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ECHR: right to marry

Latest Update

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The right to marry is guaranteed under the [European Convention on Human Rights \(ECHR\) in art.12](#), which reads: "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 provision was given effect in the UK through the enactment of the [Human Rights Act 1998](#), which incorporated ECHR rights, allowing domestic litigants to rely on them before the British courts. The express referral to "national laws" in [art.12](#) indicates that States may legitimately impose restrictions on the exercise of this right, such as bars on marriage between persons who fall within the prohibited degrees of a relationship, a minimum marriageable age, and the requirement to comply with certain formalities for the valid celebration of marriages. The Convention institutions maintain, nevertheless, the power to scrutinise any such restrictions, and ensure that domestic law strikes a fair balance between the prevention of objectionable marriages and the protection of individual rights against social prejudice. Controversial issues in this area include same-sex marriage, polygamous, underage and religious marriage within ethnic minority communities, transsexuals' right to marry according to the newly acquired gender, the suspension of the exercise of the right in circumstances involving deprivation of liberty, the right to re-marry, and the right to divorce and re-acquire the capacity to marry.

Overview of Topic

1. Whilst the deferential language of [art.12](#) provides for regulation of marriage by national laws, the Convention institutions have clarified that the *conditions for the exercise of this right* do not lie entirely within the discretion of State authorities. As the European Court of Human Rights ("the Court") observed in [R. and F. v. United Kingdom \(App. No. 35748/05, decision of 28 November 2006\)](#), "(t)he matter of conditions for marriage in national law cannot, however, be left entirely to Contracting States as being within their margin of appreciation. This would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry. ... Any limitations 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".
2. The Court provided a useful summary of *restrictions deemed compatible with art.12* in [Jaremowicz v. Poland \(App. No. 24023/03, judgment of 5 January 2010\)](#) : "The Convention institutions have accepted that limitations on the right to marry laid down in the national laws may comprise formal rules concerning such matters as publicity and the solemnisation of marriage. They may also include substantive provisions based on generally recognised considerations of public interest, in particular concerning capacity, consent, prohibited degrees of affinity or the prevention of bigamy. In the context of immigration laws and for justified reasons, the States may be entitled to prevent marriages of convenience, entered solely for the purpose of securing an immigration advantage" (para.49).
3. In *X. v. Federal Republic of Germany* (App. No. 6167/73, decision of 18 December 1974), the European Commission on Human Rights ("the Commission") found that States were not bound to recognise legal effects to *marriages entered into only in accordance to a religious*

rite , without satisfying the civil procedures prescribed by law. The Grand Chamber reaffirmed this position in [Serife Yigit v. Turkey \(App. No. 3976/05, judgment of 2 November 2010\)](#), concluding that a woman having undergone a purely religious marriage did not qualify for the transfer of her late partner's social-security entitlements, in fact [art.8](#) could not be interpreted as requiring States to establish a particular regime for certain unmarried couples. It further dismissed the claim that the scheme discriminated on grounds of status in breach of [art.14](#) (non-discrimination) read in conjunction with [art.1 of Protocol 1](#) (right to property); the Court found that the difference in treatment based on the non-civil nature of the marriage pursued the legitimate aim of protecting public order and the rights of others and it was proportionate, insofar as the conditions for succession to social-security entitlements were clear and contracting a civil marriage to qualify was not an excessive burden.

