Family Law

God and nature are viewed to be the sources of so called 'natural rights' Natural rights are inalienable.
They are commonly referred to as 'individual sovereignities'[1] to take a full control of one's life. People are deemed to be equal with respect to the 'soverenity' they have. Every person asserts an individualized identity and realizes his rights as individualized.

The right to constitute a family is one of the basic natural rights to the effect that men and femin are designed by nature to have a sexual relations and form a family. Thus, human rights extend to include the rights of spouses, partners and family.

Marriage is a covenant or personal union of one man and one female that implies their mutual obligations and obligation to the children or potential children for them to provide all entitlements that are due to their children.

Family is identified with household, i.e cohabitants which are related with regard to kinship or sexual relations.

[1] http://www.libertocracy.com/Librademia/Essays/Humanity/2personal.htm

FITZPATRICK V STERLING HA Ltd [2000] case throws a good deal of light on family definition.

Opinions of the Lords of Appeal for judgement the cause revealed that term 'family' is not a "term of art". Nor it is a technical term capable of strict and unequivocal interpritation. For the purpose of each specific piece of legislation the definition of family may vary. For the uppermentioned case the accurate definition of the 'family' term was critical. Since the nature of relations of appelant and the deceased 'original tenant' Mr. John Thompson did not allow judges to qualify appelant as a 'spouse' as provided in paragraph 3 of the Housing Act 1988 ((2) "For the purposes of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant."), the alternative claim was made that "the appelant was a member of Mr. John Thompson's family".

For the purpose of a Rent Act, the minimum residence qualification was established.

As stated by Lord Nicholls of Birkenhead, "the key is the statutory juxtaposition of membership of the tenant's family and residence with the tenant… In this context children will readily qualify. More remote blood relations of the tenant may also qualify if they satisfy this 'sharing' criterion.[2] The family nexus was, in this context, deemed necessary but not sole factor of identifying the qualification. Langdon v. Horton [1951] case is an instance of the fact that lasting relations of living together and sharing feelings and commitments, in a word, "strongly tied up social relationship"[3] is demanded of the relations to be qualified as 'family'relations. The said case revealed that "sharing a residence for purposes of convenience, were held not to qualify."

The second fact to acknowledge was that for this purpose the membership of the family is not confined to relations of blood. Marriage relations will also succeed. "Indeed, the paradigm family unit was, and still is, a husband and wife and their children."[4]. 'In-law' or step-relationship may also qualify. The width of meaning, which expression 'family' bears with regard to the purpose of legislation, may also enclose adopted children and even partner or a number of partners which are not bound by the legal marriage but are cohabitants and form a special and long standing union based on the sexual relations. In Hawes v. Evenden [1953] case court recognized that a mistress with two children had by the man though not legally married may be regarded as this man's 'family'.

[2] Fitzpatrick v Sterling HA Ltd [2000], para 44
[3] Ibid., para 34
[4] Ibid., para 46

The two extremities of the non-married cohabitants' cases seem to be accurately identified with Gammans v. Ekins [1950] case on one side and Dyson Holdings Ltd. v. Fox [1976] case on the other. While in Gammans 328 "where it was held that a man who had lived for 20 years with a female tenant did not acquire the status of membership of the tenant's family"[5] the court and society were much influenced by the traditional moral, in Dyson where "the relationship was recognisable as a de facto marriage and therefore could be regarded as a family relationship" (para 124) the court and society consented to report that "the social stigma that once attached to them (such union of unmarried people) has almost, if not entirely, disappeared."[6]. What Dyson case demonstrated, inter alia, was that social reality and court, as a part to it, exists in continuum. Another valuable outcome was that word 'family' is to be applied flexibily.

"The hall marks of the relationship were essentially that there should be a degree of mutual inter-dependence, of the sharing of lives, of caring and love, of commitment and support. In respect of legal relationships these are presumed, though evidently are not always present as the family law and criminal courts know only too well."[7]
The main issue within this case was to find whether a same sex partner is capable of being the member of the other partner's family[8]. As far as heterosexual partners give rise to the membership of the family for the purpose of a Renatal act, there might not be reasonable objections to homosexual partners' capability of being the members of each other's 'families'. "The concept underlying membership of a family for present purposes is the sharing of lives together in a single family unit living in one house."[9]. The stable and long standing sexual relations where "love and commitment exists" of heterosexual partners are in no way different from the same relations when shared by homosexual partners. For the purpose of the present legislation the difference between the relations of heterosexual and that of homosexual partners is immaterial though it certainly present when described in sexual terms.

