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# Promoting and ensuring diversity of family life

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Since the Convention has been written the Court has been faced with technical and societal developments affecting family life in ways entirely unforeseen at the time the Convention was drafted, just to name few: genetic manipulation, gender reassignment, surrogacy, the value shift toward higher order needs of self-actualization and individual autonomy ("Maslowian drift"), female emancipation and rapid increase in gender equity, post-materialism, globalization with high levels of life course uncertainties including economic and employment related uncertainty.

All these has resulted in increasing diversity of union and family types. Indeed, today, family life in social reality may mean a household consisting of:

1. A couple
    a. Married or unmarried in consensual union or registered partnership
        i. Couple could cohabitate but could also be living apart together (LAT) which is different from commuting;
        ii. Couple could be heterosexual/same-sex/trans couple/bisexual
        iii. With children: their own/from previous relationships/adopted – abandoned children or step-adoption/ as result of assisted reproduction techniques ( (sperm/ovary donation) or surrogacy)
        iv. Couple could be childless, but also childfree
        v. Both partners may work, or one may stay at home, stay at home husbands and fathers are becoming more and more frequent

2. A family with just one parent: lone father or lone mother families

As eloquently put by *Elisabetta Ruspini in her book "Diversity in Family Life"*:

"It is now becoming possible to live, love and form a family without sex, without children, without a shared home, without a partner (male or female), without a working husband, without a heterosexual orientation and without a 'biological' sexual body."

This is a significant change from 1950s when the majority (though not all) families consisted of a married mother, father and their children ("traditional" nuclear family).

How has the Court approached the issue of diversity in family life?

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The Court was many times called to address these developments and to consolidate or crystalize European standards of HR protections in this area. As the Court emphasized in **Karner v. Austria** (para. 26): "Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States." Yet, the Court is constantly remainded of its subsidiary role.

Judge Morenilla, dissenting, recalled in *Kroon and Others v. The Netherlands* that the tension between evolutive interpretation and the need to respect policy decisions taken by elected legislators is greater in matters such as marriage, divorce, filiation or adoption, because they bring into play the existing religious, ideological or traditional conceptions of the family in each community.

Indeed, the Court has reiterated many times that in areas involving sensitive moral choices or notions that have deep-rooted social and cultural connotations which may differ largely from one society to another, it must not rush to substitute its own judgment in place of the authorities who are best placed to assess and respond to the needs of society (Z.H. and R.H. v. Switzerland, 2015, para. 44; Schalk and Kopf v. Austria, 2010, para. 62) –)

However, the societal and tehnical developments of the magnitude above discribed the Court could adequatly address only relying on the Convention as a living instrument, susceptible to re-interpretation in light of present-day social and legal conditions and by recognizing legal diversity under the MoA doctrine.

- Already in *Marckx v. Belgium*, 1978, while admitting that at the time when the Convention was drafted, it was regarded as permissible to treat differently children from so-called 'legitimate' and 'illegitimate' families, the Court noted that, "the domestic law of the great majority of the member States of the Council of Europe has evolved and it continues to evolve."

- In *Christine Goodwin v. United Kingdom*, 2002 the Court relied on major social changes in the institution of marriage as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality since the adoption of the Convention.

- In *Schalk and Kopf v. Austria, 2010* in addressing the issue whether the relationship of a same-sex couple constituted family life within the meaning of Article 8 the Court took into consideration a rapid evolution of social attitudes towards same-sex couples in many member States and the fact that a considerable number of States had afforded them legal recognition; it also observed while there was an **emerging european consensus** towards legal recognition of same sex couples , that there was not yet a majority of States providing for it.

- in *Vallianatos v. Greece,* the Court emphasised that the State, under Article 8 had to take into account developments in society and the fact that there was not just one way or one choice when it came to leading one's family or private life;

Thus it is not surprising that one of the most dynamic and divisive areas of the Court's jurisprudence is the protection of family rights.

In *Mazurek v. France,* the Court itself has emphasised that the institution of the family is not fixed, be it historically, sociologically or even legally (Mazurek v. France, 2000, para. 52).

