THIRD PARTY INVERENTION

Submission to the Fourth Section

European Court of Human Rights

In the cases

Babiarz v. Poland,
Gajewski v. Poland, and
Piotrowski v. Poland

(Application n^{os} 1955/10, 8951/11 and 8923/12)

European Centre for Law and Justice

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Marriage is of public interest

1. Marriage is of public interest in that its purpose is family, unlike other emotional relationships out of marriage devoid of such purpose and falling within the jurisdiction of private life.

2. The Commission on Human Rights has said clearly that marriage is "*an institution which falls within the framework of society*"[1]; for marriage, the spouses make their engagement public. It therefore not only describes the choice of an individual life, but also a social decision. The spouses decide not only to unite themselves but also to make this union part of society. The act of taking their engagement public is constitutive of marriage: a secret marriage is for the best part void.[2] This publicity allows, if necessary, the protection of the courts for the abandoned spouse, and contributes to social peace. On the other hand, the mutual engagement of spouses and by which with regard to society they assure their future, the spouses receive protection form part of the society, and what's more – fiscal protection- of their contribution to society, on the basis of the future generation and them educating their children. The social character of the institution of marriage appears also in that marriage confers nationality: marriage to a foreign national brings in society by conferring nationality.

3. It is important for society that families are stable and can fulfill their role; aside from the means of procreation and the education of children, for the transmission of culture, the family is also the first place of solidarity, in particular between generations. The Parliamentary Assembly of the Council of Europe recalls the importance of the family in times of crisis and its vital role for the fabric of society.[3]

4. On the contrary, non- existent or broken- up families give rise to a considerable cost for society. Studies show the impact of the splitting of parents on the development of the children: the probability of finding themselves failing school, of having health problems (anorexia, bulimia, depression…), of consuming drugs or having violent and increasingly erratic behaviour. The breaking up of couples is also a factor of poverty, of unemployment and the housing problem: the protection of the family is therefore not only a necessity but also of major interest for society.

The family is recognised as that which is natural and fundamental in our society

5. The preamble of the Convention relative to the rights of children prescribes that: "*the family, as the fundamental group of society and the natural environment for the growth and*

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[1] *Jolie v Belgium*, n° 11418/85, May 14th 1986.

[2] Article 191 of the French Civil Code ; *« le droit canon l'accepte dans des cas graves et urgents, avec l'autorisation de l'évêque (canon 1130)* ».

[3] Resolution 1720 (2010) *"Investing in family cohesion as a development factor in times of crisis* ". It notably affirms: "*The Parliamentary Assembly recognises the force that the family represents in meeting life's challenges and considers that the family unit is a fundamental element to aid in the economic recovery, especially during times of adversity and change. The family produces assets and is a factor for development. Peace, stability, cohesion and solidarity, child rearing, informal services and assistance, care, freedom and responsibility, well-being, savings, economic stability and intergenerational solidarity are some of the countless and often taken-for-granted spiritual virtues and material benefits that accrue from family cohesion."* (§ 2).

well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community".

It designates "*that which is fundamental in society*"[4], "*the family is the natural and fundamental group unit of society and is entitled to protection by society and the State."*[5], the "*fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children"*[6].

The family deserves the protection of the state by reason of its children

6. Thus, the family "*is entitled to protection by society and the State.*[7]*"* and to *"assistance so that it can fully assume its responsibilities within the community"*[8] which must be "*The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses"*[9]. This protection must be "*With a view to ensuring the necessary conditions for the full development of the family, which is a family unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family*"[10].

7. The family founded on marriage, therefore, has a structural role in society, *in assuring the growth and well being of all members and in particular its children*, which the obligations on the part of the State, as entailed in article 23 of the International Covenant on Civil and Political Rights: "*The family is the natural and fundamental group unit of society and is entitled to protection by society and the State*". This recognition of the family as the foundation of society has always been recognised: it is regularly reaffirmed, notably in the Conventions on the Rights of the Child (1989) and in the European Social Charter (revised) 1996: "*With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life*". (Article 16)
The International Covenant on Economic, Social and Cultural Rights poses in its Article 10 that : "*The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children*." This last provision shows the natural relationship reuniting children, their families and society; It is in the family

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[4] European Social Charter, 1961.
[5] Article 16 § 3 of the Universal Declaration of Human Rights 1948, article 23 §§ 1 and 2 of the International Covenant on Civil and Political rights 1966, article 10 § 1 of the International Covenant on Economic, Social and Cultural Rights 1966, 5th and 6th considerations of the Preamble of the Convention on the rights of the Child, article 16 of the European Social Charter (revised) 1996, Article 33 of the Charter of fundamental rights of the European Union 1989, Resolutions 1720 (2010) 1864(2012) of the PACE from the19 January 2010 and 27 January 2012 respectively.
[6] International Convention on the Rights of the Child.
[7] Article 16 § 3 of the Universal Declaration of human rights and 23 § 1 of the International Covenant on Civil and Political Rights.
[8] International Convention on the Rights of the Child.
[9] Article 10 § 1 of the International Covenant on Economic, Social and Cultural Rights.
[10] Article 16 of the European Social Charter (revised) and article 33 § 1 of the Charter on Fundamental Rights.

that "*the natural and fundamental element of society*" which contributes to the constitutive way to the first common good which existed in society, it is for these natural motives, pre-existing positive law, that society gives a special position to marriage so as to protect the family.

