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The Marckx Case - The Impact on European Jurisprudence of the European Court of Human Rights' 1979 Marckx Decision Declaring Belgian Illegitimacy Statutes Violative of the European Convention on Human Rights

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The Marckx Case
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> [W]hilst recognizing as legitimate or even praiseworthy the aim pursued by the Belgian legislation — namely, protection of the child and traditional family —, the Court stated that in the achievement of this end, recourse must not be had to measures whose object or result is, as in the present case, to prejudice the "illegitimate" family.[1]

With the above-stated rationale, the European Court of Human Rights, in its decision of June 13, 1979 in the *Marckx* case, called for the final dismantling of the legal disabilities that had been imposed for centuries on "non-marital"[2] children throughout Europe. Notwithstanding

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1. Marckx Case, 1979, Y.B. EUR. CONV. ON HUMAN RIGHTS 414 (Eur. Comm'n on Human Rights). For the full text of the *Marckx* decision, see: Eur. Court H.R., Marckx case, judgment of 13 June 1979, Series A no. 31 [hereinafter cited as *ECHR-Marckx*]. Studies of the *Marckx* case may be found in: E. Alkema, *Verwandtschaft des nichtehelichen Kindes / Einfluss der Marckx-Entscheidung des EGMR [Kinship of the non-marital child] / Influence of the Marckx decision of the ECHR-Court]*, EUROPAISCHE GRUNDRECHTE ZEITSCHRIFT [EUROPEAN FUNDAMENTAL RIGHTS REVIEW] 213-215 (1980); Bossuyt, *L'arret Marckx de la cour europeenne des droits de l'homme [The Marckx decision of the European Court of Human Rights]*, 15 REVUE BELGE DE DROIT INTERNATIONAL [BELGIAN INTERNATIONAL LAW REVIEW] 322-325 (1980-82); A. HEYVAERT & H. WILLEKENS, BEGINSELEN VAN HET GEZINS—EN FAMILIERECHT NA HET MARCKXARREST. DE THEORIE VAN HET MARCKXARREST EN HAAR WEERSLAG OP HET GELDEND RECHT [PRINCIPLES OF NUCLEAR AND EXTENDED FAMILY LAW AFTER THE MARCKX DECISION. THE THEORY OF THE MARCKX DECISION AND ITS APPLICATION TO OPERATIVE LAW.] 1-142 (1981); Rigaux, *La loi condamnée. A propos de l'arrêt européenne du 13 juin 1979 de la cour européenne des droits de l'homme [The Condemned Law: Concerning the June 13, 1979 decision of the ECHR-Court]* 1979 JOURNAL DES TRIBUNAUX [COURT REPORTER] 513-24; Van Hove, *Het Marckx-arrest en de notariele praktijk [The Marckx decision and notarial practice]*, 4 TIJDSCHRIFT VOOR NOTARISSEN [REVIEW FOR NOTARIES] 97 (1982).

2. In modern English legal terminology, the derogatory term of "bastard" has been replaced most frequently by "illegitimate" or, more recently, "born out of wedlock". The common law expression, however, was "bastard". The unlawful connotation of "illegitimate" makes it hardly much more of an improvement over "bastard". "Child born out of wedlock" is stiff and cumbersome. Some authors have used the more neutral expressions "ex-marital" or "ex-nuptial"—two imprecise expressions which may be improperly taken to mean "formerly married" rather than "outside of marriage." The preference in this article is for "non-

solemn church canons, the time-honored Napoleonic Code, and contrary national legislation, the European Court of Human Rights proclaimed throughout the 21 nations[3] of Europe which respect its decisions that henceforth children—whether born inside or outside of marriage—should be born free of any legal disability or discrimination resulting from their parents' marital status.

This article will assess *Marckx* by first focusing on the illegitimacy laws prior to *Marckx*. Then it will analyze and appraise the *Marckx* decision. Next it will focus on the aftermath of *Marckx* in European national courts during the four subsequent years, 1979-1983.

I. BACKGROUND ON ILLEGITIMACY IN EUROPEAN LAW AND CUSTOM

Over the centuries, European tradition had made into law the biblical notion that "the sins of the fathers shall be visited upon their children."[4] Adulterous, incenstuous or simply unmarried relationships were designated as "illegitimate". By no semantic accident, the children of such relationships were called "illegitimate" too. Since sexual relations between unmarried persons were outside the law, the issue of those extralegal acts was "illegitimate", tainted with sin — in short, "bastards".[5]

Embodying and codifying that set of beliefs, the Napoleonic Code[6] determined the law pertaining to illegitimacy for almost the last two centuries in much of Europe.[7] To enforce the notion that the only rightful

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marital". It is the direct translation of the German term *nichtehelich*. *See* Klette, *Nichtehelich—Nicht 'unehelich' [Non-marital—not 'unmarried']*, FAMILIEN RECHT ZEITUNG [FAMILY LAW JOURNAL] 206-07 (1967). Nevertheless, for lack of a better expression, the word "illegitimacy" shall be used in this article to describe the noun form of the condition, while "non-marital" remains the choice for the adjective.

3. These are the 21 countries which were Member States of the Council of Europe as of January 1, 1984: Austria, Belgium, Cyprus, Denmark, Federal Republic of Germany, France, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. The European Court of Human Rights is affiliated with the Council of Europe. On the Council of Europe, *see*, A.H. ROBERTSON, HUMAN RIGHTS IN EUROPE (1977).

4. This expression comes from the Second Commandment *Exodus* 20:4. The words are ascribed to the Supreme Judge, whose full pronouncement was: "For I, the Lord, thy God, am a jealous God, visiting the sins of the fathers upon the children unto the third and fourth generation of them that hate me."