[5] Ibid., para 121
[6] Ibid., para 22

[7] Ibid., para 27

[8] Ibid., para 53

[9] Ibid., para 53

Appelant was not qualified as a 'spouse' because words 'husband' or 'wife' underlying and comprising the meaning of a 'spouse' (or to put it accurately, the extended meaning of a "spouse" which includes a person living with the original tenant "as his or her wife or husband" as in the provisions of 1988 Amendment) are gender indicative and cannot be applied to appelant. Term 'family', instead, is based on the feeling of shared intimacy and on the fact of cohabitance. The sexual partners which have stable and regular sexual relations, share a living, having the same residence, share love and support each other can, for the purpose of this act, be regarded as a 'family' with the fact of their homosexual relations having no bearance on the subject.

GOODWIN V. UK. [2002]

I V. UK [2002]

"The medical and surgical acts which in this case rendered the gender re-assignment possible were indeed carried out under the supervision of the national health authorities. Nor, given the numerous and painful interventions involved in such surgery and the level of commitment and conviction required to achieve a change in social gender role, can it be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender re-assignment."[10].

The court in effect acknowledged that gender re-assignment was a surgery practice affirmed by the state. The "4 steps" pre-surgery treatment (reffered to in Bellinger) was affirmed and supervised by state as well. The ongoing psychological and medical debates to the nature of "as to the exact causes of the condition" are no longer relevant for the case. Gender re-assignment decision and the emplementation of that decision, is 'no fancy' but a serious choice and great responsibility. Thus, "the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable"[11]. The apparent discrepancy between authrization of the treatment by the state (to include assistance in financing the operations) and rufusal to recognize the "legal implication of the result to which that treatment leads"[12] espouses the difficulties in gender definition.

[10] GOODWIN V. UK. [2002] 35 EHRR 18, para 81

[11] I V. UK [2002] (App no. 25680/94), para 70

[12] GOODWIN V. UK. [2002] 35 EHRR 18, para 79

In Corbett there was proposed a sex determination test through chromosomes, gonads and genitals. The convergence of all three results affirms the sex of a person. At that time it was apparent that sex is determined at birth and once for all times. Within Corbett approach it was virtually impossible for the person to change sex because chromosomes structure is immune to artificial changes. Person was bound to be of a sex determined at birth notwithstandind his or her personal identity, self-apprehension and look. ECHR proved the Corbett approach to be insufficient and discriminatory in that it does not takes a full acount of personal identity and psychological factors.

The recognition of full legal status accorded to post-operative transsexuals would demonstrate respect for the dignity of each individual as a human being, otherwise doing would impair the sense of identity and cause a great personal stress.

In compliance with "proportionality test" logics it was stated that on the basis that "no concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals" *and* "society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost." ECHR demands that a "new" sex was recognized for all legal purposes (with reservation for marriage question).[13] In practical terms, government should provide a full legal recognition of person in his or her 'new' social role unless substatial detriment to public interest. If the detriments found in some area the legal status may not be recognised in that area only**.**

In fact, the ECHR acknowledged that UK failed to protect the right provided in article 8 of the European Convention on Human Rights and that the ligislation of UK is discriminatory towards persons who undergone sex ressignment treatment. The approach resembling that of "proportionality test" was adopted. The only difference is that the breach of human rights provided in the Convention was apparent though the structure stating that "no concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals" likewise apparently reveals that the balancing against the rights of the other members to society was in place.

Apart from stating the nature of approach ECHR treated the case by, it is worth to note the practical outcomes of the case. The three such outcomes summarised in Bellinger[14]:

[13] I V. UK [2002] (App no. 25680/94), para 71
[14] Bellinger v Bellinger [2003] UKHL 21, para 25-27

The interdepartmental working group on transsexual people had been reconvened.

The government announced its intention to bring forward primary legislation which will allow transsexual people who can demonstrate they have taken decisive steps towards living fully and permanently in the acquired gender to marry in that gender.

The third development was that before your Lordships' House counsel for the Lord Chancellor accepted that, from the time of the *Goodwin* decision, those parts of English law which fail to give legal recognition to the acquired gender of transsexual persons are in principle incompatible with articles 8 and 12 of the Convention. Domestic law, including section 11(c) of the Matrimonial Causes Act 1973, will have to change.

BELLINGER V BELLINGER [2003]

Mrs. Bellinger went through a legal ceremony of marriage in May 1981 having undergone sex re-assignment treatment in Fabruary earlier that year. The main issue was to identify whether at the moment of her entering into marriage she could be qualified as a woman for the purpose of the Matrimonial Causes Act 1973, section 11(c) of which provides that a marriage is void unless the parties are 'respectively male and female' (Bellinger para 1) After the court refused to make a declaration that marriage "was valid at its inception and is subsisting", appelant, in a alternative claim, seeks a declaration that section 11(c) of the Matrimonial Causes Act 1973 is incompatible with articles 8 and 12 of the European Convention on Human Rights which provide the right to privacy and family life and the right to marry and to found a family respectively.