4. Despite the absence of a positive obligation to recognise religious marriages, inconsistencies in the policy regarding their legal effects can amount to a breach of the Convention. According to [Muñoz Díaz v. Spain \(App. No. 49151/07, judgment of 8 December 2009\)](#), the failure to attribute legal significance to a Gipsy marriage for the purposes of survivor's pensions allocation breached [art.14](#) taken in conjunction with [art.1 of Protocol 1](#), insofar as it was at odds with the earlier treatment of the applicant as a spouse for other social security purposes; this, for the Court, had generated a legitimate expectation to the recognition of the validity of the marriage.
5. A number of cases have challenged domestic provisions on the *minimum age required to contract a valid marriage* . In [Janis Khan v. United Kingdom \(App. No. 11579/85, decision of 7 July 1986\)](#), the applicant complained that legislation treating as void a marriage contracted by a girl under the age of 16 prevented him from manifesting his religion through his Islamic marriage. The Commission held that the imposition of a minimum matrimonial age is compatible with [art.12](#) even where the individual's religion allows for marriage at a lower age, in fact marriage could not be considered simply as a form of expression of thought, conscience or religion. The Commission also found that [art.12](#) allowed States to establish a different regime for the marriage of persons who have not reached legal majority, such as the requirement in the UK of parental consent for parties aged between 16 and 18.
6. The Court addressed the legitimacy of the *consanguinity bar* in [Stübing v. Germany \(App. No. 43547/08, judgment of 12 April 2012\)](#), a case regarding the criminalisation of incest between siblings. Following an examination of European laws, the Court noted that "all the legal systems, including those which do not impose criminal liability, prohibit siblings from getting married. Thus, a broad consensus transpires that sexual relationships between siblings are neither accepted by the legal order nor by society as a whole" (para.61). The Court also noted the German Federal Constitutional Court's justification for criminal liability based on the protection of the family, sexual self-determination and public health, and the consideration that "sexual relations between siblings might seriously damage family structures and consequently society as a whole" (para.63).
7. The compatibility of *affinity-based prohibitions* with ECHR obligations was considered in [B. and L. v. United Kingdom \(App. No. 36536/02, judgment of 13 September 2005\)](#). According to the British government, the bar on the marriage between former father-in-law and daughter-in-law sought to protect the emotional development of children involved in confusing family arrangements as well as to safeguard the stability of the family, by excluding sexual rivalry between fathers and sons. While these objectives were found to be legitimate, the impugned prohibition failed the compatibility test on the basis that it was not suitable to achieve the aims pursued: "the bar on marriage does not prevent the relationships occurring. ... There are no incest, or other criminal law, provisions to prevent extra-marital relationships between parents-in-law and children-in-law being established notwithstanding that children may live in these homes. It cannot therefore be said that in the present case the ban on the applicants' marriage prevents any alleged confusion or emotional insecurity to the second applicant's son" (para.38). The bar on in-law marriages

was consequently repealed by the [Marriage Act 1949 \(Remedial\) Order 2007/438](#).

8. In *Sanders v. France* (App. No. 31401/96, decision of 16 October 1996), the Commission found that rules designed to preclude *marriages of convenience* between citizens and aliens, such as a requirement for the alien to obtain a certificate of capacity to marry, did not breach [art.12](#), and postponing the marriage until the application was processed did not impair the substance of the right. In [O'Donoghue v. United Kingdom \(App. No. 34848/07, judgment of 14 December 2010\)](#), however, the Court condemned a policy whereby aliens with no leave or short-term leave to remain were automatically denied the certificate enabling them to marry. For the Court, even if such persons were more likely to enter into sham marriages, "a blanket prohibition, without any attempt being made to investigate the genuineness of the proposed marriages, restricted the right to marry to such an extent that the very essence of the right was impaired" (para.89). Moreover, the Court found that the substantial administrative fee could also impair the essence of the right, and the fact that aliens without leave to remain did not need an authorization if they wished to enter an Anglican marriage amounted to discrimination on religious grounds.
9. In *M. and O.M. v. the Netherlands* (App. No.12139/86, decision of 5 October 1987), the Commission held that "a Contracting State cannot be required under the Convention to give full recognition to *polygamous marriages* which are in conflict with their own *ordre public*" (para.2). In *E.A. and A.A. v. the Netherlands* (App. No. 14501/89, decision of 6 January 1992) it found that legislation requiring aliens to choose only one spouse and her children for the purposes of family reunification, while distinguishing on the ground of birth, was objectively and reasonably justified. As regards the impact on migrant children present in the territory, *R.B. v. United Kingdom* (App. No. 19628/92, decision of 29 June 1992) accepted that the refusal to issue a residence permit to a second wife aimed at the "preservation of the Christian based monogamous culture dominant in that country" (para.1), subsumed under the "protection of morals or the rights and freedom of others" in [art.8\(2\)](#). The Commission emphasised the clash between the permission sought with a fundamental principle of the UK as well as the parents' voluntary choices, in full awareness of the difficulties they would face in the host country.
10. Initially reluctant to uphold claims by *transsexuals prevented from marrying according to the acquired gender*, the Court held in [Rees v. United Kingdom \(App. No. 9532/81, judgment of 17 October 1986\)](#) that [art.12](#) "refers to the traditional marriage between persons of opposite biological sex" (para.49), although it conceded that "the appropriate legal measures concerning transsexuals should be kept under review having regard particularly to scientific and societal developments" (para.47). In [Cossey v. United Kingdom \(App. No. 10843/84, judgment of 29 August 1990\)](#), it found that "it remains the case ... that gender reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex" (para.40) and, given the persisting lack of European consensus, "attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purposes of marriage" (para.46). In [Sheffield and Horsham v. United Kingdom \(App. No. 22885/93, 23390/94, judgment of 30 July 1998\)](#), while reaffirming Rees and Cossey, the Court lamented that the UK had not revisited the legal attribution of sex so as to adapt it to the increased social acceptance of transsexualism.
11. The Grand Chamber modified this approach in [Christine Goodwin v. United Kingdom \(App. No. 28957/95, judgment of 11 July 2002\)](#) and [I. v. United Kingdom \(App. No. 25680/94, judgment of 11 July 2002\)](#), upholding the right to legal recognition of the new sexual identity. The decision was largely based on the inconsistencies of domestic legislation: "Where a State has authorised the treatment and surgery alleviating the condition of a transsexual, ... it appears illogical to refuse to recognise the legal implications of the result to which the treatment leads" (para.78). While the Court struggles to justify the departure from previous case law on the basis of widespread consensus in Europe, it "attaches less importance to the lack of evidence of a common European approach ..., than to the clear and uncontested evidence of a continuing international trend in favour not only of increased

