who is of Irish nationality, and the defendant in the proceedings, Ms E, who is of British nationality, lived together as an unmarried couple for more than 10 years in several countries and, from November 2008, in Ireland. They had three children together. On 11 July 2009, the father discovered that the mother had left the family home with their children.

On 2 November 2009, Mr McB brought an action before the High Court of Justice of England and Wales (Family Division) (United Kingdom) seeking the return of the children to Ireland, in accordance with the provisions of the 1980 Hague Convention and the Brussels IIa Regulation. By order of 20 November 2009, said Court requested that the father, pursuant to Article 15 of the aforementioned Convention, obtain a decision from the Irish authorities declaring that the removal of the children was wrongful within the meaning of Article 3 of said Convention. By a judgment of 28 April 2010, the High Court (Ireland) dismissed this claim on the grounds that the father had no rights of custody in respect of the children at the time of their removal and, consequently, that the removal was not wrongful within the meaning of either the 1980 Hague Convention or the Brussels IIa Regulation. Under Irish law, the unmarried father of children does not, by operation of law, have rights of custody.

The father brought an appeal against this decision before the Irish Supreme Court. Said Court considered that neither the provisions of the Brussels IIa Regulation nor Article 7 of the Charter imply that the natural father of a child must necessarily be recognised as having rights of custody with respect to that child for the purposes of determining whether or not the removal of the child is wrongful in the absence of a court judgment awarding him such

<sup>11</sup> See Lowe, *supra* n 2, 10–16.

<sup>12</sup> *Ibid.*, 10–13.

rights. However, the Court accepted that the interpretation of these provisions of EU Law falls within the jurisdiction of the CJEU. In these circumstances, the Supreme Court decided to refer the following question to the CJEU for a preliminary ruling:

“Does [Regulation No 2201/2003], whether interpreted pursuant to Article 7 of [the Charter] or otherwise, preclude a Member State from requiring by its law that the father of a child who is not married to the mother shall have obtained an order from a court of competent jurisdiction granting him custody in order to qualify as having ‘custody rights’ which render the removal of that child from its country of habitual residence wrongful for the purposes of Article 2 No 11 of that Regulation?”

## **2. CJEU Arguments**

The response of the CJEU to the question raised is the following:

“[Brussels IIa] must be interpreted as not precluding a Member State from providing by its law that the acquisition of rights of custody by a child’s father, where he is not married to the child’s mother, is dependent on the father’s obtaining a judgment from a national court with jurisdiction awarding such rights to him, on the basis of which the removal of the child by its mother or the retention of that child may be considered wrongful, within the meaning of Article 2(11) of that Regulation.”

The CJEU provides a definition of the right to a private and family life, within the meaning of Article 7 of the Charter:

“55 [the] child’s natural father must have the right to apply to the national court with jurisdiction, before the removal, in order to request that rights of custody in respect of his child be awarded to him, which, in such a context, constitutes the very essence of the right of a natural father to a private and family life.”

The Court also considers that Article 24(2) of the Charter agrees with the lack of automatic recognition of the father’s rights of custody because it allows the courts to analyse, on the basis of the circumstances of the specific case, what is best for the child’s interests.

The decision is open to critical analysis from the perspective of both its premises and its arguments.

The CJEU decision is based on two premises. The first premise, as set out in paragraph 44 of the judgment, is that:

“whether a child’s removal is wrongful for the purposes of applying that Regulation is entirely dependent on the existence of rights of custody, conferred by relevant national law, in breach of which that removal has taken place.”

However, as shown later in this paper, such an interpretation must be qualified in relation to inchoate rights of custody. The second premise upon which the CJEU decision is based is that there is no discrimination against the unmarried

father if the possibility exists for him to apply to the courts for an impartial review of the rights of custody. However, the CJEU overlooks the fact that the discrimination occurs in the prior phase when the law automatically grants sole custody to the mother, although the paternity of the father has been established. This, in and of itself, already puts the father in a clear situation of disadvantage compared to the mother in the case of alleged abduction of the child to another state. Within the scope of child abduction, such consequences may be observed at three different levels.

Firstly, the application of a law by means of which a Member State automatically attributes the custody only to the mother may imply that the national authorities may refuse to instigate a return action based on the 1980 Hague Convention as requested by the father because he has no custody rights.

Secondly, the application of a law which limits the father's rights of custody to the fulfilment of certain requirements may also imply that the authorities refuse to issue the decision mentioned in Article 15 of the 1980 Hague Convention declaring that the removal carried out by the mother was wrongful. This was the situation that took place in the *McB* case. In said case, unequal treatment is evident because if the father has not fulfilled the requirements imposed by law to acquire custody before the removal has taken place, such removal to another state cannot be forbidden and, furthermore, such removal would be lawful. The situation would be completely different if the father had carried out the child's removal, in which case, the removal would be wrongful, as it had violated the mother's custody rights.

Finally, a specific application of the law which does not automatically grant custody to the father would imply that the judge in the state where the child was abducted, and who is in charge of the 1980 Hague Convention proceeding, would have to decide about the non-return of the child based on the lawful nature of the removal, according to Articles 14 and 3(a) of said Convention (Article 2(11)(a) of the Brussels IIa Regulation).

In these cases, the *McB* decision leads to inappropriate outcomes. In fact, the decision ignores the basic problem, which is the impossibility of the father legally to prevent the child's removal to any other state if steps are not taken by said father in good time to obtain rights of custody. In such a case, the father will never have the right to be granted a declaration of wrongful removal as he has not been the holder of the rights of custody before the child's removal (a requirement established in Article 2(11) of the Regulation). Furthermore, this will imply that the father must apply for custody before the courts of the Member State of the child's new habitual residence (Article 8 of the Regulation),<sup>13</sup> rather than seek custody in the courts of the Member State of

<sup>13</sup> I Rodríguez-Uría Suárez, "Secuestro intracomunitario de menores: ilicitud del desplazamiento y Carta de Derechos Fundamentales de la Unión Europea" (2010) 7538 *Diario la Ley: Unión Europea*, <http://diariolaley.laley.es> 17, 20.

the child's former habitual residence (general rule of Article 10 of the Brussels IIa Regulation). Finally, the lack of any wrongful removal will prevent the father from being able to obtain the child's return by the fast track established in Article 42 of the Brussels IIa Regulation.