The right to marry results in the desire to start a family

8. The right to marry has not been known as an autonomous right; it's the faculty to start a family which gets its sense in the right to marry. The right to marry is almost an accessory to that of which to start a family: it is an instrument to its service. The court outlines consistently that marriage is the institutional framework and even the foundation of the family. *"which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family."*[11]; this appears also in all the declarations of rights: such as, for example, the recent Charter of the fundamental rights of the European Union doesn't just talk about "the right to marriage" but also "the right to marry and the right to start a family" Article 9: to marry and to start a family is a single and the same right. Article 16 of the Universal Declaration of Human Rights indicates the same that "*Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family*." It is mentioned the same way in the international Covenant on Civil and political which states in article 23.2 that the "*The right of men and women of marriageable age to marry and to found a family shall be recognized*."

9. From the above one can see that marriage is an institution in the service of family: marriage is an instrument in the service of the purpose which is the family. Thus, the conditions and restrictions of marriage are not arbitrary, but are the consequences of the purpose of marriage. These conditions are above all natural: they include marriageable age, that is to say the ability to procreate, the difference of the sexes of the spouses, which is also a condition to procreation, and blood relations, which pose problems to healthy procreation.

International and European law does not recognise a "right to divorce".

10. If international law recognises a right to marriage, it does not recognise the right to divorce. This is also the case in numerous European states that, at the time of the drafting of the ECHR, prohibited divorce. Ireland and Malta did not legalise divorce until 1995 and 2011 respectively.

The State must protect marriage. What would the sense be in the right to marry and to found a family, guaranteed in Article 12, if the State did not guarantee the stability of marriage, the legal security of spouses? Marriage attempts to confer a certain framework and legal security to a relationship. A State where the law would not guarantee this legal security would also not guarantee the substance of the right to marry. The Court recognises "*that the stability of marriage is a legitimate aim which is in the public interest.*"[12]

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[11] *Sheffield and Horsham v United Kingdom*, n° 22985/93 et 23390/94, [GC], July 30th 1998, § 66.
[12] *F v. Switzerland*, n° 11329/85, December 18th 1987, §36

11. The prohibition of divorce is neither contrary to Article 8 nor Article 12 of the European Convention on Human Rights.[13] The Court has consistently ruled that Articles 8 and 12 of "*cannot be interpreted in a manner guaranteeing the right to divorce*" notably because "*preparatory works on the Convention clearly indicate the will of the High Contracting Parties to deliberately exclude this right from the field of application of the Convention*."[14]

12. The Court specified that "*if the provisions of the Convention cannot be interpreted in a manner guaranteeing the same existence of a right to divorce to the benefit of certain parties* (*Johnston and others, aforementioned*, §§ 54 and 57), *they cannot, a fortiori, guarantee the exercise of such a right and even less so a favourable way out of the process of divorce for one spouse or the other."*[15] The Court also clearly indicates the absence of the "right to divorce". A "right to a divorce" or "to divorce" is not the negative aspect of the right to marry and to found a family. The negative aspect of the right to marry and found a family is that to not marry, to not be married by force, and not to "de-marry".

13. Regarding the right to remarry, guaranteed by Article 12, it applies solely to those who are not already engaged in a marriage, that is to say after the granting of a divorce,[16] because the "*principle of monogamy*" is "*one of the fundamental principles of the legislation in the area of familial relations in the signatory States to the Convention*."[17]

14. ***Concerning consensus*****,** it is notable to recall that it is not decisive. As the Court confirmed, "*the Convention must be interpreted in the light of present-day conditions... However, the fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect offends the Convention, particularly in a field - matrimony - which is so closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit."*[18]

In any case, there is not consensus in Europe concerning the possibility of obtaining a divorce when the spouse who is not at fault is opposed to it, even in the presence of a definitive change to the martial relationship.

15. ***Concerning Article 8***, it does not include, in itself, the right to divorce: "*the Court does not consider that a right to divorce, which it has found to be excluded from Article 12 (art. 12) can, with consistency, be derived from Article 8 (art. 8) a provision of more general purpose and scope. (…) the engagements undertaken by Ireland under Article 8 (art. 8) cannot be regarded as extending to an obligation on its part to introduce measures permitting the divorce and the re-marriage which the applicants seek*"[19].

This evaluation, which is based on the intention of Article 8, is not susceptible to being affected by the evolution of society.