5. The word "bastard" derives from the French *bâtard*, which means *fils de bast*, or, literally, "pack-saddle child".

6. On the Napoleonic Code, see generally: ARTHUR TAYLOR VON MEHREN, THE CIVIL LAW SYSTEM (1957); MAURICE SHELDOM AMOS AND FREDERICK PARKER WALTON, INTRODUCTION TO FRENCH LAW (1967); RENE DAVID AND H.D. DE VRIES, THE FRENCH LEGAL SYSTEM (1957); FREDERICK HENRY LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW (1955).

7. The illegitimacy provisions of the Napoleonic Code, which so long determined the law in France, Belgium, the Netherlands, Switzerland, Luxembourg, Italy, Spain and Portugal, have now been reformed or abandoned in most of these nations within the last 15 years. On reforms in European illegitimacy laws, *see generally* Krause, *Creation of Relations of Kinship*, 4 INT. ENCYC. COMP. L. 6:1 (1973). On illegitimacy in European legal tradition, *see also* Stoljar, *Children, Parents and Guardians*, 4 INT. ENCYC. COMP. L. 7:1 (1973); SCHMIDT-

place for children was as the issue of a lawful marriage, the Napoleonic Code made a child not the result of such a bond suffer extraordinary disabilities. Thus, the encouragement to marry was often a manipulation of the parents' desire not to have their children suffer because of the parents' improprieties. The result was unabashed discrimination.

Under the Code, parents could voluntarily recognize their non-marital children and thereby establish the legal relationship of parenthood, unless the children were the fruit of an incestuous or adulterous relationship. The acknowledgment needed, however, to be voluntary on the parents' part. "La recherche de la paternité" ("hunting down the father") was specifically proscribed. The relationship between the non-marital child and its mother was not established by the fact of birth.[8] If the mother did not voluntarily acknowledge the child, the child needed to prove maternity in court by showing the confinement of his alleged mother and by establishing that he is the child to whom she gave birth. Moreover, the Napoleonic Code distinguished not only between "legitimate" and "illegitimate" children, but distinguished further between "natural simple"[9], "adulterous"[10] and "incestuous"[11] children. Unlike natural simple children, adulterous and incestuous children, according to the old code, could not be acknowledged by their parents, and their paternity or maternity could not be declared judicially, where this would show the adulterous or incestuous nature of the parents' connection.[12]

As to inheritance rights[13], the Napoleonic Code allowed an "illegitimate" child to inherit from his unmarried mother, but he was not allowed to inherit from his mother's relatives as of right, for he had no intestacy rights in the succession of his parents' relatives, even of his own grand-

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HIDDING, DIE STELLUNG DES UNEHELICHEN KINDES IN DEN ROMANISCHEN RECHTSORDNUNGEN EUROPAS [THE POSITION OF THE NON-MARITAL CHILD UNDER ROMAN LEGAL SYSTEMS OF EUROPE] (1967).

8. On the relations between the mother and her illegitimate child, in evolving French law, see: Savatier, *L'évolution de la condition juridique des enfants naturels en droit français [The Evolution of the Legal Condition of Illegitimate Children in French law]*, in J. DABIN, LE STATUT JURIDIQUE DE L'ENFANT NATUREL [THE LEGAL STATUS OF THE ILLEGITIMATE CHILD] 4:37 (1965).

9. Father and mother are not married at the time of the child's conception or birth, and no legal impediment would have prevented their marriage.

10. Father and/or mother are married at the time of the child's conception, but not to each other.

11. Father and mother are related by blood or affinity to a degree which legally impedes marriage.

12. Specifically on voluntary acknowledgment of parenthood in European law, *see* Lasok, *Legitimation, Recognition and Affiliation Proceedings: A Study in Comparative Law and Legal Reform*, 10 INT'L & COMP. L.Q. 123 (1961); Meulders-Klein, *Fondements nouveaux du concept de filiation [New Foundations for the Concept of Affiliation]*, 1973 ANNALES DE DROIT (BELG.) [ANNALS OF LAW (BELG.)] 285.

13. On the inheritance rights of non-marital children in Europe, *see generally* Stone, *Illegitimacy and Claims to Money and Other Property: A Comparative Survey*, 15 INT'L & COMP. L.Q. 527 (1966).

parents.[14] An "illegitimate" child was classified not as an heir, but as an irregular successor.[15] In all intestate successions, his share was reduced according to the number and status of the heirs with whom he was in competition, and he was not allowed to receive by gifts or bequest more than his statutory share.[16] Owing to the dominance in Belgium and other civil law countries of intestate succession and to statutory limitations there on testamentary freedom, the result was to discriminate severely against non-marital children in their inheritance rights.[17]

II. THE MARCKX CASE

In its *Marckx* opinion of June 13, 1979, the European Court of Human Rights (ECHR-Court)[18] held that certain Belgian statutes discriminating against non-marital children, as these laws applied to the applicants, violated the right to respect for one's family life protected by Article 8[19] of the European Convention on Human Rights (ECHR-Convention), both by itself and when read with Article 14[20] prohibiting discrimination based, *inter alia*, on birth.

A. *Marckx: The Facts*

The facts of *Marckx* are relatively simple. On October 16, 1973, near Antwerp, Belgium, an unmarried Belgian national named Paula Marckx gave birth to a daughter, Alexandra Marckx. The father was neither identified nor even mentioned in the proceedings. In 1974, Paula Marckx introduced a complaint before the European Commission of Human Rights

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14. Article 756 of the Napoleonic Code.