Neither do the arguments on which the CJEU seeks to base its decision justify the conclusion reached. Its main arguments are based on ECtHR case-law on the prohibition of discrimination regarding the right to private and family life and on the application of limitations imposed by the Charter.<sup>14</sup> None of these arguments justifies the decision of the CJEU. Firstly, ECtHR case-law, particularly in the cases of *Balbontin* and *Guichard*, does not justify the discriminatory treatment of the unmarried father attempting to acquire custody of his child. Secondly, no other right or limitation contained in the Charter allows the justification of such discrimination.

### C. THE CONCEPT OF "FAMILY LIFE" AND UNMARRIED FATHERS

The control of national laws, from the Charter's perspective, only pursues the purpose of establishing limits to such laws when they lead to judgments which have to be recognised and enforced by virtue of an EU Regulation. In this case, there should always be an interpretation in accordance with the child's best interest (Article 24 of the Charter), respect towards family life (Article 7 of the Charter), the rule of non-discrimination (Article 21 of the Charter) and equality between men and women (Article 23 of the Charter). Whenever the fundamental rights mentioned in the Charter coincide with the ECHR, the interpretation of the latter by the ECtHR will be applicable. For the purpose at hand, we shall consider the most important features of the ECtHR decisions for our study.

Article 14 of the ECHR provides for the prohibition of discrimination. This Article has no independent existence, since it has effect solely in relation to the rights and freedoms safeguarded by other substantive provisions of the Convention and its Protocols.<sup>15</sup> This obliges us to decide whether the existing relationship between the unmarried father and his child is a family relationship within the meaning of Article 8 of the ECHR.

Based on ECtHR case-law, it may be indisputably stated that such a relationship should be included within the concept of "family life" mentioned in Article 8. The reasoning of the ECtHR is founded on a dynamic idea of family relations,<sup>16</sup> which is the result of an analysis of comparative law of

<sup>14</sup> See *McB*, *supra* n 1, [54]–[58].

<sup>15</sup> *Inze v Austria* (App No 8695/79) ECtHR 28 October 1987, [36].

<sup>16</sup> See U Kilkelly, *The Child and the European Convention on Human Rights* (Ashgate Publishing, 1999), 187 and G van Bueren, *Child Rights in Europe* (Council of Europe Publishing, 2007), 118.

the different Member States and of the identification of the social standards accepted at each moment in time. The concept of “family” is not only based on the marital family, but also on the fact that family life exists between a parent and his or her child from the moment of the child’s birth. In this way, Article 8 protects the relations between the parent and his or her child in all cases, without considering the relationship between both parents, be that a “legitimate” family, a natural family, or a dissolved married couple.<sup>17</sup>

However, based on the above case-law, it may also be inferred that the protection granted to these different family models is not established on the same basis. In the case of a marital family, the legal bonds will in and of themselves determine, without any other requirement, the existence of a family life according to the definition mentioned in Article 8 of the ECHR. In the case of a non-marital family, protection of family life has also required the existence of a commitment by the father towards his child as a necessary requirement for enforcing Article 8 of the ECHR in the case of any illegal interference.<sup>18</sup> Nevertheless, even this requirement has turned out to be more flexible with the passing of time, accepting other cases of family life even though a previous effective relationship between the father and his child has not been proved.<sup>19</sup> In any case, in relation to situations of child abduction, it is necessary for the father to exercise effectively his right of custody, in the sense required by Article 3 of the 1980 Hague Convention and Article 2(11) of the Brussels IIa Regulation. It therefore seems clear that this relationship between the unmarried father and his child would fall within the scope of Article 8 of the ECHR.

Once a family relationship has already been identified as defined in Article 8, it may then be considered whether the application of a law may be discriminatory as defined in Article 14 of the ECHR. A different consideration of two situations will not imply, in itself, a violation of the rule of non-discrimination. In order for such a violation to take place, it will be necessary for the measures which give different consideration to similar situations not to pursue a legitimate aim or for them not to be proportional to such purpose. As also occurs with the concept of family life, the concept of the discriminatory nature of a law has also been adapted to new social circumstances. Nevertheless, as shall be analysed hereinafter, the conclusions reached regarding equality may vary

<sup>17</sup> *Johnston and Others v Ireland* (App No 9697/82) ECtHR 18 December 1986, [55]; *Keeegan v Ireland* (App 16969/90) ECtHR 26 May 1994, [44]. For the evolution of the position of the ECHR on the concept of family life in relation to unmarried parents and their children, see Kilkelly, *supra* n 16, 189–91.

<sup>18</sup> *MB v the United Kingdom* (App No 22920/93) European Commission of Human Rights decision of 6 April 1994; *MV v Malta* (App No 18280/91) European Commission of Human Rights decision of 9 April 1992; see Kilkelly, *supra* n 16, 190 and Lowe, *supra* n 2, 7.

<sup>19</sup> *Boughanemi v France* (App No 22070/93) ECtHR 24 April 1996; *C v Belgium* (App No 21794/93) ECtHR 7 August 1996. See Kilkelly, *supra* n 16, 190–91.

if consideration is given to the relationships among the children or to the relationships between the parents themselves.

#### D. THE TREATMENT OF THE QUESTION IN ECtHR CASE-LAW

##### 1. Precedents Regarding Child Abduction: The Cases of *Guichard* and *Balbontin*

The problem of custody rights in cases of child abduction has already been submitted to the ECtHR in the cases of *Guichard*<sup>20</sup> and *Balbontin*,<sup>21</sup> though it should be mentioned that, in both cases, the Court decided to declare the complaint inadmissible on the grounds of being manifestly ill-founded, in accordance with Article 35 of the ECHR.

In the *Guichard* case, after the removal of a child by his mother from France to Canada, the unmarried father requested the French authorities to initiate the 1980 Hague Convention procedure for the child's return. The French authorities refused to take any action because the applicant did not enjoy custody rights. Consequently, the father submitted a complaint before the ECtHR based on the violation of Article 8 (due to default by the authorities of the positive obligation to enforce the provisions of the 1980 Hague Convention) and of Article 14 (due to the discrimination derived from Article 374 of the French Civil Code between the father and the mother and between the marital and non-marital family<sup>22</sup>). The ECtHR confirmed that there is no obligation for the national authorities to apply the 1980 Hague Convention if the applicant father does not fulfil the custody requirements established by the Convention itself. Regarding the discriminatory nature of Article 374 of the Code, the ECtHR only confirmed the decision pronounced in the case of *Dazin v France*,<sup>23</sup>

<sup>20</sup> *Guichard v France* (App No 56838/00) ECtHR decision of 2 September 2003.