social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals" (para.85). The [Gender Recognition Act 2004](#) removed the incompatibility found in *Goodwin* and *I.* by allowing the recognition of the new gender identity for legal purposes, including marriage.

12. To date, *same-sex marriage* has not been recognised as a right protected under [art.12](#). In [Parry v. UK \(App. No. 42971/05, decision of 28 November 2006\)](#), the Court rejected the complaint of a male-to-female transsexual who was barred from obtaining full gender recognition as long as he remained married; recognition would have, in fact, resulted in the validation of a same-sex marriage contrary to [s.11\(c\) Matrimonial Causes Act 1973 \(now repealed\)](#), which provided that a marriage was void unless the parties were "respectively male and female". The Court reiterated that [art.12](#) "enshrine[d] the traditional concept of marriage as being between a man and a woman", and held that the interference was proportionate, insofar as continued ratification of the legal bonds between the applicant and his wife was available in the form of a civil partnership, an institution carrying legal effects analogous to marriage. The Grand Chamber has recently confirmed in [Hämäläinen v. Finland \(App. No. 37359/09, judgment of 16 July 2014\)](#) that it was not disproportionate to require the conversion of a marriage into a registered partnership as a precondition for the full recognition of an acquired gender, as the latter institution offered equivalent legal protection.
13. In [Schalk and Kopf v. Austria \(App. No. 30141/04, judgment of 24 June 2010\)](#), the applicants alleged that the refusal to either allow same-sex couples to marry or introduce alternative legal recognition was discriminatory. The Court reiterated that, under Article 12, the decision to allow same-sex marriage was left to States, given the reference to "men and women", uncommon to other ECHR articles; furthermore, since the specific provision on marriage did not confer a right to same-sex marriage, it could not be based on the more general right to respect for family life in [art.8](#). The Court remained ambiguous as regards the alleged obligation to introduce an alternative legal institution for same-sex couples ineligible to marry, and held that, since Austria had introduced registered partnerships after the institution of the complaint, it could not be reproached for not having done so earlier. Subsequently, [Vallianatos and Others v. Greece \(Apps. Nos. 29381/09, 32684/09, judgment of 7 November 2013\)](#) clarified that, whilst States are not required to provide an official form of partnership for same-sex couples, legislation introducing civil unions and restricting access thereto to different-sex couples breached Article 8 taken in conjunction with [art.14](#).
14. By enacting the [Marriage \(Same-sex Couples\) Act 2013](#), the UK went beyond the ECHR requirements; moreover, since civil partnerships were not available to heterosexual couples, the [Civil Partnership Act 2004](#) was not mandated by UK's participation to the ECHR either. Nor was same-sex marriage a requirement under [art.9 of the Charter of Fundamental Rights of the European Union](#), which stipulates: "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights"; the omission of the reference to "men and women" does not impose the recognition of same-sex marriage, but merely permits the coexistence of different approaches.
15. As the Commission stated in *Hamer v. United Kingdom* (App. No. 7114/75, report of 13 October 1979), *persons deprived of liberty* do not forfeit the right to marry and "any restriction or regulation of the exercise of that right must not be such as to injure its substance" (para.63). Even where the hindrance is temporary, as in the case of prisoners serving a determinate custodial sentence, positive action is required of States to permit the effective exercise of the right in prison or on temporary release under escort, for which "no specially onerous or complex arrangements are necessary" (para.67). The objection that the prisoner could not cohabit or consummate his marriage during the course of the sentence was rejected on the basis that "[t]he essence of the right to marry... is the formation of a legally binding association between a man and a woman" (para.71). The same reasoning was applied in *Sidney Draper v. United Kingdom* (App. No. 8186/78, report of 10 July 1980) to detainees serving a life sentence; the Commission concluded that the

lack of facilities to marry was equivalent to a denial of the right for the foreseeable future and injured its very substance.