Jurisprudence "promoting and enforcing" diversity of family life has developed mainly under Article 8 (the right to respect for family life) and Article 12 (the right to marry and found the family). These are two distinct albeit interrelated rights, between which there is a sharp contrast. While the essence of marriage for the purposes of the Convention is defined in minimalistic and formalistic terms as the formation of legal bonds between a single man and a single women of a marriageable age and while the right to found a family does not arise under Article 12 in absence of marriage, assessment of 'family life' under Article 8 is qualitative, what matters is the substance of the relationship, primarily real existence in practice of close personal ties (Paradiso and Campanelli v. Italy [GC], para. 140). 'Family life' is pre-eminently social rather than legal reality. As such it is more elastic and adaptable than the notion of marriage. Consequently, the two provisions can be and are assessed by the Court with different results.

The Convention as interpreted by the Court recognizes and protects a plurality of family models. The case law has unequivocally established that the absence of marital bonds is not dispositive of existence of 'family life'. I will refresh your memory just with few most important developments in the course of past 70 years in this area. Due to the limited time I will basicly focus only to horizontal family relations:

1. In *F. v. Switzerland*, 1978 (§38) the Court recognized that if national legislation allows divorce, which is not a requirement of the Convention, Article 12 secures for divorced persons **the right to remarry** without unreasonable restrictions

2. In *Marckx v. Belgium*, 1979 (para. 31) the Court aknowledged **the single woman and her child as one form of family** ('lone parent family') and confirmed that Article 8 applies to the "family life" of the "illegitimate" as it does to that of the "legitimate" family

3. In *Christine Goodwin* v. United Kingdom, 2002 (§§ 100-04) the Court was "not persuaded that it [could] still be assumed that [marriage] must refer to a determination of gender by purely biological criteria" (§ 100). In short The Court acknowledged **the right of transsexuals to marry according to their new gender identity**.

4. The Court went long way in recognizing same sex couples:
    a. In *Schalk and Kopf v. Austria, 2010* the Court recognized that a cohabiting same-sex couple living in a stable partnership fell within the notion of 'family life' and it recognized **an emerging right for same-sex couples to some form of a legalized union,** however**,** without providing any time limit for eventual national implementation;

    b. In *Vallianatos v. Greece*, 2013 the Court confirmed **the right of same-sex couples to enter civil partnerships where these are available to heterosexual couples** – only than states act in breach of the Convention

c. In *Oliari and Others v. Italy*, 2015, the Court found a violation of Article 8 because the applicants did not have available a specific legal framework providing for the recognition and protection of their same-sex unions. However the Court did so primarily relying on the Italian Constitutional Court judgment which pointed out the need for legislation to recognize and protect same-sex relationships, but was thereafter not followed by the legislator and relying on the disparity between social reality and law in Italy. Judgment is very country specific.

d. In *Orlandi and Others v. Italy*, 2017, the applicants had contracted same-sex marriage abroad and requested its registration in Italy. However, no specific legal framework was available in Italy providing for recognition and protection for same-sex unions and, as a result, the applicants' foreign same-sex marriages could not be given recognition in Italy in any form. Consequently, the Court found that the applicants were left in a legal vacuum and the State had failed to strike a fair balance under Article 8 of the Convention between any competing interests. (ibid., § 205, 208 and 210).

e. In all of the above judgments the Court confirmed and reconfirmed that Convention does not guarantee the right of same-sex partners to inter-merry. The Court held that the decision to legalise such marriages (*Schalk and Kopf v. Austria*, 2010, §§ 61-62; *Chapin and Charpentier v. France*, 2016) as well as the decision how to regulate the effects of the change of gender in the context of existing marriage (Hämäläinen v. Finland, 2016; *Parry v. the United Kingdom* (dec.), 2006; *R. and F. v. the United Kingdom* (dec.), 2006) fell within the appreciation of the Contracting State. The Ct. emphasised that it should wait for greater consensus before reinterpreting Art. 12. in accordance with the Convention's character as a "living instrument." In the meantime number of States have recognized same-sex marriages, and at the same time number of States have introduced a definition of marriage from Article 12 into their Constitutions.

f. Indeed the Ct. has recognized the same-sex couples, but equalization of their position is still not there. Neither is marriage open to them nor there is a positive obligation to introduce registered partnerships. Although, the case -law recognizes to same sex couples a right to family life, the scope of the measures required to achieve this right is still not so clear cut.