<sup>21</sup> *Balbontin v the United Kingdom* (App No 39067/97) ECtHR decision of 14 September 1999.

<sup>22</sup> According to the French Civil Code, Art 374 (as in force at the material time):

“Where a child born out of wedlock has been recognised by only one of his or her parents, parental responsibility shall vest in the parent who has voluntarily recognised the child. Where the child has been recognised by both parents, parental responsibility shall vest in the mother.

Parental responsibility may be exercised jointly by both parents if they make an appropriate joint declaration before the guardianship judge.

At the request of the father or the mother or State Counsel, the matrimonial causes judge may modify the arrangements for exercising parental responsibility and decide that it shall be exercised either by one of the parents or by the father or mother jointly; in that event the judge shall indicate with which parent the child shall habitually reside.”

(trans Art 374 included in the court's decision)

<sup>23</sup> *Dazin v France* (App No 28655/95) European Commission of Human Rights decision of 12 April 1996.

reaching the conclusion that there is lack of violation of Article 14 if there is any possibility of a judicial review of the custody based on the child's interest.<sup>24</sup>

A proper understanding of this ECtHR decision is what it is missing here. On the one hand, the ECtHR does not rule on the compatibility between Article 374 of the French Civil Code and the ECHR because the consideration of the way of acquiring the child's custody was not the object of the complaint. The French authorities never settled the question of parental responsibility for the child; therefore, the ECtHR has no competence to review this matter. On the other hand, the ECtHR did not comment as to whether Article 374 of the Code makes any discrimination between the unmarried mother and the unmarried father; at this point, the Court merely reiterated that, in *Dazin*, the Commission of Human Rights found that "a similar complaint" had not given rise to discrimination contrary to Article 14 of the ECHR provided that unmarried fathers could at any time apply for a court decision to decide on the exclusive basis of the child's interest, with no prejudice towards the mother. This position was subsequently confirmed by decisions such as in the cases of *Zaunegger v Germany*<sup>25</sup> and *Sporer v Austria*.<sup>26</sup> However, we have to stress that none of these cases analyses the consequences derived from the direct application of discrimination by operation of law. The context in these cases was totally different to that in the *Guichard* case; in the former, the reason for the father's claim before the ECtHR was the national courts' refusal to grant custody of the child without assessing the ability of both parents and the best interests of the child, while, in the latter, the father's complaint was founded on the discrimination by operation of law resulting from initial attribution of custody of a child born out of wedlock to its mother.

The consequences derived from the direct application of discrimination by operation of law can be found in the *Balbontin* case. With reference to the removal of a child by his or her mother from the UK to Italy, the unmarried father applied to the UK authorities to be granted a decision, according to Article 15 of the 1980 Hague Convention, declaring the child's removal to be wrongful. The authorities rejected said petition because the father had no custody rights as established by English law.<sup>27</sup> The ECtHR pointed out that

<sup>24</sup> *Guichard*, *supra* n 20, [2].

<sup>25</sup> *Zaunegger v Germany* (App No 22028/04) ECtHR 3 December 2009.

<sup>26</sup> *Sporer v Austria* (App No 35637/03) ECtHR 3 February 2011.

<sup>27</sup> The Children Act 1989, s 2, provides the following:

"(1) Where a child's father and mother were married to each other at the time of his birth, they shall each have parental responsibility for the child.

(2) Where a child's father and mother were not married to each other at the time of his birth—

(a) the mother shall have parental responsibility for the child;

(b) the father shall not have parental responsibility for the child, unless he acquires it in accordance with the provisions of this Act."

the different consideration given by English law towards the unmarried father – compared with one who is married – was justified founded on the child's interests and the need to protect him or her from a father who lacked interest in any family obligations. In fact, in the *Balbonin* case, the father was neither living with the child's mother nor with the child and, therefore, the child was not cared for by the applicant. This is the reason why the ECtHR considered that the unequal treatment regarding parental responsibility had an objective and reasonable justification. This is what essentially distinguishes the *Balbonin* case from the *McB* case; in the latter, the father participated in the upbringing of the child and the parents lived together as an unmarried couple for more than ten years.

Therefore, it is important to note that none of the aforementioned precedents of the ECtHR can support the position of the CJEU because, as already explained, none of them deals directly with the consequences of applying, in a specific case, a national law which does not automatically recognise the custody rights of an unmarried father who has cared for the child.

## 2. Equality between Unmarried Mothers and Fathers

A prohibition of unequal treatment between the unmarried father and the unmarried mother in order to acquire parental rights cannot be clearly derived from ECtHR case-law. On the contrary, it has already been confirmed that the legitimate aim of the protection of the child's interests justifies a different consideration for parents who are married and those who are unmarried as regards the attribution of custody rights.<sup>28</sup> The European Commission of Human Rights declared national laws which attribute exclusive custody to the unmarried mother to be compatible with the ECHR, on the understanding that said decision is based on the child's interest and is intended to prevent the child from being subject to his or her parents' disputes.<sup>29</sup> The ECtHR has stated that a legitimate aim is:

“[T]o provide a mechanism for identifying ‘meritorious’ fathers who might be accorded parental rights.”<sup>30</sup>

It has also stated:

“[I]t was justified for the protection of the child's interests to attribute parental authority over the child initially to her mother in order to ensure that there was a person at birth who could act for her in a legally binding way.”<sup>31</sup>

<sup>28</sup> *McMichael v The United Kingdom* (App No 16494/90) ECtHR 24 February 1995, [98]; *Zaunegger*, *supra* n 25, [54]–[56]; *Sporer*, *supra* n 26, [85].

<sup>29</sup> *BN v Denmark* (App No 13557/88) European Commission of Human Rights decision of 9 October 1989. See Kilkelly, *supra* n 16, 247.

<sup>30</sup> *McMichael*, *supra* n 28, [98].

<sup>31</sup> *Zaunegger*, *supra* n 25, [54]–[55]; *Sporer*, *supra* n 26, [85].

