



# European Family Law

## Legal Constructs of Family

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# Introduction

## **What does the word “family” mean?**

- Personal
- Legal
- Symbolic
- Religious
- Political
- Any others?

## **Why is a legal definition necessary?**



# Notions of Family

## **From Bromley's Family Law**

1. Husband and wife or two persons living together in a manner similar to spouses.
2. Parents living with children
3. Brothers, sisters or others related by blood or marriage



# Possible Definitions

1. Person on the street definition
2. Formalistic
3. Functionalism
4. Idealistic
5. Self-definition



# Trends in Family Law



## **Equalisation of men and women**

- Husband and wife no longer assumed to be one unit

## **Shift from fault to future needs**

- In the field of grounds for divorce

## **Shift from adults to children**

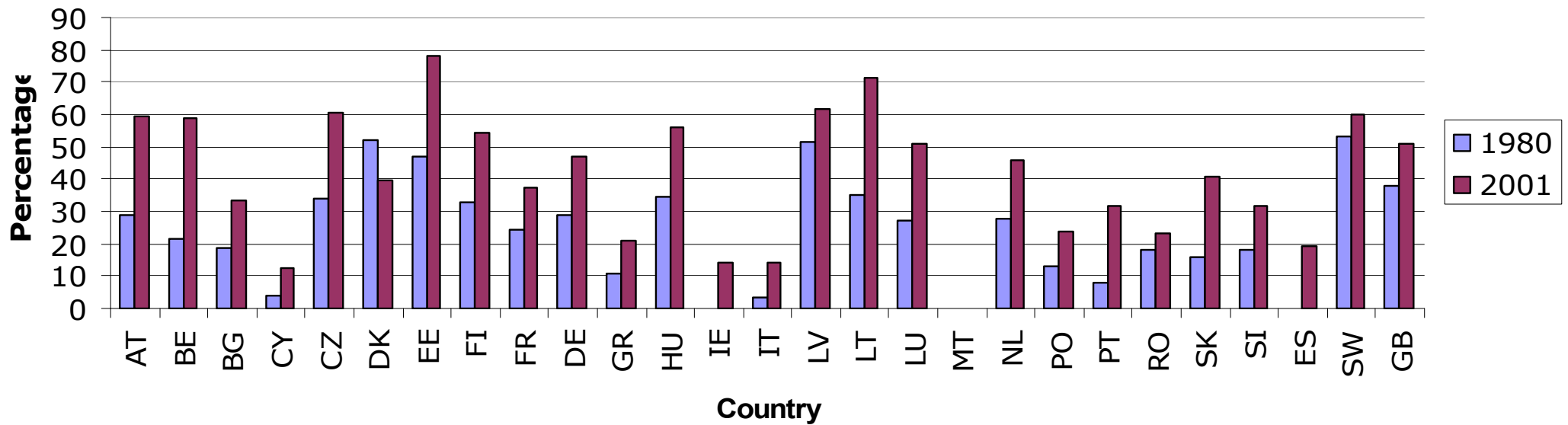
- Desire to place children at the centre of legislation

## **Private Ordering**

- Increase in desire to settle disputes instead of legal methods

# Divorce Rate

Figure 1: Percentages of marriages ending in divorce



# Extra-Marital Cohabitation

## Extra-Marital Cohabitation

- Increase in number
- More socially recognised
- More rights attached. Is this a good idea?

## Arguments For

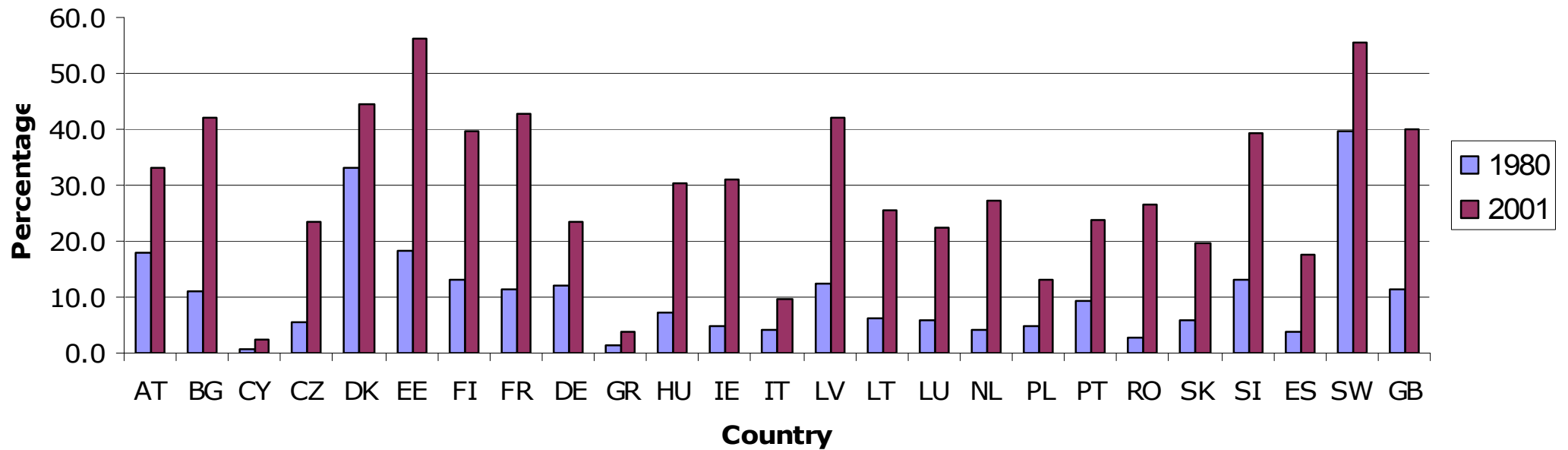
- No difference between non-marital and marital families

## Arguments Against

- It is morally wrong;
- Relationship that people enter should be as stable as possible – thus promote marriage.

