

Different Families, Same Rights?

**Lesbian, Gay, Bisexual and
Transgender Families under
International Human Rights Law**



Dr Loveday Hodson

ILGA-Europe

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and Transgender
Families**

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Rights Law

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for ILGA-Europe

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Foreword

The recognition of LGBT families is one of the main themes on which ILGA-Europe's work focuses. We strive for the elimination of discrimination in law, policies and practices relating to any form of partnership or parenting (including marriage, partnership, reproductive rights, adoption and parental responsibility): in particular, the elimination of restrictions on the rights and responsibilities of parents based on sexual orientation, gender identity and gender expression. Most importantly, the rights of the child are at the core and guiding ILGA-Europe's demands for recognition of diverse families.

This publication is the first of a collection of booklets related to different aspects of LGBT families ranging from social and legal issues to more practical consequences of not recognising LGBT families.

ILGA-Europe would like to thank Dr Loveday Hodson, the author of the report, for an overview of international law affecting LGBT families and of the problems caused by the exclusion of LGBT families. The author has also put forward some important arguments to challenge the lack of protection offered to date by international law. We would also like to thank Dr Helmut Graupner and Professor Robert Wintemute for their support for the work of ILGA-Europe in the area of the family and their comments on the draft report.

Finally, the production of this document is also the result of teamwork involving editing by Silvan Agius, proofreading by Peter Norman and Patricia Prendiville and Evelyne Paradis and production and dissemination by Juris Lavrikovs.

This document is an important contribution to ILGA-Europe's work towards the recognition of diverse forms of families and an end to the current discrimination against LGBT families and their children.

Christine Loudes
Policy Director







1. Introduction

The position of lesbian, gay, bisexual and transgender (LGBT) people under international human rights law is at a crossroads. Human rights laws have been used successfully to challenge many areas of discrimination against LGBT people, most notably in their private lives. It is now absolutely beyond doubt that the principle of equality that is enshrined in human rights laws is applicable to matters of sexual orientation and gender identity.

Nevertheless, the equality principle has not been evenly applied. The aim of achieving equality in the area of respect for the family lives of LGBT people is still in the process of being realised. This report aims to assess the levels of protection that are currently offered to LGBT families under international human rights law. While we acknowledge that some progress has been made towards achieving equality for LGBT families, we also note that significant areas of inequality remain. Consequently, this report outlines ways of moving forward towards achieving full recognition of LGBT families under international human rights law.

Due to social changes that are rapidly transforming our understanding of the family, this is a particularly important time to consider how 'the family' is understood in international law. The traditional idea of 'the family' in Europe is represented by the nuclear family: a married opposite-sex couple and their children. That notion of the family is an ideal type that retains a considerable influence in framing national and international laws and policies affecting personal relationships. However, it is becoming increasingly distant from the lived reality of very many European families, and besides it does not offer a legal basis for the exclusion of other family formations from formal recognition. Remarkable social developments are taking place that are beginning to reshape fundamental notions of the ideal family form. Divorce is now commonplace, leading to a rise in single-parent households and step-families. Growing numbers of couples are choosing not to marry, leading to greater numbers of children born out of wedlock. Increasingly sophisticated reproductive technologies are becoming available which challenge traditional assumptions about parenthood. All of these developments demonstrate that 'the family' is in fact a flexible and adaptable unit.

Amongst those at the forefront of the redefinition of family life in Europe are LGBT families. It is those families that are at the centre of this report's concerns. The term 'LGBT families' is used rather loosely throughout this report as shorthand to indicate the close and loving relationships established by people who would define themselves as either lesbian, gay, bisexual or transgender and their children or their parents. When addressing matters of concern to people of a range of sexual and gender identities there will inevitably be times when the adopted terminology seems strained. This report nevertheless aims, as far as possible, to apply terminology in an inclusive manner. Consequently, the term 'LGBT families' is adopted throughout this report, even where a particular issue under discussion may not be of equal relevance to people discriminated against on grounds of their sexual orientation, gender identity or gender expression.

LGBT families are part of everyday life throughout the world, although perhaps most visible in Europe and the Western world. Some countries now acknowledge this reality and have begun to create a legal framework of rights and obligations that formalise the relationships of LGBT families. As one Canadian Supreme Court judge has put it:

Family means different things to different people, and the failure to adopt the traditional family form of marriage may stem from a multiplicity of reasons – all of them equally valid and all of them worthy of concern, respect, consideration and protection under the law.¹

Nevertheless, LGBT families have discovered to their cost that the traditional family ideal is still a potent 'conservative force' to be reckoned with.² As they are unable to match up to the 'traditional' family ideal, many LGBT families find that they still face discrimination, marginalisation and exclusion. The practical implications of having one's most important and intimate loving relationships kept outside of a framework of legal protection and regulation can be devastating.³

International human rights law, which is founded on the principles of equality and dignity, might reasonably be expected to be making a vital contribution to the difficult process of challenging entrenched ideas about the nature of the family and negotiating new understandings of the family that accommodate a plurality of relationships, free from any discrimination based on sexual orientation, gender identity or gender expression. Instead, international human rights law has not been immune from the weighty influence of the traditional family ideal which it has still not freed itself from to this day. In many respects, international human rights law is failing to keep up with national developments relating to the recognition and protection of the rights of LGBT families. The challenge is to ensure that international human rights law lives up to its promise of ensuring equality for all.

¹ L'Heureux Dubé, J. in *Miron v Trudel* [1995] 2 S.C.R. 418, para. 80

² McGlynn, C., *Families and the European Union: Law, Politics and Pluralism*, Cambridge: Cambridge University Press, 2006, p.23

³ Some examples of the problems that LGBT families face when they are excluded from law's protections are referred to in Part 4 of this report.







2. The International Legal Framework for Protecting Family Rights

International human rights law recognises that establishing and maintaining loving relationships is of central importance to people's lives. The absolute desolation and terror caused by the destruction and separation of families in the period preceding and during the Second World War led the drafters of international human rights laws to recognise that family units need special protection. Family rights are consequently enshrined in all of the major international and regional human rights instruments.



2.1 The 1948 Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was adopted without dissent by the United Nations (UN) General Assembly on 10th December 1948. States were inspired by recently-witnessed “barbarous acts” to agree for the first time upon a catalogue of human rights which were to be at the centre of the international community’s concerns. Although it is not legally binding, the UDHR remains the principal international statement of the inalienable rights and fundamental freedoms that belong to every human being. Those rights are based on the principles of equality and respect for the inherent dignity of “all members of the human family”. As the primary reference point for international human rights, the UDHR has been key in shaping the content of subsequent human rights laws and setting out the UN’s human rights agenda.

The UDHR places respect for family life at the centre of its catalogue of rights. The family, according to the UDHR, is “the natural and fundamental group unit of society and is entitled to protection by society and the State.” Various articles of the UDHR make specific reference to family rights:

- **“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence.” (Article 12);**
- **“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...” (Article 16§1).**

Those articles enshrine the principle that we are all entitled to establish, enjoy and maintain close and loving relationships free from unnecessary interference. The right to marry also means that adults must have available to them an appropriate legal framework that provides their relationships with recognition and protection. It is the responsibility of States to ensure that these key rights are enjoyed equally by *everyone*.⁴

⁴ Article 2



2.2 The 1966 International Covenant on Civil and Political Rights

After the Universal Declaration of Human Rights was adopted, the UN turned to the task of enshrining its catalogue of rights into legally binding international agreements. The International Covenant on Civil and Political Rights (ICCPR), which was adopted for signature on 16th December 1966 and came into force on 23rd March 1976, is one of two major UN treaties that emerged out of this project. Its main concern, as its title suggests, is to establish a legal framework to secure the enforcement of our civil and political rights (which are sometimes known as ‘first generation’ rights). It is now widely accepted that the ICCPR reflects essential values for modern democratic States. There are currently 160 States parties to this treaty.