When considering ECtHR case-law it is wise to bear in mind that it is not based on an abstract analysis of the laws of the Member States but within the context of the specific complaints lodged in each case.<sup>32</sup> In this respect, the common point in the cases of *Zaunegger*, *Sporer* and *McMichael* is the justification of a different treatment that discriminates against unmarried fathers for those situations where “arguments or lack of communication between the parents risk jeopardising the child’s welfare” but with the express caveat that “however, nothing establishes that such an attitude is a general feature of the relationship between unmarried fathers and their children”.<sup>33</sup>

Based on ECtHR case-law, the problem of the application of a discriminatory law arises in two contexts: when the unmarried father applies to the courts for an impartial review of the rights of custody (the cases of *Dazin*, *Zaunegger* and *Sporer*) and when the father seeks to acquire and enforce his rights of custody by operation of law under the same conditions as the mother (the cases of *Guichard* and *Balbontin*).

In the first context, we have to assess the possibilities of attributing joint or sole custody to the father. Based on case-law, a violation of the discrimination prohibition mentioned in Article 14 of the ECHR may be understood to take place if the national law does not allow the father to apply before the court to request such a revision of the rights of custody, if the national law introduces criteria which will oblige the judge to grant said rights in favour of one of the parents without taking into account the child’s interest, or even if an unmarried father is considered in a different way in spite of the fact of having demonstrated a close relationship with his child.<sup>34</sup>

In the second context, we have to assess the initial attribution of custody of a child born out of wedlock to its mother. It may never be derived from the cases of *Guichard* and *Balbontin* that legal discrimination between the unmarried father and mother is in accordance with Article 14 of the ECHR if it may be demonstrated, as in the specific case of *McB*, that the application of said law prevents the father – who was in charge of taking care of his child – from being able to acquire and enforce his rights under the same conditions as the mother.

From all this, it follows that the ECtHR has, in some cases, justified differences in treatment between unmarried mothers and fathers, but that this justification does not apply to all situations. In particular, it is incomprehensible that the ECtHR should defend discrimination against an unmarried father who has been responsible for his child.<sup>35</sup> Moreover, on the basis of other cri-

<sup>32</sup> *Sommerfeld v Germany* (App No 31871/96) ECtHR 8 July 2003, [86]. See also *Zaunegger*, *ibid*, [45] and *Sporer*, *ibid*, [79].

<sup>33</sup> *Zaunegger*, *ibid*, [56].

<sup>34</sup> *Sommerfeld v Germany* (App No 31871/96) ECtHR 11 October 2001, [55].

<sup>35</sup> Regarding the comparison between unmarried fathers and married fathers, the “Court considers that the Government has not submitted sufficient reasons why the present situation should

teria provided by ECtHR case-law, it may be concluded that the application of discriminatory laws regarding the unmarried father and mother may be a violation of Article 14 of the ECHR. First, it is necessary to check whether both the unmarried father and mother are in an analogous situation in each specific situation. It is difficult to deny the existence of an analogous situation between the father and the mother as regards their child's custody. On the other hand, the situation of equality is based on the assumptions established by the ECtHR regarding the equality of children, present social and legal trends, the principle of proportionality and the exceptional and restrictive nature of any difference of consideration based on the fact that the child was born to an unmarried couple.

## E. CRITERIA CONTRARY TO THE DISCRIMINATION AGAINST UNMARRIED FATHERS

### 1. The Principle of Equality of Children

The principle of equality of children is one of the bases of the Brussels IIa Regulation, as already mentioned in Recital 5 of that Regulation.<sup>36</sup> Non-discrimination among children based on the child's or his or her parents' birth or other status is, at present, a generally assumed principle stated in Article 2(1) of the United Nations Convention on the Rights of the Child, of 20 November 1989.<sup>37</sup> It was confirmed by the ECtHR with reference to some Member States' laws which established various inheritance rights in favour of children born in wedlock versus those of children born out of wedlock.<sup>38</sup> Although the ECtHR has considered that the protection of the traditional family is a legitimate aim, it has also taken into account the fact that the different consideration of children based on their parents' relationship is a non-proportional measure for achieving such a purpose.<sup>39</sup>

allow for less judicial scrutiny than these cases and why the applicant, who has been acknowledged as a father and has acted in that role, should in this respect be treated differently from a father who had originally held parental authority and later separated from the mother or divorced" (*Zaunegger*, *supra* n 25, [62]); see also *Sporer*, *supra* n 26, [89].

<sup>36</sup> Recital 5 sets out: "In order to ensure equality for all children, this Regulation covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding."

<sup>37</sup> The UN Convention on the Rights of the Child, Art 2(1), provides: "1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."

<sup>38</sup> See the case of *Inze*, *supra* n 15, [41]; *Mazurek v France* (App No 34406/97) ECtHR 1 February 2000, [49]; *Brauer v Germany* (App No 3545/04) ECtHR 28 May 2009, [44].

<sup>39</sup> *Mazurek*, *ibid*, [50]-[55].

The trend towards equality of children can also be observed in the study of comparative law carried out by Lowe.<sup>40</sup> As already mentioned, the EU Member States have different solutions as regards the attribution of custody rights based on the existence (or absence) of a marital relationship between the parents. Nevertheless, the laws of these same Member States do not establish any difference with reference to children's rights concerning their parents as regards their rights of inheritance or maintenance. Thus, in some national laws, even though an unmarried father has not obtained parental responsibility, he is liable to care for and protect the child.<sup>41</sup>

Likewise, Principle 3:5 of the CEFL's Principles of European Family Law Regarding Parental Responsibilities and Article 1(2) of the Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities 2010<sup>42</sup> provide for equality among all children regardless of the marital status of their parents. However, it is impossible to guarantee equality among all children regardless of the marital status of their parents if, at the same time, the law provides for a different treatment in the attribution of rights of custody depending on whether the child was born within or outside of wedlock.<sup>43</sup>

## 2. Current Social Trends and Equality between Men and Women

The ECtHR itself has already accepted that current social trends assign a similar role to the father and the mother as regards the child's care. This was taken into account, for example, at the time of considering the different legal treatment of the father and the mother with regard to gaining access to social services for the child as a violation of Article 14 of the ECHR.<sup>44</sup> Therefore, it would be inconsistent to continue defending a special relationship between the father and his child in order to justify the rule of the non-automatic attribution of custody to the unmarried father. This equal nature regarding the access to

<sup>40</sup> See Lowe, *supra* n 2, 17–19.