The main reason why Mrs. Bellinger's marriage was not found valid was that "there must be some objective, publicly available criteria by which gender reassignment is to be assessed."[15] and the court cannot at present with an adequate degree of certainty point were this line is within the broad context of national and international law. Further, "where this line should be drawn is far from self-evident"[16] and Strasburg's court too have not identified any persuasive principles in this regard.

[15] Bellinger v Bellinger [2003] UKHL 21, para 72

[16] Bellinger v Bellinger [2003] UKHL 21, para 43

The alternative claim for declaration of incomparability sought by Mrs. Bellinger might fail with regard to the decision of the European Court which stated that it 'will be for the United Kingdom Government in due course to implement such measures as it considers appropriate to fulfil its obligations': (2002) 35 EHRR 18, 33, paragraph 120. But government has not sought to question the decision of the European Court of Human Rights in Goodwin and is commited to change its legislation giving effect to this decision. Thus, court should "formally record that the present state of statute law is incompatible with the Convention"[17] because the present case goes paralell way with that of Goodwin and the amendments to the legislation "triggered" by this case would only enhance the overal positive effects of legislation.

EVANS V AMICUS [2003]

The dicision of the court on the given case was highly controversial. Appelant claimed violation of her rights under the Fertility Act 1990 as stemming from the wrong definition of the decisive terms "treatment together" (with regard to the men and woman who provided the genetic material, namely, gameta and sperm which formed an embrion) and "use" (with regard to thus formed embrion) in the course of the trial in the family division as well as rights under the Convention provided in article 2 (the right to life), article 8 (the right to privacy, "engaged because Ms Evans' bodily integrity (private life) is affected"[18], article 14 (discrimination against, here, "as an infertile woman"[19]

The facts material to this are as follows. Ms Evans and Mr. Johnson, anticipating the imminent infertility of the former as a result of removal of ovaries inflicted with cancerous tumour, entered into a consent with a view to provide an eggs and sperm and to fertilize the former with the latter to form a fertilized embrions, which was actually done on 12th November 2001; the written form justifying the mutual consent being filled in in compliance with Scheme 3 Act 1990. "On the 19th December Ms Evans was advised that she should wait two years before an embryo transfer should be attempted."[20] After the operation Ms. Evans became infertile and the fertilized embrions were in effect the only things containing her genetical material. 27th May 2002 the relationship between the couple ended. Mr. Johnson withdrew his consent on the subsequent operations with the fertilized

[17] Bellinger v Bellinger [2003] UKHL 21, para 55

[18] EVANS V AMICUS [2003] EWCA Civ 727, para 104
[19] EVANS V AMICUS [2003] EWCA Civ 727, para 116
[20] EVANS V AMICUS [2003] EWCA Civ 727, para 13

embrions and stated that embrions could be destroyed. His withdrawal of consent was reported to Ms Evans who, on 11th September 2002 issued proceedings.

Appelant tried to point out the "treatment together"(as provided in 1990 Act 2.1(a): "use in providing treatment services to the person giving consent, or that person and another specified person together,") does not actually mean "together". To substantiate the claim *Re R (a child)* [2003] 2 All ER 131 case was invoked. That court held that, "as the couple were not receiving treatment services together at the time of the transfer of the embryo to the woman, the person who sought legal paternity did not acquire that status under section 28(3) [of 1990 Act]."[21] But the court in Evans recognized that "the effect of the provision of treatment services together in section 28 is a very different from its effect in schedule 3, paragraph 2(1)(a)."[22] Instead, the "effective consent" reffered to in Scheme 3 1. is recognized to turn into "ineffective" or fail if a "joint enterprise" of the two people who provided genetic material should happen to no longer be so. Thus, withdrawal of the consent by one of the genetical material providers may only result in consent, vital to the treatment of embrions, being rendered "inoperative".

The next claim was pointed at identifying "the last point in time when a consent can be withdrawn."[23] 1990 Act, Schedule 3, 4.2. states that "the terms of any consent to the use of any embryo cannot be withdrawn, once the embryo has been used:(a) in providing treatment services, or (b) for the purposes of any project of research." The appelant submitted that "use" is practically limited to transfer to a woman" on the basis of paragraph 1(1)(d) of schedule 2 that refers "activities" that can be licensed as "practices designed to secure that embryos are in a suitable condition to be placed in a woman…"[24] On the basis of in *R (Quintavalle) v Human Fertilisation and Embryology Authority* [2004] QB 168 case when the license was granted to the removal of a single cell from an embryo (thus, that procedure was held to be the "use" of an embryo). Thus, appelant did not succeed in substantiating that withdrawal can be made only prior to the "use" which in his definition practically meant transfer to the woman and all together may mean the denial of the right to withdraw consent after the fertilization.