The ICCPR contains the following provisions on family rights:

- **“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence...” (Article 17§1);**
- **“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” (Article 23§1);**
- **“The right of men and women of marriageable age to marry and to found a family shall be recognized.” (Article 23§2)**

Those rights recognise the importance of family groups and require States to give families special protection and respect. The ICCPR affirms the principle of equality,⁵ and it expressly states that its rights belong to everyone, regardless of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁶

Although the ICCPR’s family rights and equality provisions mirror those found in the UDHR, placing them in a binding treaty meant that their implementation and enforcement was no longer left to States alone. The ICCPR is monitored by a body of independent experts, the Human Rights Committee, which receives regular reports from States about their compliance with the treaty. After examining a report, the Committee makes recommendations to the reporting State (known as ‘concluding observations’). The Human Rights Committee may also hear complaints from individuals about alleged violations of their civil and political rights, and it also interprets the meaning of the ICCPR’s rights through its General Comments.⁷

⁵ Article 26

⁶ Article 2§1

⁷ More information about the work of the Human Rights Committee can be found at

www.ohchr.org/english/bodies/hrc/index.htm



2.3 The 1966 International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is the twin treaty of the ICCPR. It was drafted alongside the ICCPR and both treaties came into force at the same time. It aims to protect 'second generation' rights, which, like civil and political rights, are drawn from the UDHR. The aim of 'second generation' rights is to ensure that everyone is free from "fear and want" and has the necessary means to ensure their survival.⁸ It is now widely acknowledged that the rights contained in the ICESCR are essential to the preservation of our inherent dignity. There are currently 156 States parties to this treaty.

The ICESCR specifies the economic rights of families and places them into a binding legal framework. It requires States to recognise the following:

- **"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." (Article 10§1);**
- **"...the right of everyone to the enjoyment of just and favourable conditions of work which ensure...a decent living for themselves and their families..." (Article 7(a)(ii));**
- **"...the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions." (Article 11§1).**

In short, those rights require States parties to take appropriate steps to ensure that families have adequate resources to ensure their survival and well-being.

The ICESCR, like the ICCPR, affirms that equality is a central principle of human rights law and it expressly states that its rights are to be enjoyed equally by everyone, without discrimination.⁹ States are therefore obliged to take steps towards realising the economic security and material comfort of all families. As with the ICCPR, States parties to the ICESCR are required to regularly report to a monitoring body (in this case, the Committee on Economic, Social and Cultural Rights) on how the rights are being implemented.¹⁰

⁸ Preamble, ICESCR

⁹ Article 2§2

¹⁰ More information about the work of the Committee on Economic, Social and Cultural Rights can be found at www.ohchr.org/english/bodies/cescr/index.htm



2.4 The 1989 Convention on the Rights of the Child

The Convention on the Rights of the Child (CRC) is a specialist UN human rights treaty that more fully articulates the particular rights of children. It sets out the rights that children need in order to develop and reach their full potential. It was opened for signature on 20th November 1989 and came into force on 2nd September 1990. It is the most widely ratified human rights treaty, with 193 States parties.¹¹

The CRC recognises that the family provides the best environment for children to be raised in. It says that “the child...should grow up in a family environment, in an atmosphere of happiness, love and understanding.” Because it recognises that families have the primary role in raising children,¹² the CRC contains several references to the child’s right to a family life. In particular, it states that the child has a right to know and to be cared for by his or her parents;¹³ to preserve his or her family relations;¹⁴ to not be unlawfully separated from his or her parents against his or her will;¹⁵ and the right to freedom from arbitrary interference with his or her family or home.¹⁶

Although the CRC contains a number of specific references to the child’s parents, it nonetheless acknowledges that a child’s family may encompass something broader than the nuclear family. The CRC acknowledges, for example, the possibility that legal guardians, as opposed to parents, may have primary responsibility for a child’s upbringing.¹⁷ Furthermore, while the CRC says that parents have a right and duty to help children to exercise their rights, it also recognises that this responsibility may be assumed by “members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child.”¹⁸

The CRC also reiterates the equality provisions of earlier UN human rights instruments. States are obliged to protect children’s rights on the basis of equality:

“All State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.” (Article 2§1)

Discrimination on grounds of the sexual orientation or gender identity of the child’s parent or guardian is therefore incompatible with the CRC.

The CRC rights are enforced by the Committee on the Rights of the Child. This Committee, like the human rights bodies mentioned previously, receives regular reports from States on how they are implementing the treaty. After examining these reports, the Committee identifies areas of concern and makes recommendations for future State action in its concluding observations. In common with other human rights bodies, the Committee also provides detailed interpretation of the convention’s rights through a series of published ‘General Comments.’¹⁹

¹¹ The U.S. and Somalia are the only members of the UN that have not ratified this treaty.

¹² Article 18§1

¹³ Article 7§1

¹⁴ Article 8§1

¹⁵ Article 9§1

¹⁶ Article 16§1

¹⁷ Article 18§1

¹⁸ Article 5

¹⁹ More information about the work of the Committee on the Rights of the Child can be found at

www.ohchr.org/english/bodies/crc/index.htm



2.5 The 1950 European Convention on Human Rights and Fundamental Freedoms

The European Convention on Human Rights ('ECHR') is a key regional treaty which binds all Member States of the Council of Europe. It was drafted in the aftermath of the Second World War, and it draws heavily on the UDHR's catalogue of civil and political rights and its principles of equality and dignity. The ECHR was opened for signature by Member States on 4th November 1950 and entered into force on 3rd September 1953.

The ECHR recognises that close relationships are of central importance to human happiness and dignity, and to this end it requires States to provide families with special recognition and respect. The following provisions are designed to maintain the integrity of the family unit and to protect it from disruption:

- **"everyone has the right to respect for his private and family life, his home and his correspondence" (Article 8§1); and**
- **"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." (Article 12).**

Like the UN treaties, the ECHR prohibits discrimination in relation to the enjoyment of the rights contained within the Convention.²⁰ Protocol 12 is a recent addition to the ECHR that came into force in April 2005. Although not all Member States are yet party to this Protocol, it takes the equality provisions of the ECHR further by providing that the "enjoyment of any right set forth by law shall be secured without discrimination on *any* ground..."²¹

The ECHR is often described as having the most effective enforcement mechanism of the many international human rights treaties. The ECHR's catalogue of civil and political rights was originally enforced by a part-time Commission on Human Rights and Court of Human Rights. In November 1998, this two-tiered system was replaced with a single full-time Court. Thousands of individuals each year take complaints of human rights abuses to the Court in Strasbourg. The Court's numerous judgments are now widely regarded as the most sophisticated and authoritative interpretation of international civil and political rights. Consequently, what the Court has to say about the scope of LGBT families' rights has a considerable and widespread influence.

²⁰ Article 14

²¹ Article 1§1



2.6 The 2000 Charter of Fundamental Rights of the European Union

The aim of the Charter of Fundamental Rights of the European Union, that was signed and proclaimed in 2000, was to collect into one document a whole range of civil, political, economic and social rights and certain “third generation” rights that are found in international conventions, and raise their visibility in the EU context. In spite of its signature, the status of the Charter had remained uncertain until recently when the EU Member States ratified the ‘Reform Treaty’²².

The Articles within the Charter that expressly refer to the family are:

- **“Everyone has the right to respect for his or her private and family life, home and communications.” (Article 7)**
- **“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.” (Article 9)**
 - “1. The family shall enjoy legal, economic and social protection.**
 - 2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.” (Article 33)**

Art 21§1 of the Charter is a significant development in the EU’s increasing engagement with human rights issues. The Charter prohibits “Any discrimination based on any ground such as... sexual orientation”. The absolute prohibition of *any* discrimination sits interestingly next to the Charter’s protection of family life in similar terms to the ECHR.²³ The Charter also provides that “the family shall enjoy legal, economic and social protection”²⁴ Article 9 provides for the right to marry, but it does not restrict that right to *men and women* in the way that Article 12 of the ECHR does. In removing this phrase the Charter avoids the argument that marriage is inherently a union of heterosexual couples. The Charter, therefore, gives the EU the authority to take further measures to protect LGBT families.

Following the signing of the Charter, the ECtHR made a direct reference to it in the *Christine Goodwin*²⁵ case, observing that:

“100. ... There have been major social changes in the institution of marriage since the adoption of the Convention [in 1950] ... Art. 9 of the [2000] [EU] Charter of Fundamental Rights departs, no doubt deliberately, from the wording of Art. 12 [EConvHR] in removing the reference to men and women.”