5. Furthermore, the Court confirmed that the existence of family life between partners in a non-formalized union is independent of cohabitation. In *Vallianatos* (para. 73) the Court acknowledged that it can see no basis for drawing the distinction between those applicants who live together and those who – for professional and social reasons – do not if the relationship is stable. Yet it is not clear whether the Court ment to cover LAT couples (living apart together) therby as well.

It is by now firmly established that the same sex partnership cannot be discriminated for the alleged purpose of protecting the traditional family. Yet, the traditional nuclear family is still granted a

privileged treatment in the Court's jurisprudence and discrimination if found is based on different treatment of cohabiting couples or civil partners based on their sexual orientation:

1. Contracting states enjoy certain MoA in differentiating between the rights and duties (material and parental) attached to legal regime of marriage as opposed to regulated partnership. However, in light of *X v. Austria*, 2013 any distinction between these two institutions would require compelling justification.

    a. In *X. v. Austria* (case of second- parent adoption by same-sex partner) the Grand Chamber held that there had been no violation of Article 14 taken in conjunction with Article 8 when the applicant's situation was compared with that of a married couple in which one spouse wished to adopt other spouse's child; nonetheless there had been violation of said provisions when the applicants situation was compared with that of unmarried different sex couple in which one partner wished to adopt the other partner's child.

    b. In *Pajić v. Croatia*, 2016, the Court found a violation of Article 8 in conjunction with Article 14 on the bases that the applicant had been affected by a difference in treatment based on Aliens Act, which reserved the possibility of applying for a residence permit for family reunification to different-sex couples only.

    c. In *Aldeguer Tomas v. Spain*, 2016, in concluding that there was no discrimination in refusing to grant retroactively survivor's pension to same sex partner the Court recalled that States had a certain room for manoeuvre ("margin of appreciation") as regards the timing of the introduction of legislative changes in the field of legal recognition of same-sex couples and the exact status conferred on them, an area which was regarded as one of evolving rights with no established consensus.

    Just few concluding remarks:

    1. European jurisdictions that currently recognize different forms of family life generally changed through incremental steps, gradually increasing rights of alternative families; often offering at first limiting forms of recognition before moving to full-fledged marriage rights.

    2. European consensus helps the Court to further protection of minority rights by justifying the evolutive interpretation of the Convention.

    3. Sensitive nature of the issues led to uneven progress in the development of Convention family rights in particular for sexual minorities

        a. The Court has often chosen to follow and not to lead on various issues of social tradition.
        b. It is cautious, it endorses the changes taking place at the national level.
        c. However, the Court has also demonstrated that it is also prepared to trigger rather than to endorse the change
            i. relying on the concept of emerging consensus,
            ii. proportionality test or

iii. balance of harms test emphasizing the loss minority will suffer if measure is not introduced.

4. The Court would obviously need the overwhelming consensus to change the traditional institution of marriage

5. By placing de facto unions within the ambit of Article 8 the Court often pursued relatively modest objective of guaranteeing protection against obstacles to the normal development of relationship.

6. However, research demonstrates that the frequency of same-sex marriage or registered partnership, in states in which these institutions have been introduced, can be associated through statistical analysis with macro as well as micro factors. At both levels parenting appears as one of the key determinants. We should not underestimate the significance of the impact of legal consequences attached to recognition of different forms of families in promoting and enhancing diversity in family life.

7. To end with two statistical data:

    a. In EU 27 countries in 2018 according to Eurostat– on average 42.4% of children born were born out of marriage, 60% in France and in Island 70.5%.
        i. The consideration of the best interests of the child could not remain marginal in approaching issues related to diversity in family life.

    - According to 2011 census in EU 28 countries, already than around 29% of families, i.e. more than one quoter were non-traditional families.
    - It will be interesting to see in census of 2021 to what extent and in which direction this picture has changed.
    - It might be legitimate to pose the question how long we will be able to address alternative families as minorities.