<sup>41</sup> In many jurisdictions (eg Bosnia and Herzegovina, Estonia, Georgia, Hungary, Latvia, Norway, Romania, Serbia, Slovenia and Ukraine), both parents, regardless of marriage to each other, are liable to care for and protect the child. In others (Denmark, England and Wales, Netherlands, etc), the liability to care for and protect the child is an aspect of parental responsibility or parental authority or of custody and will consequently fall on married parents, unmarried mothers and unmarried fathers who have obtained such authority (see Lowe, *supra* n 2, 19–20).

<sup>42</sup> See the "Report of the Third Meeting of the Committee of Experts on Family Law", Council of Europe, Strasbourg, 6–8 October 2010, CJ-FA-GT3 (2010) RAP3.

<sup>43</sup> A Bainham, "When Is a Parent not a Parent? Reflections on the Unmarried Father and his Child in English Law" (1989) 3 *International Journal of Law and the Family* 208, 215; K Boele-Woelki *et al*, *Principles of European Family Law Regarding Parental Responsibilities* (Intersentia, 2007), 48.

<sup>44</sup> *Petrovic v Austria* (App No 25458/92) ECtHR 27 March 1998, [36]; *Weller v Hungary* (App No 44399/05) ECtHR 31 March 2009, [33]-[35]; *Konstantin Markin v Russia* (App No 30078/06) ECtHR 7 October 2010, [49].

custody by both the father and the mother would be in accordance with the principle of equality of the sexes also supported by European case-law.<sup>45</sup>

The principle of gender equality derived from EU law has a direct bearing on the matters that fall within its competences.<sup>46</sup> This means that custody, considered on its own, cannot be evaluated in the light of this principle of EU law. However, the concept of custody itself can be analysed insofar as the law of the Member State has consequences for the implementation of an EU regulation. In this regard, it should be noted that the Brussels IIa Regulation, while in the process of being drafted, was submitted to the Opinion of the Committee on Women's Rights and Equal Opportunities, on 26 June 2002, to assess its impact in the light of gender mainstreaming.<sup>47</sup> The perceived context for what served as the basis for the Committee's Opinion was not the same as the current context in which child abductions occur. The perceived context stemmed from situations in which the abduction was carried out, above all, by the father, who retained the child subsequent to exercising a right of access. The proposals were thus intended to ensure adequate legal assistance to women and to protect them in their condition as "victims".<sup>48</sup> The current context is substantially different, as many abductions are carried out by the mother, who is, single-handedly or jointly, the child's primary carer.<sup>49</sup> Thus, the new proposals seek to justify the reasons for refusal to return the child in response to the particular situation of women (influence of domestic violence and structural inequality).<sup>50</sup>

The situation of unmarried fathers in relation to Article 2(11) of the Brussels IIa Regulation has not been considered from the perspective of gender mainstreaming. However, it is clear that the Brussels IIa Regulation and gender

<sup>45</sup> *Konstantin Markin, ibid*, [47].

<sup>46</sup> See Art 23 of the Charter ("Equality between men and women") and Art 6(1) TEU: "The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties."

<sup>47</sup> See the Opinion in the European Parliament Report on the proposal for a Council regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (CE) No 1347/2000 and amending Regulation (CE) No 44/2001 in matters relating to maintenance (COM(2002) 222—C5-0234/2002—2002/0110(CNS)).

<sup>48</sup> In this respect, see the Opinion of the Committee on Women's Rights and Equal Opportunities: "The cases of cross-border recognition of court rulings most frequently entail considerable cost and effort: this should not, however, constitute an impediment for those parents who have not the financial or other means to claim the return of the child. In addition, it is statistically proved that women are in a weaker economic situation than men, more so if they have the responsibility/custody of the child or children after a legal separation, marriage annulment or divorce" (Amendment 1).

<sup>49</sup> See R Lamont, "Mainstreaming Gender into European Family Law? The Case of International Child Abduction and Brussels II Revised" (2011) 3 *European Law Journal* 366, 374. Even in 2002 it was an incorrect assumption to make about the nature of child abductions as it was already known at that time that a significant majority of abductions were done by mothers and that the vast majority of them were likely to be primary carers, see P Beaumont and P McEleavey, *The Hague Convention on International Child Abduction* (Oxford University Press, 1999), 3–4.

<sup>50</sup> Lamont, *ibid*, 377.

mainstreaming are founded on the same principle. Gender mainstreaming is an EU policy tool encouraging equality between men and women by incorporating gender concerns into the formation of EU law. This principle of equality is now found not only in Article 23 of the Charter, but also in Articles 2 and 3 TEU and Article 8 of the Treaty on the Functioning of the European Union (TFEU). A consequence of this is that equality between men and women must be defended in relation to rights and duties within the scope of the home by supporting women's access to the labour market and the reconciling of work and family life. These latter aspects clearly constitute one of the core principles of EU. Moreover, the European Commission Communication of 1996 already made it clear that equality between men and women required reconsidering the role assumed by each within the sphere of family responsibilities.<sup>51</sup> All this implies that it would be inconsistent with gender mainstreaming for the Brussels IIa Regulation to protect, when applying Article 2(11), the law of a Member State which does not establish said equality between men and women in obtaining the rights and duties arising out of custody.

An analysis of the principles which are currently generally accepted by EU Member States also allows us to confirm that both the father and the mother enjoy the same position. In comparative law, the position of unmarried fathers is varied. Nevertheless, Article 18 of the Convention on the Rights of the Child 1989 states in very general terms, without distinguishing between children born within or outside wedlock, that the contracting states shall use their best efforts to ensure the recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. The principle of common responsibilities implies that both parents are holders of parental responsibilities as stated in Principle 3:8 of the CEFL's Principles of European Family Law Regarding Parental Responsibilities.<sup>52</sup> The rule is based on the idea that joint attribution is in the best interests of the child and both parents have equal rights and obligations.<sup>53</sup> This is also the general rule estab-

<sup>51</sup> European Commission Communication, "Incorporating Equal Opportunities for Women and Men into All Community Policies and Activities", 21 February 1996 (COM(96) 67 final, 5):

"The promotion of equality between women and men, therefore, does not simply require the implementation of positive measures targeted at women, e.g. to promote their access to education, training or employment. It also requires measures aimed at adapting the organisation of society to a fairer distribution of men's and women's roles: eg by adapting the organisation of work to help women as well as men reconcile family and working life; or by encouraging the development of a multitude of activities at local level to provide more flexible employment solutions, again for both men and women; or by guaranteeing the rights of fathers as much as those of mothers so that both can be expected to carry out their responsibilities and duties to the full; or by adapting social protection to incorporate the trend towards the individualisation of rights into collective responsibility, etc."