It will be interesting to monitor the interpretation that the Court of Justice may now give to the Charter with regard to the rights of LGBT families, and any spillover effect that the Charter may have on the ECHR in the recognition of the rights of LGBT families.

²² The UK and Poland have obtained an opt-out from the Charter and it will thus not be enforceable within these two countries.

²³ Article 7

²⁴ Article 33§1

²⁵ *Christine Goodwin v. The United Kingdom*, Application No. 28957/95 (11 July, 2002)

2.7 Summary

There is an impressive collection of international and regional human rights laws that recognise that the desire to establish close and loving relationships is a natural and, indeed, essential part of human existence. Consequently, the concept of family in international human rights law refers to a place that merits special protection because of its capacity to provide us with security, love, happiness, and the most suitable environment in which to raise children.







3. LGBT Families' Rights under International Human Rights Law

Although protecting the family is a central concern of international human rights law, the relevant treaties say little about the nature of 'the family' they protect. Given the enormous global differences in the nature and form of the family unit, together with the cultural significance of the task of defining the family, it is perhaps unsurprising that human rights treaties are largely silent on this matter. It is consequently left to those bodies that interpret and apply the various human rights treaties to give form and meaning to the idea of 'the family'; it is their decisions and judgments that determine what relationships are protected under international human rights law.

Two things become clear when looking at the decisions of those bodies. Firstly, international human rights treaty bodies have spent little time defining 'the family'. International human rights law has had remarkably little to say about the rights of LGBT families, and it has largely been left to States to decide what legal recognition, if any, will be given to LGBT families. Secondly, where international human rights tribunals have made efforts to define the family (the European Court of Human Rights is notable for its case-law in this area, which is discussed in detail below), their approach has tended to be heavily influenced by the traditional nuclear family ideal. Consequently, LGBT family members are currently denied equal enjoyment of the family rights that international human rights law protects.



3.1 UN human rights treaties

In 1994 the Human Rights Committee, the body responsible for interpreting and enforcing the ICCPR, recognised that the criminalisation of sexual contact between consenting adult men in private can amount to a violation of the right to privacy.²⁶ However, the HRC has not been very forthcoming about defining the family that is referred to in Article 23§1 of the ICCPR. The HRC has taken as its starting position that “the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition.”²⁷ Consequently, the HRC has left the meaning of ‘the family’ to be determined first and foremost by the legislation and practices of States.

The HRC was first asked to address sexual orientation discrimination in family life matters in a case brought by two lesbian couples, *Joslin et al v New Zealand*.²⁸ Each couple was living together, raising children together, and had pooled financial resources. Each couple had attempted to get married, but had been refused because the relevant marriage laws in New Zealand applied to heterosexual couples only. The four women complained to the Human Rights Committee that they faced discrimination caused by the non-recognition of their relationships and that their right to marry had been violated. The Human Rights Committee held that the couples had no right to marry. The use of the term “men and women” in Article 23, the Committee said, “has been consistently and uniformly understood” as obliging States “to recognize as marriage only the union between a man and a woman wishing to marry each other.”²⁹ In another context, the HRC has also commented that the “right to found a family implies, in principle, the possibility to procreate and live together.”³⁰ Of course, the ICCPR has not “been interpreted as precluding a country that has ratified either treaty from voluntarily deciding to allow same-sex couples to marry.”³¹ However, the message sent by the HRC, a key UN human rights body, to the great majority of LGBT people denied marriage rights is unequivocally negative.

The HRC struck a slightly different note in its 2003 judgment in *Young v Australia* in relation to family rights.³² That case was brought by the long-term partner of a deceased war veteran (Mr C), who had been denied a dependant’s pension. Australian law recognised only dependants from opposite-sex relationships, meaning Mr Young’s claim was denied. He complained to the HRC about his discriminatory treatment, where his arguments were successful. The HRC recognised that Mr Young’s sex or sexual orientation meant that he could neither have married Mr C, nor be recognised as his cohabiting partner for the purpose of receiving pension benefits. While the *Young* decision is certainly promising, it is also problematic because it actually does little to clarify the scope of LGBT families’ rights under the ICCPR. Because the Australian Government completely failed to put forward any arguments addressing why the discrimination against Mr Young might be reasonable and objective (and therefore legitimate), the case was, in a sense, uncontested. The Committee *might* have accepted arguments justifying the discriminatory treatment of Mr Young had any such arguments actually been put forward. This decision, therefore, leaves a large question mark and has not determined the circumstances in which it might be considered lawful to discriminate against people in LGBT relationships. The HRC will undoubtedly have that discussion at some future time.

²⁶ *Toonen v Australia*, HRC Communication no. 488/1992, 31 March 1994

²⁷ General Comment No.19: Protection of the family, the right to marriage and equality of the spouses (Art. 23), 27 February 1990, at para. 2

²⁸ HRC Communication no. 902/1999, 17 July 2002

²⁹ As above, at para. 8.2

³⁰ *Toonen v Australia*, HRC Communication no. 488/1992, 31 March 1994

³¹ Wintemute, R., ‘Same-Sex Marriage: When Will it Reach Utah?’, 20 *BYU Journal of Public Law*, pp. 527-547, available at www.law2.byu.edu/jpl/Vol%2020.2/Wintemute%20PDF%20Final%20v2.pdf

³² HRC Communication No. 941/2000, 18 September 2003



3.2 The European Convention on Human Rights and Fundamental Freedoms

Both the European Commission on Human Rights (the Commission or ECmHR) and European Court of Human Rights (the Court or ECtHR) have made a considerable contribution to defining ‘the family’ that is protected under the Convention. In doing so, they have moved a considerable distance from the idea of ‘the family’ as a nuclear unit of opposite-sex married parents and their legitimate offspring. It is true that the Court case-law has given precedence to ‘traditional’ family units comprised of married heterosexual couples and their offspring.³³ Particularly important is the fact that it has so far not recognised the rights of same-sex couples to marry under Article 12. However, we will see below that an increasing number of relationships falling outside of the traditional family model have been recognised as *de facto* family units that merit the Convention’s protection under Article 8. Consequently, the ‘family’ of the ECHR is not defined by rigid legal criteria, but is a flexible concept that attempts to reflect the diversity of close relationships that people establish. This approach has not, however, so far led to an explicit recognition that same-sex partnerships can establish ‘family life’ (the same is not true of transgender people who form opposite-sex partnerships, which will be discussed below).

³³ See, for example, *Abdulaziz, Cabales & Balkandali v UK*, 28 May 1986, 7 EHRR 471. In *Berrehab v Netherlands* (21 June 1988, 11 EHRR 322), the Court considered the question of whether the applicant, divorced from his daughter’s mother before the child was born, had a recognised family life with his daughter. The Court held that a child born out of Mr Berrehab and his former wife’s lawful and genuine marriage was automatically a part of their family, regardless of whether her parents remain living together (para. 21).

Consequently, cohabitation is not a vital part of establishing family life. The Court held that although the bonds of family life can be broken, this had not happened in the case of Mr Berrehab and his daughter.

³⁴ 13 June 1979, 2 EHRR 330

³⁵ *Moustaquim v Belgium*, 18 February 1991, 13 EHRR 802. See also *Boughanemi v France*, 24 April 1996, 22 EHRR 228

³⁶ *Marckx*, n.34 above

³⁷ Report adopted in *Boyle v UK*, no. 16580/90, 9 February 1993

³⁸ *Marckx*, n.34 above, para. 31

3.2.1 Recognising the de facto family

One of the Court’s earliest and most important decisions about family life was delivered in the case of *Marckx v Belgium*.³⁴ In this case the Court held that Belgian law, which discriminated against ‘illegitimate’ children, was incompatible with the right to respect for family life. In this instance an ‘illegitimate’ child and her mother were found to have a family life, regardless of the status of their relationship under Belgian law. This judgment consequently established a view of ‘the family’ that is not confined to marriage based relationships. The Court went on to find that States may be required to take certain measures to ensure that family life is respected and to create conditions in which people can lead a ‘normal family life’.