16. It must be noted that the absence of divorce, in the case at hand, does not prevent the applicants and their new partners from leading a private and family life in the sense of Article

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[13] *Johnston and others v. Ireland*, n° 9697/82, December 18th 1986.
[14] *Ivanov and Petrova v. Bulgaria*, n° 15001/04, June 14th 2011, §60 (No official English translation.) ; *Johnston and others v. Ireland*, n° 9697/82, December 18th 1986.
[15] *Ivanov and Petrova v. Bulgaria*, n° 15001/04, June 14th 2011, §64 (No official English translation.)
[16] *F v. Switzerland*, n° 11329/85, December 18th 1987.
[17] *Ivanov and Petrova v. Bulgaria*, n° 15001/04, June 14th 2011, §60 (No official English translation.)
[18] *F v. Switzerland*, n° 11329/85, December 18th 1987, §33.
[19] *Johnston and others v. Ireland*, n° 9697/82, December 18th 1986, §57

8: the extramarital character of a stable relationship does not prevent it from being a form of family life in the sense of Article 8. Article 8 does not necessitate that every relationship constituent of a family life must enter into marriage. The fact that a couple (or several people in the case of polygamy) cannot marry is not, in itself, a violation of the right to respect for family life. Thus, in the case of Johnston, the Court ruled that "*there has been no interference by the public authorities with the family life of the first and second applicants* [the illegitimate couple]*: Ireland has done nothing to impede or prevent them from living together and continuing to do so and, indeed, they have been able to take a number of steps to regularise their situation as best they could*". [20]

In fine, Article 8 protects private life; yet marriage is a public act which engages the couple, the eventual children and society, and which therefore surpasses the private sphere.

The effects of the absence of divorce

17. According to the Court, the absence of the right to divorce "*guaranteed in such as it is by the Convention*"[21] does not resolve the question as to whether "*the effects that this judgement* [refusing the dissolution of marriage] *had on the situation of the two applicants were compatible with the guarantees stated in Articles 8 and 12 of the Convention*".[22] The Court had already considered that the conditions of the implementation of the divorce procedure envisaged in internal law could enter into the field of application of the Convention and be subject to its control.

The Court thus had the opportunity to rule that "[i]*f national legislation allows divorce, which is not a requirement of the Convention, Article 12 (art. 12) secures for divorced persons the right to remarry without unreasonable restrictions."*[23] ; and it also ruled that " the excessive length of proceedings may" pose a problem under Article 12.[24]

18. Beyond that, the Court ruled in the case *Ivanov and Petrova* that if the national legislation permits divorce, it "*no longer excludes that*" the assessment of a violation under Article 12 could "*occur in the case where, despite that assessment of an irreconcilable alteration in the marital relationship, internal law establishes the opposition of the spouse who is not at fault as an absolute obstacle to the obtention of a divorce*" (§61). The adoption of this position in the present case would constitute a spectacular revival of jurisprudence because it would harm the marital link in itself in the name of the Convention, and not the conditions of its dissolution conducted by internal law. Article 12 would therefore turn against itself and against the will of the authors of the Convention. This approach would interpret Article 12 as susceptible to "forcible divorce" of a spouse, to depriving them of possession of their marital estate, acquired in virtue of this same right.

19. Such a change would favour the individualist conception of freedom, which perceives true freedom as the absence of definitive engagement, depending on a – more demanding – conception that considers that freedom is exercised and is accomplished in engagement and

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[20] *Johnston and others v. Ireland*, n° 9697/82, December 18th 1986, §66
[21] *Ivanov and Petrova v. Bulgaria*, n° 15001/04, June 14th 2011, §61. (No official English translation.)
[22] *Ivanov and Petrova v. Bulgaria*, n° 15001/04, June 14th 2011, §60. (No official English translation.)
[23] *F v. Switzerland*, n° 11329/85, December 18th 1987, §38.
[24] *Aresti Charalambous v. Cyprus*, n° 43151/04, July 19th 2007 ; *Wildgruber v. Germany*, n° 42402/05 and 42423/05, January 21st 2010.

loyalty. They can be summarised thus: can a person invoke their freedom against themselves? Article 12 protected the "freedom of engagement" by reason of the social character of marriage and especially the family; will it protect the "freedom of disengagement" in the future in accordance with a fundamentally individualist conception of human rights?

20. Once again, although we can derive the ban on the death penalty from Article 2 or the right to conscientious objection from military service from Article 9 (two points which were also the subject of "reserves" by the High Contracting Parties), we cannot derive a right to divorce from a right to marry: it would be just as contradictory to derive a "right to death" from the right to life, which the Court refused to do in the case of *Pretty v. the United Kingdom.*

21. ***In the case at hand,*** however, we are not in the situation where the deserted spouse would have a right to "veto", as Polish law (in article 56.3 of the Family and Guardianship Code) does not confer such an absolute power to the deserted spouse, but allows the judge to grant the divorce even against the will of the spouse who is not at fault with regard to the circumstances of the specific case, as soon as he considers that this refusal is excessive.

22. Additionally, it is worth recalling that the Court "*is by no means tasked with substituting itself for internal courts in establishing facts and the interpretation of internal law*".[25] By virtue of the subsidiary character of the mechanism established by the Convention, it is for the national judge to consider the circumstances of the present case, keeping in mind the national margin of appreciation resulting notably from local culture.

[25] *Ivanov and Petrova v. Bulgaria*, n° 15001/04, June 14th 2011, §44. (No official English translation.)