15. *Id.*

16. Articles 757, 760 and 908 of the Napoleonic Code.

17. On succession in common law systems as compared to succession in civil law systems, see generally: MAZEAUD, 4 LEÇONS DE DROIT CIVIL [LESSONS IN CIVIL LAW] (1971).

18. The European Convention on Human Rights and its institutions, the European Court of Human Rights and the European Commission on Human Rights, are abundantly documented. For updated bibliographies of the most recent articles, see the bibliography section in each volume of: Y.B. EUR. CONV. ON HUMAN RIGHTS (Eur. Comm'n on Human Rights). *See also* LAURIDS MIKAELSEN, EUROPEAN PROTECTION OF HUMAN RIGHTS (1980); A.H. ROBERTSON, HUMAN RIGHTS IN THE WORLD (1982); A.Z. DRZEMCZEWSKI, EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW: A COMPARATIVE STUDY (1983).

19. The full text of Article 8 is:

> 1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others.

20. The full text of Article 14 is: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

(ECHR-Commission) on behalf of her infant daughter and herself. She complained of Belgian law with respect to: 1) the maternal affiliation (acknowledgment of parenthood) of a non-marital child, 2) the non-marital child's family relationships, and 3) the non-marital child's inheritance rights. The first two points need some explanation. First, under Belgian law, a non-marital child is only regarded as the child of its mother if the latter chooses to recognize her maternity. A marital child undergoes no such delay; affiliation is proved simply by the legally obligatory entry of the married mother's name on the birth certificate. Second, as regards family relationships, a non-marital child remains, even after recognition, in principle a stranger to his mother's family. Thus, for example, in the absence of its mother, the state guardianship agency rather than its grandparents has the power to consent to the child's marriage. The reverse is true of marital children.

B. *Marckx: The Opinion*

The ECHR-Court gave complete satisfaction to Paula Marckx's claim on each count. In the introduction of its opinion, the ECHR-Court formulated two general and significant statements of law. First, it confirmed that Article 8 (protecting "family life") of the ECHR-Convention made no distinction between a marital and a non-marital family. Second, the ECHR-Court indicated that Article 8 had a positive as well as a negative side. The Court held that Article 8:

> does not merely compel the State to abstain from such [arbitrary] interference; in addition to this primarily negative undertaking, there may be *positive obligations* inherent in an effective "respect" for family life.
>
> This means, amongst other things, that when the State determines in its domestic legal system the regime applicable to certain family ties such as those between an unmarried mother and her child, it must act in a manner calculated to allow those concerned to lead a normal family life. As envisaged by Article 8, respect for family life implies in particular, in the Court's view, *the existence in domestic law of legal safeguards* that render possible as from the moment of birth the child's integration in his family. In this connection, the State has a choice of various means, but a law that fails to satisfy this requirement violates paragraph 1 of Article 8 without there being any call to examine it under paragraph 2.[21] [emphasis added]

C. *Marckx: Judicial Activism*

Until *Marckx*, the ECHR-Court had always interpreted Article 8 of the ECHR-Convention as including only a negative duty of non-interference in private family life. In *Marckx*, for the first time, the Court implied from Article 8 "positive obligations" on States Party to provide for

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21. *ECHR-Marckx, supra* note 1, at 15, Section 31.

"the existence in domestic law of legal safeguards", and thereby seemingly appealed to the legislature and tribunals of States Party to reform their domestic illegitimacy laws. *Marckx* signalled the adoption by the ECHR-Court of a judicial "activism" that transcends the immediate context of illegitimacy.

Just as the U.S. Supreme Court[22] under Chief Justice Warren came under heavy fire from opponents of "judicial legislation", so has the ECHR-Court been severely criticized in some circles for its "activist" approach—for law-making instead of law-interpreting. Two Belgian jurists have stood out in their opposition. Both of them are law professors at Belgian universities: Francois Rigaux of the Catholic University of Louvain and Marc Bossuyt of Antwerp University.

Professor Bossuyt argues strongly against the Court's implying of positive obligations and for the adoption of a "strict constructionist" approach:

> The transformation of classical freedoms, which impose essentially negative obligations (duties to abstain) into social rights, which demand a positive interpretation by the State, is difficult to justify simply by a court's interpretation. Except where the Convention contains some indications allowing one to conclude that the States Parties were ready to submit it to the positive obligations of control mechanisms of the Convention, any interpretation transforming the negative contents of a guaranteed right into a positive obligation is rebuttable. Such an interpretation ends up in a considerable expansion—probably without the States Parties having desired it—of the power of the Court. An interpretation expanding the power of a court of international jurisdiction has no basis, however, in international law.[23]

Professor Rigaux objects even more strenuously to the "activism" in the *Marckx* decision. He considers that "the Court has gone beyond its mission by imposing on the States Parties the adoption of a specific system for maternal legitimation."[24]

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22. With respect to illegitimacy, the U.S. Supreme Court has shown little of the judicial activism of the ECHRCourt. The U.S. Supreme Court has been applying a balancing test when deciding on the constitutionality of state statutes allegedly discriminating against nonmarital children. Thus a permissible legislative purpose of public policy is balanced with, and may override, the goal of equal protection. Some state statutes have been condemned while others have been upheld; the Supreme Court has used an ad hoc approach rather than articulating a clear standard of review. *See* Note, *Protecting the Illegitimate's Right to Inherit*, 6 OKLA. CITY U.L. REV. 469-91 (1981); Guerin, *Illegitimates and Equal Protection: Lalli v. Lalli—A Retreat from Trimble v. Gordon*, 57 DEN. L.J. 453-65 (1980); Metz, *Trimble v. Gordon and Lalli v. Lalli: Shall the Sins of the Fathers Be Visited Upon the Sons?*, 48 CIN.L. REV. 578-88 (1979); Harris, *"Legitimate Discrimination against Illegitimates" A Look at Trimble v. Gordon and Fiallo v. Bell.* 16 J. FAM. L. 57-75 (1977).