# Births outside marriage rate

Figure 2: Number of Births Outside Marriage







# ECHR

## Articles to be studied

### *Article 8*

Right to respect for his private life and family life, his home and correspondence

### *Article 12*

Right to marry

### *Article 14*

Anti-discrimination provision



# Article 8, ECHR



## Core concept

“to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in “effective” respect for private life [and the other Article 8(1) values]”

Stated in *Kroon v. The Netherlands*



# Article 8, ECHR

## Values of Article 8

- Private life
- Family life
- Home
- Correspondence

Applicant must characterise his case himself (*Gaskin v. UK*)

All of the meanings are autonomous

# Article 8, ECHR

## Private Life

- Wider than Anglo-Saxon idea of privacy
- Ever increasing scope of notion of private life
- Warning, although the breadth of scope is broad, the restrictions imposed in terms of margin of appreciation are also broad!

### *Personal identity:*

Choice of name: *Burghartz v. Switzerland* (1994)

Mode of dress: *McFeely v. UK* (1980)

Sexual identity: *B v. France* (1992) / *Goodwin v. UK* (2001)

# Article 8, ECHR

## *Moral or physical integrity:*

Environmental claims: *Rayner v. UK* (1986)

## *Private Space:*

Wire-tapping: *Klass v. Germany* (1978)

## *Collection and use of information*

Collection of info w/out consent: *X v. UK* (1982) (census)

Collection of info w/out consent: *Murray v. UK* (fingerprints by police)

## *Sexual Activity*

Even if homosexual: *Dudgeon v. UK* (1981), *Norris v. Ireland* (1988)

# Article 8, ECHR

## Family Life

Best example of the ways in which the convention has been interpreted to take account of social change.

Best explained through reference to case law:

- *Marckx v. Belgium* (1979)
- *Johnston v. Ireland* (1986)
- *Keegan v. Ireland* (1994)
- *Kroon v. The Netherlands* (1994)
- *X, Y and Z v. UK* (1997)
- *Goodwin v. UK* (2001)

# *Marckx v. Belgium* ('79)

## **Complaints**

- (1) Only allowed to recognise the child, no automatic parentage rights
- (2) Discrimination between legitimate and illegitimate families.
- (3) Limitation of her rights is degrading treatment under Article 3
- (4) Did not respect her right *not* to marry



# *Marckx v. Belgium ('79)*

## **Commission**

Breach of Article 8

## **Court**

Findings:

- (a) Violation of Arts 8/14 in requiring establishment maternal parentage
- (b) Violation of Arts 8/14 effect of familial relationships
- (c) No breach of Article 3 or 12.



# *Marckx v. Belgium* ('79)

## **Court's Reasoning**

- Art. 8 applies to “family life” of legitimate and illegitimate equally.
- Imposes “positive obligations” on a State as well as a duty to prevent interferences
- Will be discriminatory if:
  - No objective and reasonable justification
  - Does not pursue a legitimate aim
  - No reasonable proportionality between means employed and aim sought
    - ◆ See later when dealing with Article 8(2) ECHR

# Positive / Negative Obligations

## **Negative obligation**

State is obliged to abstain from interference with human rights (e.g. torture)

## **Positive obligation**

State must take action to secure human rights (e.g. Art 3 prison conditions)

But this is a wholly negative view of the State's duty. Thus positive obligations imposed. For example, the state obliged to:

- Ensure enjoyment of the right is effective;
- Ensure private persons take steps to ensure effective enjoyment;
- Ensure that right not interfered with by others.

# Article 8 analysis

## Article 8(1)

1. What is the scope of the protected interest?
2. What is required of the state to “respect” that interest?

## Article 8(2)

1. Has there been an interference with an Article 8 right?
2. However, can it be justified, i.e.,
  - Is it “in accordance with the law”?
  - Is it for a “legitimate aim”?
  - Is it “necessary in a democratic society”?



# Article 8(2), ECHR

## **Interference**

Burden of proof on the applicant

## **“In accordance with the law”**

Must be able to point to specific legal rule/regime which authorises interfering act.

# Article 8(2), ECHR

## **“Legitimate Aim”**

Burden of proof rests on State to prove that aim legitimate

“Protection of public order”, “interests of national security”, “prevention of disorder and crime”

## **“Necessary in democratic society/ margin of appreciation”**

Not enough that has some reason, but must be proportional

Need to indicate the “pressing social need” for interfering

Idea of “European consensus” (*Dudgeon, Norris, but Goodwin*)

Once regarded as very broad, but gradually being fettered

# Which “families” are included?

## Families included:

- Engaged Couples included: *Wakefield v. UK*
- Siblings: *Moustaquim v. Belgium*
- Grandparents: *Price v. UK*
- Adoptive families: *X v. France*

## Families not included

- Homosexual unions not included: *X v UK*
- Sham marriages not included *Moustaquim v. Belgium*
- May end on divorce: *Berrehab v. The Netherlands*



# Conclusions

## Article 8

- Principles laid down are wide and open to wide interpretation
- The State is told to:
  - (a) cease from interfering with the private life of individuals
  - (b) told to ensure that steps be taken to effectively protect such private life.
- Difficult to rise above single instance issues because Court unwilling to draw general rights from Article 8.