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The protection of the family

Written question No. 560 to the Committee of Ministers
by Ms Michaela ŠOJDROVÁ, Czech Republic

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State[1]. In stating this principle, international law recognises two paramount facts in relations between the family and society. Firstly, the family is a natural, objective and primary fact, the basic component of society. Secondly, because of these characteristics, the relationship between family and society can be expressed only in terms of protection.

In order to protect the family and its foundations, the member States of the European Convention on Human Rights agreed to recognise and guarantee the right to marry. Article 12 of the Convention provides that "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right". This article shows that the "right to marry" and the right to "found a family" are interdependent: the "right to marry" exists in order to protect the natural and still more fundamental right to "found a family". That is why the right to marry is guaranteed only for men and women of marriageable age, that is, only for couples able to found a family.

The *travaux préparatoires* for the European Convention on Human Rights and a long line of judgments of the European Court of Human Rights agree in their interpretation of Article 12 of the Convention on this point, as evidenced by the possibility granted to member States of establishing a legal framework for the exercise of the right to marry. The national legislation considered is intended to restrict the right to marry beyond the criteria of age and sex, particularly in terms of physical and mental health, morals and kinship between the spouses, in other words in terms of the spouses' capacity to found a family. Thus, both the explicit criteria of age and sex established in Article 12 of the Convention and the nature of the margin of appreciation granted to States demonstrate that legal protection of the right to marry is indeed closely linked, not to say subject, to the capacity to found a family.

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1. See Article 16 of the Universal Declaration of Human Rights of 10 December 1948 and Article 23 of the International Covenant on Civil and Political Rights of 16 December 1966.

Universal Declaration of Human Rights of 10 December 1948:

Art. 16: 1. 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. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

International Covenant on Civil and Political Rights of 16 December 1966:

Art. 23: 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

The criteria safeguarding the right to marry reflect a relationship in which not only does society protect the family, but the family also protects society: in protecting the family, society also consolidates its own foundations.

This is the approach that the Court adopted in its Rees v. United Kingdom judgment of 17 October 1986.[2] The Court established the principle of a strict interpretation of Article 12: "In the Court's opinion, the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family. Furthermore, Article 12 lays down that the exercise of this right shall be subject to the national laws of the Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired. However, the legal impediment in the United Kingdom on the marriage of persons who are not of the opposite biological sex cannot be said to have an effect of this kind". In the Christine Goodwin v. United Kingdom judgment of 11 July 2002, the Court maintained the principle of the strict interpretation of Article 12, and simply held that the criteria for determining the sex of a person were a matter for the State's margin of appreciation. In so doing, the Court did not commit the member States to more than they had consented to.

These few reminders reflect the coherence and consistency of European and international law on the "right to marry" and the protection of the family.

Social and cultural trends in Europe are leading to an increase in the number of unions involving persons of the same sex or under marriageable age. These unions are often sealed elsewhere than in Europe or the couple's country of residence, and requests are not generally made for them to be legally recognised by the country of residence in Europe. However, such requests, associated with the principles of non-discrimination or respect for private life, are sometimes made in the name of an extensive and subjective conception of the family and marriage.

The Council of Europe has already concerned itself with the issue of forced marriages.[3] In view of certain attempts to make use of the Council of Europe to secure recognition of a right to marry applying to persons under marriageable age or of the same sex, it is necessary to clarify some aspects of this issue.

Ms Šojdrova asks the Committee of Ministers:

– to confirm that in the Council of Europe's standard-setting framework the right to marry and to found a family exists only between men and women of marriageable age;

– to confirm that the Council of Europe's non-intergovernmental bodies cannot, without infringing the sovereignty of the member States, recommend or impose an extension of the right to marry to situations expressly excluded by the instruments adopted at the Council of Europe;

– to confirm that the conditions surrounding the exercise of the right to marry, as laid down by the instruments governing the Council of Europe, do not have the effect of discriminating against persons under marriageable age or of the same sex;

– to specify which steps the Committee of Ministers intends to take in order to protect the family as the "natural and fundamental group unit of society".[4]

Signed:

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2. ECtHR, Rees against United Kingdom judgment of 17 October 1986, paras 49 and 50; see likewise Cossey v. United Kingdom judgment of 27 September 1990, and Sheffield and Horsham v. United Kingdom judgment of 30 July 1998, paras 66 and 67.
3. PACE Recommendation 1723(2005) and Resolution 1468(2005) of 5 October 2005.
4. Universal Declaration of Human Rights of 10 December 1948, Art. 16-3.