23. Bossuyt, *L'arrêt Marckx de la Cour européenne des Droits de l'Homme [The Marckx decision of the European Court of Human Rights]*, 15 REVUE BELGE DE DROIT INT'L [BELGIAN REVIEW OF INTERNATIONAL LAW] 68, 68 (1980).

24. Rigaux, *La loi condamnée. A propos de l'arrête du 13 juin 1979 de la Cour européenne des droits de l'homme [The Condemned Law: Concerning the June 13, 1979*

The strongest articulation of the legal objections to the *Marckx* decision is contained in the dissenting opinion[25] of the British judge sitting on the ECHR-Court that tried the *Marckx* case. Sir Gerald Fitzmaurice has been noted for his judicial conservatism as judge both on the International Court of Justice and now on the ECHR-Court.[26] In Sir Gerald's view, the Court's judgment in *Marckx* was "little else but a misguided endeavour to read—or rather introduce—a whole code of family law into Article 8 of the Convention, thus inflating it in a manner, and to an extent, wholly incommensurable with its true and intended proportions."[27]

On the scope of Article 8, Fitzmaurice took the view that Article 8 dealt only with questions of state interference with family *life* and not with state regulation of civil status by family *law*:

> It is abundantly clear . . . that the main, if not indeed the sole object and intended sphere of application of Article 8 was that of what I will call the "domiciliary protection" of the individual. He and his family were no longer to be subjected to the four o'clock in the morning rat-a-tat on the door; to domestic intrusions, searches and questionings to examinations, delayings and confiscation of correspondence; to the planting of listening devices (buggings); to telephone tapping and disconnection; to measures of coercion such as cutting off the electricity or water supply; to such abominations as children being required to report upon the activities of their parents, and even sometimes the same for one spouse against another—in short the whole gamut of fascist and communist inquisitorial practices such as had scarcely been known, at least in Western Europe, since the eras of religious intolerance and oppression, until (ideology replacing religion) they became prevalent again in many countries between the two world wars and subsequently. Such, and not the internal, domestic regulation of family relationships, was the object of Article 8, and it was for the avoidance of these horrors, tyrannies and vexations that "private and family life..home and. . .correspondence" were to be respected, and the individual endowed with a right to enjoy that respect—not for the regulation of the civil status of babies.[28]

To understand why the Court chose to be so assertive in *Marckx* a few factors need to be considered.

First, the illegitimacy issue was ripe, and the inequities were blatant. The movement was already afoot in Europe to overhaul the system of disabilities imposed by centuries-old statutes based on notions of shame and transferred punishment not in tune with modern justice. There was little organized opposition to reform, even in the most traditional circles.

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decision of the ECHR-Court.] 1979 JOURNAL DES TRIBUNAUX [COURT REPORTER] 513, 518.

25. Sir Gerald Fitzmaurice, dissenting opinion, *ECHR-Marckx, supra* note 1, 39-54.

26. About Sir Gerald Fitzmaurice, *see generally* Merrills, *Sir Gerald Fitzmaurice's Contribution to the Jurisprudence of the International Court of Justice*, 1976-7 BRIT. Y.B. INT'L L. 183.

27. Sir Gerald Fitzmaurice, dissenting opinion, *ECHR-Marckx, supra* note 1, No. 10-15.

28. *Id.*, para. 7 at 41-42.

Second, the *Marckx* decision may have also grown out of the Court's desire to take a greater role in the movement toward European unity. Such an ambition was never expressed in the opinion, but might still have been very present in the judges' minds. By the late 1970s, despite Spain's addition to the Council of Europe and ratification of the ECHR-Convention in 1979, the Council of Europe and its affiliated ECHR-Convention institutions had seen their prestige eclipsed by the expanded European Economic Community (EEC). By 1979, the first directly-elected deputies sat in the EEC's European Parliament.

The EEC institution directly in "competition" with the ECHR-Court is not the European Parliament but rather the Court of Justice of the European Communities.[29] It is often called the "Luxembourg Court", after the city and country where the court meets, as opposed to the "Strasbourg Court", i.e., the ECHR-Court. The Luxembourg Court first sat in 1955 and initially dealt only with economic matters. In contrast to the judgments of the Strasbourg Court, those of the Luxembourg Court are directly enforceable in the member states of the EEC, under Arts. 187 and 192 of the EEC Treaty. Moreover, the Luxembourg Court seeks directly to promote the unification or harmonization of the laws of the EEC countries, while the ECHR institutions have not declared that as one of their goals. Moreover, in recent years, the Luxembourg Court has ruled on human rights issues as well as on economic issues.[30] There is still no specific declaration of human rights in the EEC Treaties— nothing like the ECHR-Convention. The protection of fundamental rights has nevertheless been developed by the Luxembourg Court as an inherent part of its duty to ensure that, in the interpretation and application of the EEC Treaties, "the law is observed".[31] So far, the Luxembourg Court has ruled on issues like privacy, search and seizure, and speedy trial, but it has not inquired into "respect for family life".[32]

The third factor needed to understand the *Marckx* court's judicial activism is the applicability of ECHR-Court decisions to the domestic law of States Party to the ECHR-Convention. This factor is discussed below.

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29. On the Court of Justice of the European Communities, *see* MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW (1980); SCHERMERS, JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES (1979); Schermers, *Application of International Law by the Court of Justice of the European Communities*, in ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER 169 (1980); Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981); *Special Issue on the European Court*, 8 VAND. J. TRANSNAT'L L. 515 (1975), which includes an annotated bibliography by I.I. Kavass.