16. In [Jaremowicz v. Poland \(App. No. 24023/03, judgment of 5 January 2010\)](#) the Court held that, while the requirement for a detainee to obtain prior leave in order to contract marriage was not inconsistent with [art.12](#), the authorities could not exercise discretion arbitrarily: "Except for overriding security considerations and in order to ensure that the right to marry is exercised "in accordance with the national laws" ... the authorities are not allowed under [art.12](#) to interfere with a prisoner's decision to establish a marital relationship with a person of his choice, especially on the grounds that the relationship is not acceptable to them or deviates from prevailing social conventions and norms" (para.59). The Court was critical of the objection that the prospective spouse was a female detainee illegally met in prison and with whom very superficial contact had taken place: "[The Court] does not see any reason why [the authorities] should ... evaluate the depth of the applicant's feelings, debate on the quality of his relationship and make remarks implicitly or explicitly criticising his decision to marry a particular person, based solely on the circumstances in which he found and chose his intended wife" (para.58).
17. In [Frasik v. Poland \(App. No. 22933/02, judgment of 5 January 2010\)](#), the Court further emphasised that Article 12 does not warrant an inquiry into the parties' reasons for marrying, in particular the suspicion that they wished for the intending wife to become a non-compellable witness in the case against the applicant: "Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for any automatic interference with prisoners' rights, including their right to establish a marital relationship with the person of their choice, based purely on such arguments as what ... might be acceptable to or what might offend public opinion" (para.93).
18. The argument that [art.12](#) encompasses a *right to divorce* was rejected in [Johnston v. Ireland \(App. No. 9697/82, judgment of 18 December 1986\)](#). For the Court, the ordinary meaning of the words "right to marry" indicated that "they cover the formation of marital relationships but not their dissolution", and "the travaux préparatoires disclose no intention to include ... any guarantee of a right to have the ties of marriage dissolved by divorce" (paras 52-53). Even if the non-availability of divorce was analysed as a restriction on the right to marry, "in a society adhering to the principle of monogamy, such a restriction [could not] be regarded as injuring the substance of the right" (para.52). Judge De Meyer's separate opinion suggested, nevertheless, that "a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. ... the complete exclusion of any possibility of seeking the civil dissolution of a marriage is not compatible with the right to respect for private and family life, with the right to freedom of conscience and religion and with the right to marry and to found a family" (para.6).
19. Conversely, according to [F. v. Switzerland \(App. No. 11329/85, judgment of 18 December 1987\)](#), "if national legislation allows divorce, it secures for divorced persons the *right to remarry* without unreasonable restrictions" (para.38). A three-year temporary interdiction to remarry after three failed marriages was therefore disproportionate to the aim of ensuring the stability of marriage and impaired the very substance of the right. The Court took into consideration the negative impact of the prohibition on the new partner and any children born to the *de facto* union. The Court was unimpressed by the paternalistic concerns of the respondent government as regards the protection of the prospective new spouse and the divorcee himself, dismissing the argument as "not of sufficient weight to justify the impugned interference in the case of a person of full age in possession of his mental faculties" (para.37).
20. The capacity to enter marriage may also be indirectly affected by the *excessive length of divorce proceedings*. In [Aresti Charalambous v. Cyprus \(App. No. 43151/04, judgment of 19 July 2007\)](#), the Court accepted that "a failure of the domestic authorities to conduct

divorce proceedings within a reasonable time could, in certain circumstances, raise an issue under Article 12" (para.56). In [V.K. v. Croatia \(App. No. 38380/08, judgment of 27 November 2012\)](#), the Court found that remarriage had been unduly delayed by the length of divorce proceedings (over five years), in fact "the applicant was left in a state of prolonged uncertainty which amounted to an unreasonable restriction of his right to marry" (para.106).

Key Acts

[Marriage Act 1949](#)

[Matrimonial Causes Act 1973](#)

[Human Rights Act 1998](#)

[Gender Recognition Act 2004](#)

[Civil Partnership Act 2004](#)

[Marriage \(Same Sex Couples\) Act 2013](#)

Key Subordinate Legislation

[Marriage Act 1949 \(Remedial\) Order 2007/438](#)

Key Quasi-legislation

None.