The next claim was dismissed on the ground of UK and European court cases. Article 2 of the convention provides the right to life. Appelant submits "that an embryo has a qualified right to life,

[21] EVANS V AMICUS [2003] EWCA Civ 727, para 93
[22] EVANS V AMICUS [2003] EWCA Civ 727, para 94
[23] EVANS V AMICUS [2003] EWCA Civ 727, para 102
[24] EVANS V AMICUS [2003] EWCA Civ 727, para 101

that is a right to life which is consistent with his mother's wishes."[25] Though neither the Convention nor UK legislation does not give a clear cut answer on where is the line of right to life starts, in *Re F (in utero)* [1988] Fam 122 the court rejected the foetud right to life as provided in article 2. As the european court, which also lacks consensus in ethcial issues of IVF treatment, left the wide margin of appreciation to the member states, the dicision of the court on the basis of 1990 Act denying the embryo even a qualified right to life is in no way incompatible with the Convention.[26]

The relevance of the claim on the infringement of the right to privacy as provided in article 8 of the Conventions was sustained by the court and the claim was treated on the basis of "proportionality test". The latter is in that the court must decide whether the means employed by the statute to achieve the policy objective is appropriate and not disproportionate in its adverse effect.[27] The limitations of Ms. Evans rights was prescribed by UK legislation and made so for the protection of the rights of the others. The question is, therefore, whether those limitations was proportionate "to the need which makes it legitimate'.[28]

The need, as perceived by Parliament, is for bilateral consent to implantation, not simply to the taking and storage of genetic material, and that need cannot be met if one half of the consent is no longer effective. To dilute this requirement in the interests of proportionality, in order to meet Ms Evans' otherwise intractable biological handicap, by making the withdrawal of the man's consent relevant but inconclusive, would create new and even more intractable difficulties of arbitrariness and inconsistency.[29]

It was admitted that in no way, for the reasons given, it is possible to construct an alternative system which would have the effect satisfactory to Ms. Evens privacy and maternity rights, "would be Convention-compliant and would still be able to achieve the legitimate objectives of the legislation. It might be otherwise if one of those objectives were to fix consent at the moment of sperm donation"[30] but that could not be done by the court without change in legislation. Thus, the appeal was declined and the violation of rights provided in article 8 was not found on the basis of "proportionality test".

[25] EVANS V AMICUS [2003] EWCA Civ 727, para 106
[26] EVANS V AMICUS [2003] EWCA Civ 727, para 107
[27] EVANS V AMICUS [2003] EWCA Civ 727, para 62
[28] EVANS V AMICUS [2003] EWCA Civ 727, para 69
[29]EVANS V AMICUS [2003] EWCA Civ 727, para 69
[30] EVANS V AMICUS [2003] EWCA Civ 727, para 67

Conclusion:

Human right act has got a mighty impact on family law and its impact is likely to be so. Goodwin v UK and I v UK cases illustrates that trend. This is not to say that the decisions of Strasburg Court were unpredicted with regard to the state of societal relations. The sand of time run fast and societal perceptions of the family matters in fact changes. The point is that legislation lags behind. There are some problems which are capable of deciding if the court adheres to the "legislative intention" (FITZPATRICK V STERLING HA Ltd [2000]), those demanding new legislation (Goodwin v UK, I v UK, Bellinger v Bellinger) and those weighed against "proportionality" and failed (Evans v Amicus). The incomparability declaration provided in section 4 of Human rights act 1998 and decisions of ECHR are the means to prompt an 'up-to-date' legislation and decide the three supra stated problems all together.

References:

1. [2004] EWCA Civ 727

2. Goodwin & I v. United Kingdom Government: What Does It Mean?

Analysis of the implications of the ECtHR judgments in the cases of *Goodwin v. UK* and *I v UK*

2nd November 2002

By Stephen Whittle (vice-president, Press For Change)

http://www.pfc.org.uk/legal/gime

3. [2003] UKHL 21

4. The European Convention on Human Rights

5. http://www.hrothgar.co.uk/hol/reports/07/74.htm

6. http://www.libertocracy.com/Librademia/Essays/Humanity/2personal.htm

7. Gender Recognition Act