30. On the human rights cases tried by the Court of Justice of the European Communities, *see* Sorensen, *The Enlargement of the European Communities and the Protection of Human Rights*, in 1971 EUR. Y.B. 3 (Council of Europe); Pescatore, *The Protection of Human Rights in the European Communities*, 1972 COMMON MKT. L. REV. 73.

31. Art. 164 of the EEC Treaty.

32. See generally the index of each annual bound volume of COMMON MKT. L. REV. for a survey of the cases decided by the Luxembourg Court.

D. *Marckx: Enforceability of the Decision*

The *Marckx* court could "afford" to be judicially active; it knew that its decision would be respected. Though the decision was clear and forthright, it was not exactly bold and revolutionary. Nearly all of the States Party had already committed themselves to reform at the time of *Marckx*.[33] The issue of non-marital children, like that of consenting homosexual behavior[34], is a relatively marginal one that does not threaten a State's dignity.

The ECHR-Court wished to win over the trust of the States Party. The member states, which accept the Court's jurisdiction to receive individual petitions against them, must, according to Article 25 of the ECHR-Convention, annually renew their declarations of acceptance. Six member states—Cyprus, France, Greece, Malta, Spain and Turkey—do not even recognize the Court's competence. The human rights cases that come before the Court are matters relating directly to the sovereignty of nations. The Court knows that it will not win this confidence by an adventurous brand of judicial activism.

The Court is acutely aware that it lacks an enforcement mechanism and that compliance with its decisions is essentially discretionary.[35] It is indeed quite remarkable that most member states have been willing to waive formal objections to admissibility, accept applications against them raised on their merits, cooperate with the ECHR Commission when trying to settle out of court, and modify their legislation and administrative practice. Member states often compensate individuals for the acts of their own administrative authorities and courts of law. What the ECHR-Court has achieved is precious and fragile. It has gained the cooperation of many member states in allowing the ECHR-Court to point out deficiencies in their own systems of law. Against the backdrop of increased unwillingness of nations to submit disputes for international judicial settlement, the relative success of the ECHR-Court is indeed remarkable.

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33. For the most up-to-date survey of illegitimacy laws in Western Europe, especially as regards inheritance rights, *see* Pauwels, *De hervorming van het afstammingsrecht in West-Europa [The reform of the law of descent in Western Europe]*, 3 TIJDSCHRIFT VOOR FAMILIE EN JEUGDRECHT [REVIEW OF FAMILY AND JUVENILE LAW] 182 (1981). Countries with Napoleonic Code legacies that had undergone major reforms in their illegitimacy laws were: France, 1972; Italy, 1975; Luxembourg, 1978; Netherlands, 1970; Portugal, 1966.

34. *See also* Dudgeon Case, *Decisions on the European Convention on Human Rights during 1981*, 1981 BRIT. Y.B. INT'L L., 343-7]. In the *Dudgeon* case [Eur. Court H.R., Dudgeon case, judgment of 22 October 1981, Series A no. 47], the ECHR-Court for the first time declared a homosexuality law violative of the ECHRConvention. The case arose out of the complaint of an adult homosexual resident of Northern Ireland that Northern Irish law rendered criminal any homosexual acts between consenting adult males. The court found that the relevant statute constituted an unjustified interference with the petitioner's right to respect for his private life, in breach of Article 8.

35. On implementing the ECHR-Convention in the States Party, *see* Buergenthal, *The Domestic Status of the European Convention on Human Rights*, 13 BUFFALO L. REV. 354 (1963-4).

The ECHR-Court has been cautious. It is this caution which allows *Marckx* to be enforced, because the member states have confidence in the Court's decisions. Thus, once the Court made its decision in *Marcx*, it could be reasonably sure of eventual compliance by the member states' domestic courts.

III. THE AFTERMATH OF MARCKX IN EUROPEAN NATIONAL COURTS

The domestic status of the ECHR-Convention as it relates to the national law of each member state varies widely. When the member states ratified the ECHR-Convention, they agreed to Article 1 providing that: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."[36] In fact, the member states have chosen to implement these guarantees by different methods, according to their own constitutional practice. The means of implementation are essentially of two kinds: 1) complete integration of the Convention into domestic law, or 2) the integration of only specific provisions of the Convention into domestic law through legislation.

The states that completely integrated the Convention into their own domestic law include: Austria, Belgium, Cyprus, France, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain, Switzerland, Turkey and West Germany. Under Belgian law, the Convention is directly applicable, so that the Convention has the force of law in that country. Once the national judge in Belgium determines that the relevant provision of the ECHR-Convention is "self-sufficient"—that is, clear and complete—he can enforce that provision of the Convention, which is understood as being "self-executing" under Beligan law.[37]

The states that have not totally integrated the Convention into their own domestic law include the Scandinavian countries, Ireland and the U.K. In those countries, where specific legislation has not incorporated the provisions of the Convention, the Convention has legal effect only in interstate relations with other member states.

A. *Aftermath: Marckx As It Relates to Direct Applicability*

The *Marckx* case raises peculiar problems as to the direct applicability of the ECHR-Convention, or, to be more precise, Article 8 of the

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36. Article 1, The European Convention on Human Rights (Convention of November 4, 1950 for the Protection of Human Rights and Fundamental Freedoms).