If in *Marckx* the Court took the bold step of recognising that non-traditional family forms deserve protection, it was left with the problem of providing some coherent and workable definition of the modern *de facto* family. Biological ties are one factor that the Court has given considerable weight to in this respect. It has held that the relationship between adult siblings,³⁵ grandparents and grandchildren,³⁶ and between an uncle and nephew³⁷ may all amount to ‘family life’. Nevertheless, although the Court does give significant weight to genetic ties, such ties alone generally appear to be insufficient to create a *de facto* family. Indeed, in *Marckx v Belgium* the Court commented that “Paula Marckx assumed responsibility for her daughter Alexandra from the moment of her birth and has continuously cared for her, with the result that a real family life existed and still exists between them.”³⁸



The Court here was not only looking to the biological link between Ms Marckx and her daughter, but to the emotional bond and a relationship of care that existed between them.

In a number of cases involving unmarried fathers and their children the Court's approach has suggested that a biological relationship alone is normally insufficient to establish *de facto* family ties. In *Keegan v Ireland*,³⁹ the applicant complained of an interference with his family life because his daughter (born outside of marriage) had been released for adoption without his knowledge or consent. In recognising the existence of a *de facto* family in this case, the Court took particular notice of the fact that the child had been conceived as a result of a deliberate decision, which was made by parents who had planned to marry. These factors, the Court held, gave their relationship the hallmark of family life. In *Lebbink v Netherlands*, the Court highlighted the importance of evidence of a caring paternal role before Article 8 is engaged:

The existence or non-existence of "family life" for the purposes of Article 8 is essentially a question of fact depending upon the real existence in practice of close personal ties. Where it concerns a potential relationship which could develop between a child born out of wedlock and its natural father, relevant factors include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the father to the child both before and after its birth.⁴⁰

While the Court appears well disposed towards recognising *de facto* relationships bound by biological ties (even in the absence of cohabitation), some evidence of real and constant relationship will normally be needed before such relationships are afforded the protection of Article 8.

Although the above cases show that the Court attaches considerable weight to biological ties when deciding if family life exists between parent and child, they also show this is by no means the sole characteristic of *de facto* family relations. In *Nylund v Finland*⁴¹ the Court held, in contrast to its decision in *Keegan*, that there was no family life between a man and a child who he had never met and with whom he had established no emotional bonds, in spite of the fact that he had been engaged to the child's mother when the child was conceived (although it undoubtedly considered it significant that the mother had remarried before the child's birth and had denied Mr Nylund's paternity). Conversely, a family relationship may exist between *de facto* parents and their children, even in the absence of any biological or legal connection. In *K & T v Finland*,⁴² the Court had little difficulty in finding that a man who cohabited with a woman and her children from an earlier relationship had a 'family life' with those children.

Although most of the ECtHR's cases concerning *de facto* family relationships relate to parent-child relationships, the Court has taken some steps towards extending its interpretation of Article 8 to encompass other close and loving relationships. The leading case in this area is *Johnston v Ireland*,⁴³ which concerned a man and woman who had lived together unmarried for some fifteen years and who had a child together. The couple were unable to marry as the Constitution of Ireland prevented Mr Johnston from obtaining dissolution of a marriage that he had previously entered into with another woman. In its judgment the Court held that the couple had established family life, "notwithstanding the fact their relationship exists outside marriage." It did not, however, find that the

³⁹ 26 May 1994, 18 EHRR 342

⁴⁰ 1 June 2004, 40 EHRR 18, para. 36

⁴¹ Application No.27110/95, Dec. 29 June 1999

⁴² 12 July 2001 [Grand Chamber judgment], 36 EHRR 18

⁴³ 18 December 1986, 9 EHRR 203



couple's inability to marry was a violation of Article 8. In another case, *Velikova v Bulgaria*, the Court allowed the unmarried applicant to bring a complaint concerning the death of her long-term partner, as there was "no valid reason to distinguish...the applicant's situation from that of a spouse."⁴⁴

This issue of the factors to be taken into account when determining whether adults with no legal or biological ties can establish family life was addressed in some detail in *X, Y & Z v UK*. In that case a transgender male complained that he could not be registered as the father of the child that his long-term partner had conceived by alternative insemination.

When deciding whether a relationship can be said to amount to "family life", a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means.⁴⁵

Although the Court did not find a violation of Article 8 in that case, it nevertheless found – as X had lived "to all appearances" as Y's male partner, and "acted as Z's 'father' in every respect since the birth" – that the three applicants had a family life.⁴⁶

The Court has begun to recognise *de facto* family ties in its case law and to extend the meaning of family life under the ECHR beyond marriage and relationships of blood to certain long-term committed relationships. Such an approach suggests that the definition of the family under the ECHR is inclusive and based on the social and emotional realities of family ties, and does not rely upon definitions of the family found in national laws. This clearly has the potential to be an extremely important development for members of LGBT families. However, an examination of the Court's judgments to date shows that its approach has been uneven; LGBT families have been excluded from equal enjoyment of their rights. This situation is not sustainable as national courts are finding this anomalous situation as a ground to refute or not recognise that such relationships constitute a family. One can only hope that in the near future the ECtHR will address the current ambiguity by pronouncing itself on the issue and conclude that unmarried same-sex couples (without children) also enjoy 'family life' as different-sex couples (without children) do.⁴⁷

3.2.2 ECHR case law on LGBT families

The Court's notion of *de facto* family has the potential to be very useful to LGBT families, particularly since the Court has not yet recognised that same-sex couples have a right to marry and form 'legitimate' partnerships. However, the idea of the *de facto* family has so far not been applied to same-sex couples. Although the Court has moved away from marriage as a prerequisite for family life, the *de facto* families it has recognised bear a remarkable resemblance to traditional family forms in all but marriage. The *de facto* family appears to refer to adults living to all intents and purposes as an opposite-sex married couple.⁴⁸ The Commission, in a line of decisions discussed below, explicitly stated that same-sex relationships cannot establish family life. While this line of decisions dates back nearly twenty-five years and now seem very outdated, it still appears to be influential in the Court's recent judgments and has yet to be explicitly overturned.

⁴⁴ Application No.41488/98, Dec. 18 May 1999

⁴⁵ 22 April 1997, 24 EHRR 143, at para. 36

⁴⁶ As above, at para. 37

⁴⁷ See for example *Kroon v Netherlands* (27 Oct. 1994); *Saucedo Gómez v Spain* (26 Jan. 1999 decision); and *Velikova (A.V.) v Bulgaria* (18 May 1999).

⁴⁸ In *X, Y & Z v UK* (application no. 9369/81, Cm Dec. 3 May 1983) the Court recognised the *de facto* family ties of a transgender male and his partner. However, in recognising the couple's family life the Court effectively viewed the applicants as an opposite-sex couple, noting that 'X' had lived "to all appearances" as 'Y's "male partner". While welcome in many respects, this judgment cannot be said to extend the concept of the *de facto* family to same-sex relationships.

In 1983 the Commission was given the opportunity to consider the case of a same-sex couple, a Malaysian and a British national, who were living together in the UK. A deportation order was made against 'Mr X', the Malaysian man, which was challenged without success. The Commission held "despite the modern evolution of attitudes towards homosexuality" that the applicant's relationship "did not fall within the scope of the right to respect for family life."⁴⁹ The Commission consequently analysed the men's relationship as a matter of private life. This decision was of limited value to the couple because the right to private life does not attract the same positive obligations in respect of the maintenance and development of relationships that are associated with the protection of family life. As a result, the Commission found that there was no duty on the UK to allow 'Mr X' to reside in the UK, and the couple's application was declared inadmissible. This decision set a precedent which was followed for a number of years and provided a fatal stumbling block to the human rights claims of same-sex couples. The Commission continued to follow this decision in other cases concerning the deportation of members of bi-national same-sex couples.⁵⁰

In *S v UK* (1986)⁵¹ and *Rössli v Germany* (1996)⁵² the Commission addressed complaints about property laws that treated those in same-sex relationships less favourably than those in (unmarried) opposite-sex relationships. Both applicants had been in long-term stable relationships and both had been left with no right to remain in their homes after their partners, the legal tenants of the properties, had died. In its decisions in these cases, the Commission once again failed to recognise that same-sex relationships could establish family life. It unsatisfactorily reasoned that the discrimination in question was justified on the basis that "there is no reason why a High Contracting Party should not afford particular assistance to [heterosexual] families."