<sup>52</sup> Boele-Woelki *et al*, *supra* n 43, 59.

<sup>53</sup> *Ibid*, 65.

lished in Principle 19, paragraph 1 of the Council of Europe White Paper on Principles Concerning the Establishment and Legal Consequences of Parentage 2002 and in Article 23, paragraph 1, of the Council of Europe's Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities 2010.<sup>54</sup>

### 3. Proportionality and Restrictive Interpretation of Discrimination

The principle of proportionality between the aim pursued (the child's protection) and the means chosen (the non-automatic acquisition of the right of custody by the father) does not justify the discrimination between the father and the mother. Obviously, the solution would not be proportional in those cases in which the father has been responsible for the child since his or her birth.<sup>55</sup> Such a solution cannot be understood as justified when there are other alternatives for achieving the same protection for the child. This has been demonstrated by the amendments of the laws in several Member States (eg Germany and France), as they have been eliminating the differences of consideration between the father and the mother. As was expressly pointed out by the ECtHR with reference to the case of *Sommerfeld v Germany*, this affords the possibility of protecting the child's interest without any distinction on the grounds of birth<sup>56</sup>, as occurs in Spanish law.<sup>57</sup>

Finally, discrimination between the father and the mother in the acquisition of custody rights is not coherent with the exceptional and restrictive nature that, according to the ECtHR itself, national laws which establish a difference of treatment on the grounds of birth out of wedlock should have.<sup>58</sup>

<sup>54</sup> See the "Report of the Third Meeting of the Committee of Experts on Family Law", *supra* n 42, Art 23:

"1. Parental responsibilities should in principle belong to each parent.

2. In cases where only one parent has parental responsibilities by the operation of law, states should make procedures available for the other parent to have an opportunity to acquire parental responsibilities, unless it is against the best interests of the child. Lack of consent or opposition by the parent having parental responsibilities should not as such be an obstacle for such acquisition."

Paragraph 1 sets out the general position that parental responsibilities should in principle belong to each parent irrespective of the relationship between the parents. However, implicit in paragraph 2 is that this is not an absolute rule and that where only one parent has parental responsibilities by operation of law then, subject to the child's best interests, states should provide legal procedures by which the other parent has the opportunity to acquire such responsibilities (Explanatory Memorandum prepared by Lowe, cited *supra* n 2, 40).

<sup>55</sup> *Sommerfeld*, *supra* n 34, [55]–[56]; *Zaunegger*, *supra* n 25, [56].

<sup>56</sup> *Sommerfeld*, *supra* n 34, [57].

<sup>57</sup> See the Spanish Civil Code, Arts 154–61.

<sup>58</sup> See *Mazurek*, *supra* n 38, [49]; *Zaunegger*, *supra* n 25, [5]; *Sommerfeld*, *supra* n 34, [93].

Thus, from the perspective of both the ECHR and EU law, the application of a law which, by not automatically attributing the custody of the child to the unmarried father, impedes a father from preventing the removal of his child to another state even when he is responsible for the child, is not justified.

## F. INCHOATE RIGHTS OF CUSTODY AND UNMARRIED FATHERS

### 1. Treatment in the 1980 Hague Convention

The conclusion reached requires a revision in the procedure of the 1980 Hague Convention and the Brussels IIa Regulation. As already stated, it is clear that the rule regarding the determining of custody stems from a remission to the state in which the child was habitually resident immediately before the removal in terms of Article 3 of the 1980 Hague Convention and Article 2(11) of Brussels IIa. However, this does not mean that there is total dependence on the law of that state, but rather that the concept of custody assumes an autonomous nature for the 1980 Hague Convention and also for the Brussels IIa Regulation.

Regarding the 1980 Hague Convention, the aforementioned autonomous interpretation of the concept of custody has clearly been defended in diverse Special Commissions.<sup>59</sup> This also stems from what is expressly stated in Article 5(a), by providing that, for the purposes of the Convention, custody must be understood as including “the right to determine the child’s place of residence”. This means that there will be a right of custody for the 1980 Hague Convention, regardless of what is recognised as such in the state of the former place of habitual residence, if, in a particular case, one of the parents has a right of veto over the child’s place of residence.<sup>60</sup>

This autonomous interpretation is also furthered by the very letter of the last paragraph of Article 3 of the 1980 Hague Convention when it establishes that the rights of custody “may arise *in particular* by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement

<sup>59</sup> “The key concepts which determine the scope of the Convention are not dependent for their meaning on any single legal system. Thus the expression “rights of custody”, for example, does not coincide with any particular concept of custody in a domestic law, but draws its meaning from the definitions, structure and purposes of the Convention” (Conclusion 2 of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, 18–21 January 1993; see also Conclusion 44 of the Sixth Special Commission Meeting, 1–10 June 2011).

<sup>60</sup> P Jiménez Blanco, *Litigios sobre la Custodia y Sustracción Internacional de Menores* (Marcial Pons, 2008), 146–50. Courts in an overwhelming majority of contracting states have accepted that a right of veto over the removal of the child from the jurisdiction amounts to a right of custody for Convention purposes: see *C v C (Minor: Abduction: Rights of Custody Abroad)* [1988] www.incatat.com ref HC/E/UKc 34; *Re D (A Child) (Abduction: Rights of Custody)* [2006] www.incatat.com ref HC/E/UKc 880; *AJ v FJ* [2005] www.incatat.com ref HC/E/UKs 803.

having legal effect under the law of that State”. With this wording, remission to the law of the state in which the child was habitually resident before the removal does not appear to be a closed issue and the wording favours a flexible interpretation of the terms “rights of custody”, which allows the largest possible number of premises to be covered, as indicated by E Pérez Vera in the Explanatory Report to the Convention.<sup>61</sup>

To all the above must be added the fact that the law of the state of former habitual residence of the child should be interpreted, in all cases, respecting public policy and fundamental rights, as expressly permitted by Article 20 of the 1980 Hague Convention in order to reject the return of the child.<sup>62</sup> It is even more sensible to defend this interpretation when the aim is to ensure the return of a child who has been removed by the mother without the consent of the unmarried father.