37. On the implementation of the ECHR-Convention in Belgium, *see* Bossuyt, *The Direct Applicability of International Instruments on Human Rights (with special reference to Belgian and U.S. law)*, 15 REVUE BELGE DE DROIT INTERNATIONAL 317 (1980-2). For a general survey of changes that have been introduced in Belgian law as a result of findings by the ECHR-Court, *see* De Meyer, *Belgie en het Europees Verdrag tot bescherming van de rechten van de mens [Belgium and the ECHR- Convention]*, in BELGISCH BUITENLANDS BELEID IN INTERNATIONALE BETREKKINGEN [BELGIAN FOREIGN POLICY IN INTERNATIONAL RELATIONS] (De Raeymaeker ed. 1978).

ECHR-Convention. In Belgium, the ECHR-Convention is directly applicable and has been incorporated into Belgium law. Article 8 would then be "self-executing" in Belgium if it were also self-sufficient—that is, clear and complete. Many observers, however, say that the Article 8 guarantee of protection of "family life" is extremely imprecise and therefore not self-executing. In his comments on the *Marckx* judgment, Professor Francois Rigaux stated that Article 8 of the ECHR-Convention as interpreted by the ECHR-Court in *Marckx*, was "not sufficiently precise to have direct effect in national law."[38]

Part of the problem of imprecision arises out of the "evolutive" interpretation by the *Marckx* court of the notion of "family life" in Article 8. The *Marckx* court held that even if the signatories of the ECHR-Convention in 1950 considered non-marital families as falling outside under Article 8 protection, even if they considered it normal at that time to distinguish between marital and non-marital children, that, nevertheless, an evolution in social thought had occurred by 1979, leading to a consensus that such a distinction was now discriminatory.[39] The determination of the evolution of social consensus is of course an area fraught with imprecision.

Even more disturbing—because even more imprecise—is the clause in the *Marckx* decision referring to "positive obligations inherent in an effective 'respect' for family life".[40] Without articulating exactly what this clause meant, the *Marckx* court stated that, in their domestic laws, member states must "act in a manner calculated to allow those concerned [non-marital families] to lead a normal family life."[41]

This aspect of *Marckx* has come under a great deal of fire from European jurists. Professor Fritz Sturm of the Law Faculty of the University of Lausanne, Switzerland, refers to the ECHR-Court's action of broadening Article 8, through uncertain "positive obligations", as "uberstrapazierung", which can only be translated as "bootstrapping".[42] Pro-

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38. *Rigaux, supra* note 24, at 523.

39. In the *Marckx* decision, the Court spelled out its commitment to make the Convention evolve with society:

> Finally, in reply to an argument advanced by the [Belgian] Government, the Court acknowledged that, at the time when the Convention was drafted, it was regarded as permissible and normal in many European countries to draw a distinction in this area between the "illegitimate" and the "legitimate" family. The Court however recalled that the Convention is to be interpreted in the light of present-day conditions; it could not but be struck, it stressed, by the evolution in the domestic law of the great majority of the Member States of the Council of Europe towards equality between "legitimate" and "illegitimate" children on the point under consideration.

Marckx Case, 1979 Y.B. EUR. CONV. ON HUMAN RIGHTS 414 (Eur. Comm'n on Human Rights).

40. *ECHR-Marckx, supra* note 1, at 15, Section 31.

41. *Id.*

42. Sturm, *Das Strassburger Marckx-Urteil zum Recht des nichtehelichen Kindes und seine Folgen [The Strasbourg Marckx Decision as to the Law of Non-marital Children and*

fessor Jacques Velu of the Law Faculty of the Free University of Brussels stated his vehement objection to the direct applicability of the *Marckx* decision:

> Insofar as Article 8 has negative obligations, meaning a prohibition against the State's arbitrarily meddling in the private and family life of individuals, it [the Marckx decision] enunciates a sufficiently precise and complete rule that takes on a directly applicable character.
>
> Insofar as Article 8 includes positive obligations. . .,this holding does not take on a directly applicable character, because, as soon as several alternative means are available for the State to adopt in order to implement this court instruction, the holding is not sufficiently precise or complete. To this extent, Article 8 imposes, in our mind, only an obligation for the legislator to act, an obligation which should only be invoked in national courts as one element, for interpretation according to domestic law, but not as a principal source of controlling law or obligation.[43]

B. *Aftermath: The Three Dutch and Belgian Cases*

The three cases *infra* purport to represent all reported cases in European national courts that have cited *Marckx* in their decisions. There are several reasons why of all 21 States Party, only in Belgium and in the Netherlands were cases reported that cited *Marckx*. One reason is that in many countries, most notably in Scandinavia[44], illegitimacy laws have been reformed to eliminate any discrimination against non-marital children; no cases would be likely to arise. Among the other reasons for the dearth of cases citing *Marckx* are: 1) the common practice throughout Europe *not* to report any cases except the most important appellate cases; 2) the non self-executing status of the ECHR-Convention in most European countries, including France; and 3) the social context in many European countries which prevents plaintiffs from bringing suits that might attract public attention to their own non-marital status or to that of their children. The three reported cases, two Belgian and one Dutch, that did cite *Marckx* all involved statutes which were found to violate Article 8 of the ECHR-Convention as interpreted by *Marckx*. Each case sheds light on ramifications of the *Marckx* decision in specific and different areas.

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its Aftermath], 12 ZEITSCHRIFT FUR DES GESAMTE FAMILIENRECHT [FAMILY LAW REVIEW] 1150, 1154 (1982).

43. Velu, *Les effets directs des instruments internationaux en matiere de droits de l'homme [The Direct Effects of International Instruments Concerning Human Rights]*, 15 REVUE BELGE DE DROIT INTERNATIONAL [BELGIAN JOURNAL OF INTERNATIONAL LAW] 293, 314 (1980-2).

44. *See supra* note 7 and note 33. On illegitimacy statutes in the Scandinavian countries, *see generally* KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971) at 179-93.