It is particularly perplexing that the Commission's approach did not differ where the issue before it concerned children being raised in LGBT families. In *C & L. M. v UK* (1989),⁵³ the Commission found once again that same-sex relationships could not establish 'family life', and consequently it said that there was no reason why the UK could not deport one member of a lesbian couple to her country of origin. That decision was reached in spite of the fact that the couple concerned had had a child by alternative insemination that they were raising together in the family home. In *Kerkhoven v Netherlands* (1992),⁵⁴ the Commission appeared to somewhat soften its position. It found that a woman in a lesbian relationship might have family life with the child born into that relationship (although family life could not be established with her partner), even though she was the non-biological parent. It nevertheless found her application inadmissible as Article 8 did not require the State to enable her to obtain parental responsibility over that child.

In confining same-sex relationships to the realm of private life, the Commission's decisions had the unfortunate consequence of suggesting that such relationships are somehow shameful and rightly kept secretive. It also denied those in LGBT families the positive measures of protection that are normally required to respect family life. Furthermore, because the Commission declared all cases that came before it concerning same-sex relationships inadmissible, issues of LGBT families could not be addressed by the Court until the Commission was abolished in 1998.

Since the Commission was abolished, the Court has delivered a small number of judgments relating to LGBT relationships. It is, however, early days and it is fair to say that its approach so far has

⁴⁹ *X & Y v UK*, application no. 9369/81, Cm Dec. 3 May 1983

⁵⁰ *W.J. & D.P. v UK*, application no. 12513/86, Cm Dec. 13 July 1987; *Z.B. v UK*, application no. 16106/90, Cm Dec. 10 February 1990

⁵¹ Application no. 11716/85, Cm Dec. 14 May 1986

⁵² Application no. 28318/95, Cm Dec. 15 May 1996

⁵³ Application no. 14753/89, Cm Dec. 9 October 1989

⁵⁴ Application no. 15666/89, Cm Dec. 19 May 1992



been somewhat mixed. The influence of the Commission's early decisions is certainly apparent in the Court's more recent judgments. In an admissibility decision of May 2001, for example, the Court held that discrimination against same-sex couples in respect of social security provisions did not violate the Convention. Worryingly, the Court adopted the Commission's approach to excluding LGBT relationships from the definition of 'family':

The Court considers that, despite the growing tendency in a number of European States towards the legal and judicial recognition of stable *de facto* partnerships between homosexuals, this is, given the existence of little common ground between the Contracting States, an area in which they still enjoy a wide margin of appreciation.⁵⁵

This approach to LGBT relationships undoubtedly appears outdated and out of touch with current national trends. So it is somewhat reassuring that there are signs that the Court is gradually responding to the remarkable legal and social developments that have taken place throughout Europe during the last decade, in which many European States have come to offer legal recognition to same-sex relationships, whether in the form of marriage or civil partnerships.⁵⁶

In *Smith and Grady v UK* (2000), a case which concerned the dismissal of military personnel on the basis of their sexuality, the Court held that "convincing and weighty" reasons were required to justify sexual orientation discrimination.⁵⁷ This judgment was significant because it applied the principle of non-discrimination to a wider sphere than the criminalisation of gay male sexual activity. That approach was reiterated in *Salgueiro da Silva Mouta v Portugal* (1999),⁵⁸ in which the applicant's request for a parental responsibility order in respect of his daughter had been denied exclusively on the basis of the applicant's sexual orientation. Of course, the significance of this case is somewhat limited for LGBT families. In spite of the applicant's sexuality becoming a key issue in his custody case, the facts nevertheless related to the applicant's biological child born into a heterosexual marriage. The Court has long recognised that the relationship between divorced fathers and their children amounts to family life.

⁵⁵ *Mata Estevez v Spain*, application no. 56501/00, Dec. 10 May 2001

⁵⁶ For a survey of the legal status of same-sex relationships in Europe, see ILGA-Europe's survey at www.ilga-europe.org/europe/issues/marriage_and_partnership/same_sex_marriage_and_partnership_country_by_country

⁵⁷ 25 July 2000, 31 EHRR 24

⁵⁸ 21 December 1999, 31 EHRR 47

⁵⁹ 26 February 2002, 38 EHRR 21

⁶⁰ As above, at para. 42

⁶¹ 24 July 2003, 38 EHRR 24, at para. 36

A comparison of two recent judgments shows that the Court's current approach to LGBT families is confused and lacks clear direction. In *Fretté v France* (2002),⁵⁹ an openly gay man complained that his application for authorisation to adopt a child had been dismissed on the grounds of his 'lifestyle', which the Court took to be a reference to his sexuality. The Court found that the discriminatory treatment experienced by Mr Fretté was objectively justified in light of the lack of scientific consensus on the effects on children of being brought up by gay parents.⁶⁰ However, the Court took a far more forward-thinking approach just a year later in the ground-breaking case of *Karner v Austria* (2003). The applicant in this case, who had been in a long-term same-sex relationship, complained about discriminatory property laws that denied him tenancy succession rights after his partner died. The Court took notice of the fact that:

A growing number of national courts in European and other democratic societies required equal treatment of unmarried different-sex partners and unmarried same-sex partners, and that that view was supported by recommendations and legislation of European institutions.⁶¹



The Court found in this case, in complete contrast to earlier Commission decisions, that the relevant Austrian laws violated the applicant's right to respect for his home (Article 8). In reaching this decision the Court reiterated that "differences based on sexual orientation require particularly serious reasons by way of justification."⁶² This was obviously a progressive and encouraging judgment and it is certainly an important step in the right direction towards LGBT families receiving equal protection under international human rights law. It is nevertheless significant that the case was analysed as an interference with Mr Karner's *home*, as opposed to his family life. It still remains for the Court to acknowledge that people in same-sex relationships can establish 'family life'. Furthermore, the Court still accepted in this case "that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment" against other family forms.⁶³

As mentioned previously, the Court has not yet explicitly recognised that the right to marry (contained in Article 12 of the Convention) extends to people in same-sex relationships. It will nonetheless have to deal with issues raised by the relatively recent forms of legal recognition for people in same-sex relationships throughout Europe. Many such civil partnerships fall short of the rights given to married couples. It is not clear that the Court would find discriminatory treatment between those who are married and those who are in some other form of relationship to be unacceptable, in the same manner that it has continued to reaffirm the legitimacy of different treatment of married and unmarried couples:

The Court finds that, though in some fields the *de facto* relationship of cohabitants is recognised, there still exist differences between married and unmarried couples, in particular, differences in legal status and legal effects. Marriage continues to be characterised by a corpus of rights and obligations that differentiate it markedly from the situation of a man and woman who cohabit.⁶⁴

If the Court does not explicitly reject the traditional heterosexist approach to marriage rights, the creation of civil partnerships for same-sex couples opens up the disturbing possibility that a further hierarchy of family rights will be recognised by the Court, with LGBT partnerships falling below traditional marriage.

Another issue that is of particular concern to LGBT people is the Court's reluctance to require States to take measures to assist in the creation of families. In *Marckx v Belgium*, the Court held that "by guaranteeing the right to respect for family life, Article 8 presupposes the existence of a family."⁶⁵ The Court has held that Article 8 of the Convention does not safeguard the aspiration to become a parent.⁶⁶ This approach has significant implications for people in same-sex relationships seeking to establish their families, many of whom may wish or need to rely upon some form of reproductive assistance, or acceptance by the relevant authorities that they can provide a suitable environment for adopted children.