In this respect, a practice already exists within the framework of the 1980 Hague Convention, which has been favourable to an autonomous, comprehensive and flexible interpretation of the right of custody through inchoate rights of custody. This construction allows the removal of the child to be qualified as wrongful even though it has not been carried out in breach of a legally established custody. “Inchoate rights of custody” afford a Convention remedy to applicants who actively cared for removed children, but who do not possess legal custody rights. This construction is not specifically intended for situations of unmarried fathers, but has been applied rather to different situations in which the person who exercised custody was not the legal holder of said custody right.<sup>63</sup>

This paper does not aim to defend the application of inchoate rights of custody to all situations. The weak points of this construction should be also considered.<sup>64</sup> However, the application of the construction of “inchoate rights

<sup>61</sup> E Pérez Vera, “Explanatory Report”, para 67:

“[P]aragraph 2 of article 3 takes into consideration some – no doubt the most important – of those sources, while emphasizing that the list is not exhaustive. . . . Now . . . these sources cover a vast judicial area, and the fact that they not are exhaustively set out must be understood as favouring a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration.”

See also K Beevers and J Pérez Milla, “Child Abduction: Convention “Rights of Custody” – Who Decides? An Anglo-Spanish Perspective” (2007) 3 *Journal of Private International Law* 201, 204.

<sup>62</sup> See Jiménez Blanco, *supra* n 60, 106–11.

<sup>63</sup> In *Re O (Child Abduction: Custody Rights)* [1997], [www.incadat.com](http://www.incadat.com) ref HC/E/UKe 5, although the grandparents did not have legal rights of custody, their exercise of full parental responsibilities over a substantial period of time was sufficient to establish their joint custody rights for the purposes of the Convention.

<sup>64</sup> Beaumont and McEleavy, *supra* n 49, 60: “It would also open the door to indeterminacy as to when rights would or would not arise.”

of custody” to the situation of unmarried fathers<sup>65</sup> enables the interpretation of the 1980 Hague Convention in accordance with fundamental rights in the sense seen above. Thus, the case *Re B*<sup>66</sup> is an example of the application of inchoate rights of custody in relation to unmarried fathers:

“The purposes of the Hague Convention were, in part at least, humanitarian. The objective is to spare children already suffering the effects of the breakdown of their parents’ relationship the further disruption which is suffered when they are taken arbitrarily by one parent from their settled environment and moved to another country for the sake of finding there a supposedly more sympathetic forum or a more congenial base. The expression ‘rights of custody’ when used in the Convention therefore needs to be construed in the sense that will best accord with that objective. In most cases, that will involve giving the term the widest sense possible. . . .

The difficulty lies in fixing the limits of the concept of ‘rights’. Is it to be confined to what lawyers would instantly recognise as established rights – that is to say those which are propounded by law or conferred by court order – or is it capable of being applied in a Convention context to describe the inchoate rights of those who are carrying out duties and enjoying privileges of a custodial or parental character which, though not yet formally recognised or granted by law, a court would nevertheless be likely to uphold in the interests of the child concerned?

The answer to that question must, in my judgment, depend upon the circumstances of each case. If, before the child’s abduction, the aggrieved parent was exercising functions in the requesting State of a parental or custodial nature without the benefit of any court order or official custodial status, it must in every case be a question for the courts of the requested State to determine whether those functions fall to be regarded as ‘rights of custody’ within the terms of the Convention. At one end of the scale is (for example) a transient cohabitee of the sole legal custodian whose status and functions would be unlikely to be regarded as qualifying for recognition as carrying Convention rights. The opposite would be true, at the other end of the scale, of a relative or friend who has assumed the role of a substitute parent in place of the legal custodian.”

It is true that in *Re B*, in principle, the admitted right of custody in favour of the father was recognised only in situations where he exercised sole custody, in cases of child abandonment by the mother.<sup>67</sup> In the case of *K*, however, there was a joint exercise of custody by the father and the mother.<sup>68</sup> In that case, the removal carried out by the mother contrary to the will of the unmarried father is considered wrongful even though English law does not automatically grant

<sup>65</sup> See K Beever, “Child Abduction: Inchoate Rights of Custody and the Unmarried Father” (2006) 4 *Child and Family Law Quarterly* 499.

<sup>66</sup> *Re B (A Minor) (Abduction)* [1994] www.incadat.com ref HC/E/UKc/4.

<sup>67</sup> This is particularly highlighted by Beever, *supra* n 65, 507. See *Re G (Child Abduction) (Unmarried Father: Rights of Custody)* [2002], www.incadat.com ref HC/E/UKc 506; *AAA v ASH (Registrar General for England and Wales and the Secretary for Justice)* [2009], *ibid*, HC/E/UKc 1019.

<sup>68</sup> *Re K (Children) (Rights of Custody: Spain)* [2009], www.incadat.com ref HC/E/UKc 1027.

custody to the father.<sup>69</sup> What is interesting about the case is that the English court interprets the content of English law in view of Spanish public policy as established in Article 39.2 of the Spanish Constitution, which guarantees the equality of all children, irrespective of their parentage.<sup>70</sup> Moreover, Lord Justice Thorpe stated, *obiter dictum*, that “given the evolution of the treatment of unmarried fathers and in the light of the Convention’s autonomous approach to custody rights”, he would have considered the father to have had rights of custody within the meaning of Articles 3 and 5 of the Convention even if English law had been held to be applicable.

The construction of inchoate rights of custody is perfectly in keeping with the purpose of the 1980 Hague Convention. Inchoate rights of custody prevent the harm which may be caused to the child by a unilateral removal from the state in which that child had a settled environment.<sup>71</sup> This ensures a factual situation (which the child had prior to removal) while at the same time respecting the jurisdiction of the custody court to rule on the merits of the case.