B.1 *Supreme Court of the Netherlands: The "Adoption by Aunt" Case of Nijmegen—decided January 18, 1980*[45]

Facts: Petronella Janssen, a Dutch national living in Nijmegen (Netherlands), filed a motion on November 24, 1978 with a local Nijmegen court asking that she be allowed to officially adopt Leyla Janssen, a minor child under her care. Leyla Janssen was born on November 16, 1974, the non-marital daughter of Anna Maria Janssen, who died on November 6, 1978, and who was the sister of Petronella Janssen. The identity of Leyla's father was never made known by her mother, and was never declared.

Holding: In effect, Petronella Janssen wanted to adopt her sister's non-marital four-year-old daughter, after her sister died and the child became an orphan. Such an adoption procedure would have been quite normal under Article 959 of the Dutch Civil Code[46], which allows for adoption of orphans by the next blood relative. Such an adoption would have proceeded without any opposition *if* the aunt, Petronella Janssen, were recognized by law as her niece Leyla's next blood relative. However, because Leyla was illegitimate, she was considered by Dutch law, as under the Napoleonic Code, to have no blood relative other than her mother. Therefore, the trial court at Nijmegen, in February, 1979, followed Dutch law and declared her "a ward of the state" because she was without a blood relative. In April, 1979, two months before *Marckx*, the Arnhem appellate court affirmed the trial court's decision, stating that the child's *only* relative was her unmarried mother. As the plaintiff was not a relative within the meaning of Article 959, the motion to adopt could not be granted.[47]

The Dutch Supreme Court rendered its decision on January 18, 1980. It reversed the decision of the Arnhem Appellate Court and remanded the case to that court with instructions to proceed with the case in a manner that would make no distinction between marital and non-marital children. Basing its holding specifically on *Marckx*, the Dutch Supreme Court gave this explanation for its decision:

> The legal distinction made between marital and non-marital children has of late undergone sizable change. This development found expression in the ECHR-Court's judgment in the *Marckx* case in an inter-

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45. De Hoge Raad der Nederlanden [Supreme Court of the Netherlands], Case No. 463 of January 18, 1980, NEDERLANDSE JURISPRUDENTIE [DUTCH JURISPRUDENCE] 1460 (1980); REPRINTED IN SUMMARY FORM IN *Rechtspraak [Law Talk]*, No. 21, 7 NEDERLANDS JURISTENBLAD [DUTCH LAWYERS' PAGE] 141 (1980); summarized and intepreted in German in: De Hoge Raad der Nederland [Supreme Court of the Netherlands], *Verwandtschaft des nichtehelichen Kindes / Einfluss der Marckx-Entscheidung des EGMR [Kinship of the non-marital child / Influence of the Marckx decision of the ECHR-Court]*, EUROPAISCHE GRUNDRECHTE ZEITSCHRIFT [EUROPEAN FUNDAMENTAL RIGHTS REVIEW] 213 (1980).

46. Article 959, Civil Code of the Netherlands.

47. *De Hoge Raad, supra* note 45, at 1460.

> pretation of Article 8 in conjunction with Article 14 of the ECHR-Convention. The domestic judge must therefore take into account this important evolution when examining matters which come before him on this point.
>
> With respect to the question whether in the instant case, Article 959 ought to be applied to the sister of the mother of a minor child, even when the child is not a marital offspring of the mother, the need for legal consistency does not oppose such an application. So then, for all unadjudicated proceedings henceforth the applicable Dutch law is that in this regard no distinction must be made between marital and non-marital children.[48]

It appears that the Dutch Supreme Court gave the ECHR Convention, as interpreted in *Marckx*, the force of binding law that could overrule Dutch statutes. Without that binding force of the Convention, the Dutch Supreme Court would have had, in the name of "legal consistency" in a civil law jurisdiction, to rule against the aunt's motion, unless the Dutch Parliament changed the law and gave it retroactive force.

B.2 *Civil Tribunal of Ghent, Belgium: The "Granddaughter's Inheritance" Case—decided November 20, 1980*[49]

Facts: When Elza D. died in 1978, her estate was to be divided up among her heirs according to Belgian law. A problem arose because Elza D. had only one child, a non-marital daughter, Denise, who, for unstated reasons, refused to accept any part of her mother's estate. This non-marital daughter, Denise, had married and had a marital child, Antonia, who was an adult at the time of her grandmother's death. Antonia wanted very much to inherit her grandmother's entire estate. If Denise had been a marital child, Antonia would have been a "conventional" granddaughter. As the only grandchild, Antonia would have been the closest heir in line for the estate, and, under Belgian law, would have received the entire estate. Antonia's mother's illegitimacy had barred her from doing so. Meanwhile, certain "legitimate" nieces and nephews of the decedent had opposed Antonia's claim to any part of the estate, and had argued for their exclusive rights to the estate.

Under the Belgian Civil Code, a non-marital child has a blood relationship only with its mother and thus has the right to inherit only from its mother and not from any extended family beyond. Thus, by Beligan statutes, Antonia had no relationship to her grandmother, Elza D.

Holding: The judge refused to apply the relevant Belgian statutes, which he considered to be violative of the ECHR-Convention:

> The Belgian Civil Code therefore makes a distinction between the inheritance rights of legal [marital] offspring and the inheritance rights

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48. *Id.* at 1462.

49. Burgerlijke Rechtbank Te Gent [Civil Tribunal of Ghent], Decision of November 20, 1980, RECHTSKUNDIG WEEKBLAD [WEEKLY LAW REPORTER SHEET] 2328 (1980-81).

of natural [non-marital] offspring.