Although the Court has been hesitant to recognise that same-sex couples can form a family unit, it has taken a more positive approach to transgender people and their families. We have already seen that in *X, Y & Z v UK* the Court took the significant step of finding that a transgender man had a

⁶² As above, at para. 37

⁶³ As above, at para. 40

⁶⁴ *Nylund v Finland*, application No.27110/95, Dec. 29 June 1999

⁶⁵ 13 June 1979, 2 EHRR 330, para. 31

⁶⁶ *Di Lazzaro v Italy*, no. 31924/96, Cm. dec. of 10 July 1997; *X & Y v UK*, no. 7229/75, Cm. dec. of 15 December 1977



family life with his child (although it went on to find that he had no right to be legally registered as the father of that child). It went even further in a landmark judgment in 2002, *Christine Goodwin v UK*.⁶⁷ The applicant in that case was a transgender woman who complained about the discrimination she faced as a result of not being able to have her birth certificate amended to reflect her assigned gender. Not least of her complaints was the fact that she was unable to marry a male partner (somewhat anomalously, she would have been able to marry a female partner). The Court, whilst holding that Article 12 refers to the right of a man and a woman to marry, nonetheless found that such gender categories cannot be determined by biological criteria:

The Court is not persuaded that at the date of this case it can still be assumed that these terms ['man' and 'woman'] must refer to a determination of gender by purely biological criteria... There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality.⁶⁸

The UK government acted swiftly in response to the *Goodwin* judgment by passing the Gender Recognition Act 2004, as a result of which transgender people in the UK may now have their assigned gender recognised in law.

There are a number of reasons why the *Goodwin* judgment is important, beyond securing marriage rights for transgender people. The Grand Chamber, for example, recognised that Article 9 of the Charter of Fundamental Rights of the European Union “departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women.”⁶⁹ It also reaffirmed that the right to marry is not dependent upon the couple’s ability to procreate.⁷⁰ Although these observations may not amount to an explicit recognition of same-sex marriage rights, they are obviously significant in this regard. In light of the *Goodwin* judgment, it is hoped that the Court will continue to develop a body of case-law that is inclusive and that rejects outdated and heterosexist interpretations of marriage rights.

Protocol 12 of the ECHR, which came into force in April 2005, is a potentially useful development for LGBT families. As opposed to Article 14 of the Convention, which prohibits discrimination only in relation to the enjoyment of ECHR rights, Protocol 12 introduces a general non-discrimination clause which applies to any legal right. Obviously, such a clause will increase the number of discrimination issues dealt with by the Court, and this will undoubtedly include matters concerning LGBT rights. However, Protocol 12 has only been ratified by 15 States so far.⁷¹ It also departs from recent trends in international law by not specifically referring to sexual orientation and gender identity as a prohibited ground for discrimination, in spite of calls from the Parliamentary Assembly for its inclusion.⁷² While sexual orientation and gender identity discrimination is obviously not excluded from the Protocol’s ambit, the message Protocol 12 sends to Council of Europe States about sexual orientation and gender identity discrimination is somewhat equivocal. In any case, excluding same-sex couples from legal marriage involves a difference in treatment that is directly based on sexual orientation and is as a result contrary to the spirit of the Protocol.

⁶⁷ 11 July 2002, 32 EHRR 18

⁶⁸ As above, at para. 100

⁶⁹ As above, at para. 100

⁷⁰ As above, at para. 98

⁷¹ Protocol 12 has currently been ratified by: Albania; Armenia; Bosnia and Herzegovina; Croatia; Cyprus; Finland; Georgia; Luxembourg; Montenegro; Netherlands; Romania; San Marino; Serbia; the Former Yugoslav Republic of Macedonia; and Ukraine. An updated list of ratifications can be obtained from

www.conventions.coe.int

⁷² Parliamentary Assembly Opinion No. 216 (2000). See also Parliamentary Recommendation 1474 (2000)



3.3 The European Union

Matters relating to family life have traditionally been viewed as falling outside of the powers and concerns of the European Union (EU). But this is rapidly changing as the EU gains increasing authority in the areas of equality, free movement, immigration and human rights, all of which have the capacity to be of importance to citizen's intimate relationships. Indeed, the EU has the potential to exceed the Council of Europe in upholding the rights of LGBT families. While traditionally hesitant to take measures forcing Member States to recognise non-traditional family forms, in recent years the EU institutions have begun to take steps towards addressing the rights of LGBT families.⁷³

Since 1997, Article 13 of the Treaty on European Union has expressly prohibited sexual orientation discrimination.⁷⁴ Consequently, the EU institutions have started to take measures to address specific aspects of sexual orientation discrimination,⁷⁵ including discrimination against LGBT families. For example, a 2004 Directive on the free movement of family members provides that, for the purposes of the Directive, the term "family member" includes registered partners where these are treated as "equivalent to marriage" by the host Member State. Although that provision is strictly limited to those in particular forms of civil partnerships, the Preamble to the Directive asks Member States to consider granting residence to a person who does not automatically fall within the Directive's definition of "family member", "taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen."⁷⁶ That requirement clearly applies to those in long-term same-sex relationships. Although the Directive still gives preference to traditional family forms, it demonstrates that the EU is starting to take the question of LGBT families' rights seriously.

Although the formal steps that the EU has taken to recognise the rights of LGBT families have so far been modest, there is certainly scope for continued developments in this area. LGBT families' rights are regularly on the agenda of the European Parliament. As the European Parliament has an active legislative role, its interest in this matter is important. In a 1994 Resolution, the European Parliament called on the Commission to draft a Recommendation seeking to end "the barring of lesbian and homosexual couples from marriage or from an equivalent legal framework" and guaranteeing "the full rights and benefits of marriage, allowing the registration of partnerships."⁷⁷ In 2001 it called on Member States to "legally recognise same-sex marriages" and to "decrease the discrimination between opposite-sex marriages and same-sex life partners."⁷⁸ In 2004, the European Parliament's call was heeded by the Council, which amended the Staff Regulations to provide for household allowances and for survivor's pensions for the non-marital partners of officials.⁷⁹ Even more recently, in 2006 the European Parliament adopted a Resolution that condemned constitutional amendments explicitly to prohibit same-sex unions as a form of homophobia and also referred to the widespread disadvantage and discrimination suffered by those in same-sex unions.⁸⁰ It urged Member States to enact laws "to end discrimination faced by same-sex partners in the areas of inheritance, property arrangements, tenancies, pensions, tax, social security etc."

⁷³ For a more detailed discussion, see McGlynn, n. 2 above. See also ILGA-Europe, *Families, Partners, Children and the European Union*, Policy Paper, April 2003

⁷⁴ The reference to sexual orientation discrimination was introduced by the 1997 Treaty of Amsterdam (in force 1 May 1999)

⁷⁵ See, for example: Framework Directive on Equal Treatment in Employment and Occupation (Directive 2000/78/EC of 27 November 2000, OJ L303/16); Council Decision 2000/750/EC of 27 November 2000 (OJ L303, 2.12.2000)

⁷⁶ Directive on the Rights of Citizens of the Union and their Family Members to Move and Reside Freely Within the Territory of Member States, 2004/38/EC of 29 April 2004

⁷⁷ "Resolution on equal rights for homosexuals and lesbians in the EC", OJ [1994] C 61/40. See also "Resolution on respect for human rights in the European Union (1998-9)", 16 March 2000, A5-0050/00, which "calls on the Member States ... to amend their legislation recognising registered partnerships of persons of the same sex and assigning them the same rights and obligations as exist for registered partnerships between men and women; ... to amend their legislation to grant legal recognition of extramarital cohabitation, irrespective of gender; ... rapid progress should be made with mutual recognition of the different legally recognised non-marital modes of cohabitation and legal marriages between persons of the same sex in the EU."

⁷⁸ Resolution on the Situation as Regards Fundamental Rights in the European Union (2000), A5-0223/2001, 21 June 2001, paras. 82-4 (adopted 5 July 2001), cited in McGlynn, n.2 above, at p.150

⁷⁹ Staff Regulations of officials of the European Communities, Article 1d(1) and Article 1(d)(1), Annex VII, Article 1(2)(c), Annex VIII, Article 17 as amended by Council Regulations 723/2004/RV of 22 March 2004, (27 April 2004) Official Journal L 124/1

⁸⁰ Resolution on Homophobia in Europe, adopted on 18 January 2006 (P6_TA(2006)0018). See also the European Parliament Resolution on Homophobia in Europe, adopted on 26 April 2007 (P6_TA(2007)0167)



The issue of LGBT families' rights continues to appear regularly on the agenda of the EU institutions, and it may be that the EU will make greater progress in protecting non-traditional families than those treaty bodies that have particular responsibility for protecting human rights. Nevertheless, the steps taken so far have been tentative. Many of the provisions relating to LGBT families that do exist in legislation (such as the Directive on freedom of movement) are framed as matters for Member States "to consider". Much will depend on how far the European Court of Justice is willing to recognise fundamental human rights principles of family rights and equality in its future case law on LGBT families. Although the Court's case law in this area has not been very positive so far,⁸¹ a number of cases concerning freedom of movement and mutual recognition are to be expected before the Court which would enable it to recognise the rights of LGBT families in the future.