Key European Union Legislation

[Charter of Fundamental Rights of the European Union](#)

Key Cases

[R. and F. v. United Kingdom \(App. No. 35748/05, decision of 28 November 2006\)](#)

[Jaremowicz v. Poland \(App. No. 24023/03, judgment of 5 January 2010\)](#)

X. v. Federal Republic of Germany (App. No. 6167/73, decision of 18 December 1974)

[Serife Yigit v. Turkey \(App. No. 3976/05, judgment of 2 November 2010\)](#)

[Muñoz Díaz v. Spain \(App. No. 49151/07, judgment of 8 December 2009\)](#)

[Janis Khan v. United Kingdom \(App. No. 11579/85, decision of 7 July 1986\)](#)

[Stübing v. Germany \(App. No. 43547/08, judgment of 12 April 2012\)](#)

[B. and L. v. United Kingdom \(App. No. 36536/02, judgment of 13 September 2005\)](#)

Sanders v. France (App. No. 31401/96, decision of 16 October 1996)

[O'Donoghue v. United Kingdom \(App. No. 34848/07, judgment of 14 December 2010\)](#)

M. and O.M. v. The Netherlands (App. No. 12139/86, decision of 5 October 1987)

E.A. and A.A. v. The Netherlands (App. No. 14501/89, decision of 6 January 1992)

R.B. v. United Kingdom (App. No. 19628/92, decision of 29 June 1992)

[Rees v. United Kingdom \(App. No. 9532/81, judgment of 17 October 1986\)](#)

[Cossey v. United Kingdom \(App. No. 10843/84, judgment of 29 August 1990\)](#)

[Sheffield and Horsham v. United Kingdom \(App. No. 22885/93, 23390/94, judgment of 30 July 1998\)](#)

[Christine Goodwin v. United Kingdom \(App. No. 28957/95, judgment of 11 July 2002\)](#)

[I. v. United Kingdom \(App. No. 25680/94, judgment of 11 July 2002\)](#)

[Parry v. UK \(App. No. 42971/05, decision of 28 November 2006\)](#)

[Hämäläinen v. Finland \(App. No. 37359/09, judgment of 16 July 2014\)](#)

[Schalk and Kopf v. Austria \(App. No. 30141/04, judgment of 24 June 2010\)](#)

[Vallianatos and Others v. Greece \(Apps. Nos. 29381/09, 32684/09, judgment of 7 November 2013\)](#)

Hamer v. United Kingdom (App. No. 7114/75, report of 13 October 1979)

Sidney Draper v. United Kingdom (App. No. 8186/78, report of 10 July 1980)

[Jaremowicz v. Poland \(App. No. 24023/03, judgment of 5 January 2010\)](#)

[Frasik v. Poland \(App. No. 22933/02, judgment of 5 January 2010\)](#)

[Johnston v. Ireland \(App. No. 9697/82, judgment of 18 December 1986\)](#)

[F. v. Switzerland \(App. No. 11329/85, judgment of 18 December 1987\)](#)

[Aresti Charalambous v. Cyprus \(App. No. 43151/04, judgment of 19 July 2007\)](#)

[V.K. v. Croatia \(App. No. 38380/08, judgment of 27 November 2012\)](#)

Key Texts

None.

Further Reading

M.K. Eriksson, *The Right to Marry and to Found a Family. A World-Wide Human Right* (Uppsala: Iustus Foerlag, 1990)

K. Boele-Woelki and A. Fuchs (eds), *Legal Recognition of Same-Sex Relationships in Europe. National, Cross-border and European Perspectives* (Cambridge-Antwerp-Portland: Intersentia, 2012)

R. Young, and S. Leech, "Marriage, divorce and ancillary relief under the Human Rights Act 1998: an introduction", *European Human Rights Law Review* 3/2001, 300-311

E. Sutherland, "A step closer to same-sex marriage throughout Europe", *Edinburgh Law Review* 15(1)/ 2011, 97-102

L. Hodson, "A marriage by any other name? Schalk and Kopf v Austria", *Human Rights Law Review* 11(1)/ 2011, 170-179.

F. Hamilton, "Why the margin of appreciation is not the answer to the gay marriage debate", *European Human Rights Law Review* 1/2013, 47-55

R. Probert, "The right to marry and the impact of the Human Rights Act 1998", *International Family Law* 2003 (Mar), 29-32

L. Schäfer, "Marrying an In-Law? The Future of Prohibited Degrees of Affinity and Consanguinity in English Law", *Child and Family Law Quarterly* 20 (2)/ 2008, 219-229

H. Wray, "An Ideal Husband? Marriages of convenience, Moral Gate-Keeping and Immigration to the United Kingdom", in Elspeth Guild - Paul Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff, 2012), 351-373

F. Dassetto, "The New European Islam", in Ferrari, Silvio - Bradney, Anthony (eds.), *Islam and European Legal Systems* (Aldershot: Ashgate Dartmouth, 2000), 31-45