That discrimination is discriminatory and is in conflict with Articles 8 and 14 of the ECHR-Convention (signed in Rome on November 4, 1950) and with Article 1 of Protocol No. 1 (signed in Paris on March 20, 1952), both ratified by Belgian and applicable in Belgian law since June 14, 1955.

That is also the holding in the judgment of the ECHR-Court of June 13, 1979 (*Marckx* case).[50]

B.3 *Civil Tribunal of Turnhout, Belgium: The "Adulterous Child" Case—decided April 29, 1982*[51]

Facts: Maria El. was married to Hans-Joachim K. for a number of years until they separated in 1976. They continued to live apart, without divorcing. Also in 1976, Maria El. began to live with Anastassios K., and continued to live with him during the six years that followed, even though she was still legally married to Hans-Joachim. In March, 1980, Maria gave birth to a daughter, Stella, whom Hans-Joachim refused to recognize as his own. Hans-Joachim and Maria were officially divorced in October, 1980. After Maria's divorce, Anastassios, with Maria's consent, petitioned the Turnhout Civil Tribunal to allow him to be recognized as the child's father.

Articles 333 and 335 of the Belgian Civil Code forbade any official recognition of Anastassios's paternity of Stella. According to Article 331, a "natural" ("non-marital" but not "adulterous") child could become "legitimate" by its parents' marriage, but a non-marital child born of an adulterous or incestuous relationship could not be so acknowledged. According to Article 335, the paternity or maternity of a non-marital child could not be judicially declared where this would show the adulterous or incestuous nature of the parents' connection.

Holding: The Belgian court held that Articles 331 and 335 violated the ECHR-Convention and should not be applied, and that Anastassios's paternity should be officially acknowledged. The court's reasoning was as follows:

Considering that in the given circumstances, the petition from Mr. Eu. [Anastassios] concerning the child, Stella El., is not allowable under Articles 331 and 335; that the petitioner, aware of the *Marckx* decision of the ECHR-Court of June 13, 1979, contends that Articles 8 and 14 of the ECHR-Convention hold that a state which has ratified the Convention must provide legal safeguards for the protection of normal family life; that a non-marital child has as much right as the

50. *Id.* at 2329.

51. Burgerlijke Rechtbank Te Turnhout [Civil Tribuanl of Turnhout], Decision of April 29, 1982, RECHTSKUNDIG WEEKBLAD [WEEKLY LAW REPORTER SHEET] 1590 (1982-83). The opinion is immediately followed by a comment: Pauwels, *Noot: Overspelige kinderen en de directe werking van het Marckxarrest [Note: Adulterous Children and the Direct Applicability of the Marckx* decision], at 1592-5.

> marital child to the recognition of its paternity; that the existence of a non-marital family is entitled to enjoy the same safeguards as the existence of a marital family;
>
> Considering that the rules with regard to the rights recognized by Articles 2 through 12 of the Convention are directly applicable in national courts and have precedence over internal law. . . . Considering that in this case the discriminatory distinction made by Articles 331 and 335 has no objective and reasonable justification, in the light of the case law of the *Marckx* decision . . . [t]his tribunal . . . declares the petition granted and authorizes the recognition by Mr. Anastassios Eu., . . . of his child, Stella El. . . .[52]

C. *Aftermath: The Three Dutch and Belgian Cases As Illustrations of the Direct Applicability of Marckx*

In these three cases, Dutch and Belgian judges directly applied Article 8 of the ECHR-Convention as interpreted by *Marckx*, without concerning themselves with the "positive obligations" aspect of the *Marckx* decision. The judges in the three cases did not base their opinions on the "positive obligations" clause in the *Marckx* opinion. The "positive obligations" clause, because of its vagueness, is unlikely to be cited by a national court as controlling authority in any future case. The clause can be thought of as the *Marckx* court's policy statement. It is *obiter dictum* that is not directly self-executing. Despite this dictum; the *Marckx* court's interpretation of Article 8 of the ECHR-Convention is directly applicable and self-executing in Belgium and the Netherlands.

Indeed, the direct applicability of the ECHR-Convention in the Netherlands and Belgium is now a *fait accompli* that is newly, but firmly, anchored in judicial tradition in those countries. Precisely in order to strengthen the Convention's direct applicability, the ECHR-Court in the *Van Oosterwijck* case[53] refused to try the case on the merits. Instead, it decided that a Belgian court could best judge the applicant's claim, by using the *Marckx* decision as a guideline. In *Van Oosterwijck*, the ECHR-Court announced very clearly that violations of the ECHR-Convention need not be heard by the ECHR-Commission and the Court, but could and indeed should be heard by domestic courts, applying the Convention directly, as did the courts in the Hague, Ghent and Turnhout.

IV. CONCLUSION

Centuries ago, decisions in family law affecting all the European states were often made at Vatican Councils[54]. In this way, for example,

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52. *Id.* at 1590-1.

53. Eur. Court H.R., Van Oosterwijck case, judgment of 6 November 1980, Series A no. 40.

54. On Vatican Councils and canon law, *see generally* A.G. CIGOGNANI, CANON LAW (1934); R. METZ, WHAT IS CANON LAW? (1960); T.L. BOUSCAREN AND A.C. ELLIS, CANON LAW: A TEXT AND COMMENTARY (1966); J.A. ABBO AND J.D. HANNAN, THE SACRED CANONS (1960).

the Council of Trent in 1563 decided that informal marriage (cohabitation) would cease to be recognized as a valid union by canon law. Now at last Europe possesses a lay institution—the European Court of Human Rights—whose decisions are respected by the Member States of the Council of Europe. The law is an evolutive process. If discriminatory illegitimacy statutes can trace their origin to the Council of Trent decision in 1563, they may also very well trace their demise to the *Marckx* decision of 1979.