3.5 Summary

There are signs that the ECtHR in particular is gradually taking a more diverse approach to families, and is reflecting in its case-law the changing nature of intimate relationships. The idea that married heterosexual couples and their offspring represent the only valid family form has clearly been put to rest by the ECtHR, replaced by the more nuanced notion of the *de facto* family. While the idea of the *de facto* family is a potentially exciting development, opening up the possibility for international human rights law to recognise a variety of loving and mutually supportive relationships, it is nevertheless clear that traditional views about the family continue to govern its development. Where *de facto* family ties have been recognised in the absence of marriage or genetic link, this has primarily been in situations that closely mirror the traditional heterosexual family form. Other international human rights tribunals have so far been largely silent on the issue of LGBT families' rights. While the first tentative steps towards tackling the issue of sexual orientation discrimination have been taken, there remains a very long way to go before LGBT families' rights are fully recognised and secure in international human rights law.

⁸¹ See, for example, *Grant v South-West Trains Ltd* (Case C-249/96), [1998] ECR I-621 and *D and Sweden v Council* (Case C-122/99P and 125/99P) [2001] ECR I-4319





4. The Problems Caused by Excluding LGBT Families from International Law's Protection

The case law of the ECtHR and the HRC clearly demonstrates that sexual orientation and gender identity discrimination is illegitimate under the international law of human rights. Although the principle of non-discrimination should logically apply to all areas, we have seen that human rights tribunals have been hesitant to apply it to matters concerning LGBT families. The above survey of the relevant cases shows that LGBT families are less protected under international human rights law than their heterosexual counterparts. No human rights treaty expressly protects LGBT families, and the family and marriage rights that are protected have been widely interpreted as applying primarily to heterosexual unions. By being denied the status of 'family' under international human rights law, LGBT families are being denied a significant measure of protection.



It goes without saying that the majority of LGBT people live in countries where their relationships are accorded no legal rights at all. While a number of European and other democratic countries now have some form of legal framework for recognising same-sex couples, those couples are not usually accorded rights on the same basis as married couples. Marriage is currently only available to same-sex couples in a small number of countries.⁸² The ECtHR has recognised the right of transgender people to marry. However, it may be a precondition of marriage for transgender people that they are infertile or that they undergo gender reassignment surgery. Alternatively, transgender people may be required to divorce their spouse before their gender identity is legally recognised. Consequently, LGBT families suffer discrimination in almost every country of the world, although the level of discrimination obviously varies from country to country. Any difference in treatment between married and non-married couples in countries where legal marriage is denied to people on the basis of their sexual orientation or gender identity is a form of indirect discrimination. Where unmarried couples are denied the rights and benefits otherwise available to unmarried couples simply on the basis of their sexual orientation or gender identity, this is a form of direct discrimination.

The discrimination and disadvantage suffered by LGBT family members takes various forms, and it is impossible to list them all. The following examples give some idea of the problems that can arise when LGBT people are excluded from a legal framework that protects family rights:⁸³

- Unmarried bi-national couples are often not recognised for immigration purposes. LGBT families' members who are unable to marry can be denied the right to live together in one of their national countries, regardless of how long-term and well-established their relationship is. Denying bi-national LGBT couples the right to make a home together clearly interferes with their family life in a most fundamental way. LGBT bi-national families can be separated even when they include a minor child, which interferes with the child's right to be raised by his or her parents.
- Immigration problems extend to the EU, where free movement for third country national LGBT families' members is guaranteed in only very limited terms.
- Lack of legal recognition can result in certain administrative privileges being denied to LGBT families' members. For example, same-sex or transgender partners may be denied visitation rights to their partners in prison.
- LGBT people may not be recognised as their partner's or child's 'next of kin'. This is a very common concern among LGBT couples and parents as it restricts their ability to be consulted and make decisions in the event of a medical emergency. This is a clear interference with family life.
- Children in LGBT families often have no means of establishing a legally-recognised relationship with a non-biological parent, regardless of the depth of relationship between them. This leaves a relationship with a key adult in their life extremely vulnerable, which is certainly not in the child's best interests, and may lead to a violation of a child's right to be raised by his or her parents.

⁸² Spain, Belgium, the Netherlands, South Africa and Canada. Sweden and Norway are expected to legalise same-sex marriage in the near future.

⁸³ Many of these examples are referred to in Ryder, B., 'Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege', 9 *Canadian Journal of Family Law*, 1990, p.39



- As a result of not being able to establish a legal bond with their child, non-biological LGBT parents can experience difficulty in performing what would otherwise be straightforward everyday actions, such as travelling abroad with their children. This is a clear interference with family life.
- LGBT families' members are denied the protection of property laws that usually recognise that the family home merits special protection. They may, for example, suddenly find themselves homeless if a family member dies and the family home was in his or her name. This interferes both with their family life and their right to a home.
- LGBT people may be denied the chance to adopt a child purely on the basis of their sexual orientation or gender identity. On the one hand such automatic proscription potentially denies a child his or her right to be raised by the most suitable parents available. As finding a suitable adoptive home for many children is problematic, this is a particularly significant problem. On the other hand, it also clearly denies the potential adoptive parents their right to form a family.
- Employment laws recognise that families have certain special needs. Family members in many countries are offered benefits such as parental leave to ensure that they are able to both work and focus on raising their children. These employment benefits may not be equally available to LGBT families. When such benefits are denied to a certain group on the basis of their sexual orientation or gender identity, they are discriminated against both in their enjoyment of their family life and economic rights.
- Many pension schemes offer particular benefits to family members but do not recognise LGBT families' relationships. This can leave older people without the financial support that they would otherwise be entitled to on their partner's death simply because of their sexual orientation or gender identity. When such benefits are denied to a certain group on the basis of their sexual orientation or gender identity, they are discriminated against both in their enjoyment of their family life and economic rights.
- Many countries have intestacy rules from which family members automatically benefit if a person dies without making a will. Such laws recognise the simple propositions that most families have shared finances and most people expect their family will inherit their money. Denying LGBT families legal recognition and family status in these circumstances obviously can leave family members financially vulnerable and discriminates against them in respect of their enjoyment of family life and home.
- Many countries encourage family life by offering income tax benefits, typically to married couples and parents of minor children. Other State-provided benefits are often made available to families when a family member dies or is injured. LGBT families obviously suffer discrimination and additional financial burdens when such benefits are not extended to them. When such benefits are denied to a certain group on the basis of their sexual orientation or gender identity, they are discriminated against in their enjoyment of their family life.



- Family relationships are usually placed in a legal framework that determines financial support and how property is to be divided in the event of divorce or separation. Such laws are designed to ensure that the division of assets is equitable and that vulnerable family members, particularly children, have some financial security. Without such a legal framework, when LGBT families break up they are often left to make informal arrangements. Without adequate legal protection, children and homemakers are most likely to be the losers in such situations. This clearly discriminates against LGBT families' members in their enjoyment of family life and their economic rights.
- Various criminal law provisions are designed to protect the family. For example, a person may be offered immunity from appearing as a witness against his or her partner in a criminal trial. Many legal systems also recognise that civil wrongs can have a special impact on family members. If a man is involved in a serious accident, for example, his wife may be awarded compensation for emotional damage. Obviously these provisions are designed to recognise the integrity of the family unit and preserve domestic harmony. When such provisions are not extended to a certain group on the basis of their sexual orientation or gender identity, they are discriminated against in their enjoyment of their family life.
- LGBT people are not guaranteed equal access to fertility treatment. As fertility treatment may be a necessary step in establishing a family for LGBT people, this is a critical denial of their right to form a family.