## 2. Treatment in the Brussels IIa Regulation

The question arises whether this autonomous interpretation not only of the content of the rights of custody, but also of who constitutes the holder of such rights, can be maintained within the scope of the Brussels IIa Regulation. In the case of *McB*, although the CJEU supports an autonomous interpretation of the concept of “rights of custody”, it considers that the determination of the identity of the holder of these rights depends on the law of the Member State of the former place of habitual residence.<sup>72</sup> However, the Advocate General is clearly against the possibility of applying inchoate rights of custody within the scope of the Brussels IIa Regulation. His arguments are based on the wording of Article 2(11) of the Brussels IIa Regulation, on the lack of jurisdiction of EU law to “regulate” the question of attribution of custody, and on the scope of the rights of free movement and legal security of the mother. I cannot share any of these arguments.

<sup>69</sup> It was noted that under Spanish choice-of-law rules on parental responsibility, reference would be made to the law of the child’s state of nationality, according to Arts 9.4 and 9.6 Spanish Civil Code. This would lead to the application of English law, which, in contrast to Spanish domestic law, would lead to the father not being attributed with parental responsibility. See the problems of using *renvoi* in the 1980 Hague Convention in Beevers and Pérez Milla, *supra* n 61, 211–24.

<sup>70</sup> See the same opinion in Beevers and Pérez Milla, *ibid*, 218–19.

<sup>71</sup> *In Re W (Minors) (Abduction: Father’s Rights)* [1998], www.incadat.com ref HC/E/UKe 503, Hale J stated that cases *In re B (A Minor) (Abduction)* and *In re O (Child Abduction: Custody Rights)* “were a good example of the courts doing their utmost to protect children from being taken away from their primary caretakers, the classic case of abduction in the public mind”.

<sup>72</sup> See the case of *McB*, *supra* n 1, [41]–[42].

Firstly, although the wording of Article 2(11) omits the expression “in particular”, which is present in Article 3 of the 1980 Hague Convention,<sup>73</sup> this cannot give rise to a different interpretation of the Regulation with respect to the 1980 Hague Convention. Indeed, it would be absurd to qualify a removal as wrongful within the scope of the 1980 Hague Convention and yet qualify the same removal as lawful within the scope of the Regulation. The remission that Recital 17 of the Brussels IIa Regulation makes to the 1980 Hague Convention shows that there was no intention of constructing a different concept of wrongful removal within the scope of application of the Regulation.<sup>74</sup>

Secondly, to consider that the father holds custody according to the provisions established in Article 2(11) of the Brussels IIa Regulation does not imply legislating on custody – which, in fact, is not included within the present scope of European Union Law – but only understanding that “as far as the Regulation is concerned”, the father is also entitled to decide on the child’s place of residence and, therefore, his or her removal without the father’s consent would be considered wrongful. As already indicated, the concept of custody does not necessarily require that the law of the state of former habitual residence recognises a right of custody as such. For the purposes of Article 3 of the 1980 Hague Convention and of Article 2(9) of the Brussels IIa Regulation, it is sufficient for one of the holders to have the right of veto over the child’s place of residence. Therefore, recognising the unmarried father’s inchoate right of custody is not to “ascribe” to him a right of custody, but only his right to participate in the decision regarding the child’s place of residence so as to prevent the child’s unilateral removal by another person to another state. The decision on custody will depend exclusively on the decision regarding the merits dictated by the competent court.

Thirdly, in no case whatsoever may it be understood that the obligation to return the child to the Member State of his or her former place of habitual residence may imply a limitation to the mother’s safety and her own right of freedom of movement, as provided for in Article 20(2)(a) TFEU and Article 21(1) TFEU. As regards parental responsibility rights, the prevailing criterion will be the child’s best interest and said interest may either justify or limit the

<sup>73</sup> This is highlighted by AG Jääskinen’s Opinion in Case *J McB*, n 19. Under para 2 of Art 3 of the 1980 Hague Convention: “The rights of custody mentioned in subparagraph (a) above may arise *in particular* by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State”; under Art 2(11) of Brussels IIa: “(a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State”.

<sup>74</sup> Recital 17 in the Preamble to the Brussels IIa Regulation states: “In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention of 25 October 1980 would continue to apply as complemented by the provisions of this Regulation, in particular Article 11.”

right of free movement of holders of custody rights.<sup>75</sup> Obviously, the criterion to be considered by the authority in order to decide on the child's return will also be based on the child's interest in each specific case.

Moreover, the Charter establishes, in Article 24(2), that public authorities and private institutions must consider the child's best interest in all actions relating to children. Specifically, one of the elements to be considered regarding the child's interest is his or her right to maintain on a regular basis a personal relationship and direct contact with both his or her parents (Article 24(3) of the Charter). The CJEU has already stated its position in the *Detiček* case:

“[A] measure which prevents the maintenance on a regular basis of a personal relationship and direct contact with both parents can be justified only by another interest of the child of such importance that it takes priority over the interest underlying that fundamental right.”<sup>76</sup>

Therefore, it seems quite clear that if custody is initially acquired exclusively by the mother, the child's right to have a relationship with his or her father is limited by operation of law especially when, as we have already shown, such a legal regulation can give rise to the possibility of the mother removing the child to another State.

## G. CONCLUSION

The treatment that the laws of some Member States of the European Union give to the custody rights of unmarried fathers should be regarded as contrary to the ECHR and the Charter of Fundamental Rights, insofar as the unmarried father who is responsible for the child cannot prevent the removal of said child to another state just because of the absence of his automatic acquisition of rights of custody under national law. Although the Charter only applies to Member States expressly when they are “implementing European Union law” (Article 51(1)), this paper has argued for a broad construction of a uniform EU law meaning of “custody rights” under Brussels IIa, including the inchoate custody rights of unmarried fathers, influenced by a desire to avoid unnecessary and disproportionate restrictions (Article 52(1)) on the right to non-discrimination on the grounds of sex (Article 21(1)) in the application of the right to object to a child abduction by fathers compared to mothers.

<sup>75</sup> See Jiménez Blanco, *supra* n 60, 146–50 and C González Beilfuss, “El traslado lícito de menores: las denominadas *relocation disputes*” (2010) 2 *Revista Española de Derecho Internacional* 51.

<sup>76</sup> Case C-403/09 PPU *Ľasna Detiček v Maurizio Sgueglia* [2010] 3 WLR 1098, judgment of 23 December 2009, [59].