The cost of this discrimination in personal terms cannot easily be counted, but the damage caused by having the legitimacy of loving relationships denied is well documented. There is an inevitable psychological stress that arises from having your most significant relationships viewed as shameful and secretive. As the Canadian Supreme Court so eloquently explained, not recognising same-sex relationships “perpetuates disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.”⁸⁴ Undoubtedly, a lack of legal recognition has contributed to the destruction of many loving LGBT relationships.

In simple terms, the discriminatory treatment that LGBT families experience outlined in this section means that they are denied equal enjoyment of the family rights that international human rights law promises to everyone. Specific rights concerning family life were referred to earlier, in Part 2 of this report. Firstly and most obviously, most LGBT people are denied the right to marry. Discriminatory laws mean that LGBT people do not enjoy the same right to enjoy their family life, free from interference.⁸⁵ With relationships existing outside of a legal framework, LGBT couples may be denied the right to found a family. Children raised in LGBT families may be denied their right to live with their parents and to have the integrity of their family life respected.⁸⁶ This is clearly not consistent with the child's best interests, which should be the primary consideration in all actions concerning them.⁸⁷ Ultimately, we cannot avoid the conclusion that LGBT people face widespread discrimination in the enjoyment of their family rights, which is contrary to the promise of equality contained in each and every human rights treaty.

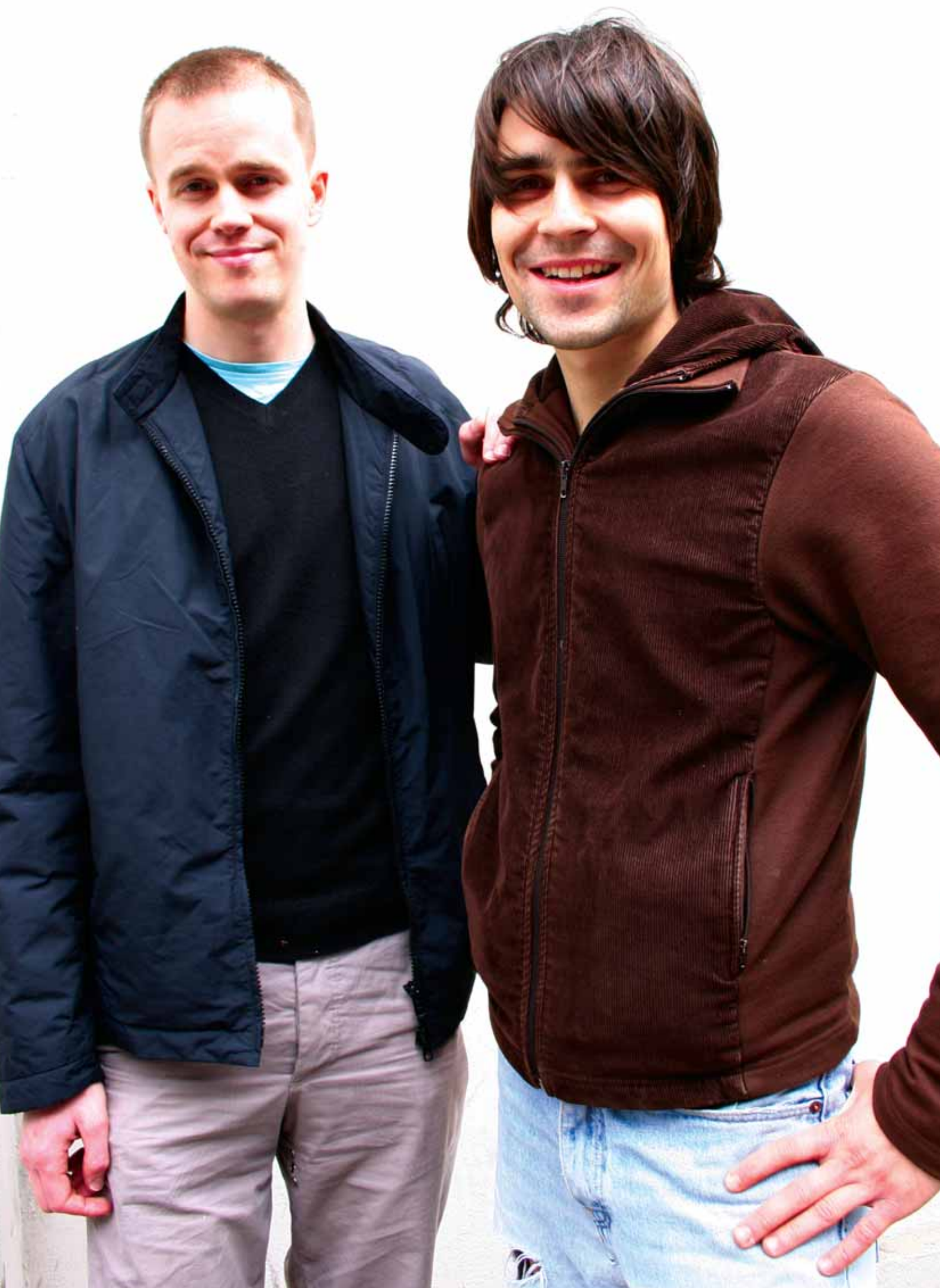
⁸⁴ *M v H* [1999] 2 S.C.R. 3, para. 73

⁸⁵ Contrary to: Art. 8, ECHR; Art. 17 ICCPR; Art 18 ACHPR; Art 17 ACHR

⁸⁶ Contrary to Arts. 2, 7, 8, 9, and 16 CRC

⁸⁷ Art 3, CRC







5. Challenging the Legitimacy of Excluding LGBT Families from International Law's Protection

We have seen that LGBT families are not presently offered equal protection under international human rights law. We have seen that such discrimination and exclusion from legal protection can bring with it devastating consequences. However, human rights law also provides that differences in treatment based on sexual orientation or gender identity are illegitimate unless they can be justified by particularly serious reasons.⁸⁸ Recognising the rights of LGBT families is consistent with human rights law's commitment to promoting equality. To tolerate discrimination against LGBT families, without legitimate grounds, is inconsistent with that commitment. It is therefore critical for those with an interest in justice and human rights to assess the validity of the arguments that are put forward to justify discrimination against LGBT families.

⁸⁸ *Smith & Grady v UK*, 25 July 2000, 31 EHRR 24



5.1 The ‘natural order’

Many people would wish to prioritise the ‘traditional’ (heterosexual) family unit on the basis that it represents the ‘natural order’ of things. Some people feel that the recognition of LGBT families offers a serious threat to the values upon which European society has been built. The concern is that if non-traditional family forms are given legal recognition the traditional family unit will fragment, which will lead to social breakdown. In recognition of those concerns, some countries have passed laws that are specifically designed to ‘defend’ the traditional family. In the United States, the Defense of Marriage Act (1996) prohibits federal recognition of same-sex marriages. The Constitutions of Latvia, Poland and Lithuania have all been amended in efforts to ensure that marriage is restricted to heterosexual unions. Similar legislative measures outlawing ‘gay marriage’ have been passed, or are in the process of being passed, in a number of other countries.⁸⁹

The irony is that laws that attempt to exclude particular groups from the meaning of marriage and family life simply serve to highlight the fact that there is not one ‘natural’ family unit. If there were, special laws would simply not be needed to defend it. Laws like ‘Section 28’ show that the ‘traditional family’ is a social construct, supported by many laws and conventions. As Andrew Sullivan has written, the idea of a single natural family form with deep historical roots is extremely fragile:

The institution of civil marriage, like most institutions, has undergone vast changes over the last two millennia. If marriage were the same today as it has been for 2,000 years, it would be possible to marry a twelve-year-old you had never met, to own a wife as property and dispose of her at will, or to imprison a person who married someone of a different race. And it would be impossible to get a divorce.⁹⁰

The idea that the traditional family represents the ‘natural order of things’ because it has always been recognised as the only legitimate family form is in any event historically inaccurate. There is evidence to suggest that same-sex relationships were recognised and celebrated in many early civilisations.⁹¹ Far from being a post-modern ‘problem’ that, if left unchallenged, will lead to the destruction of society, same-sex relationships have existed and shaped the fabric of many societies over many centuries.

To recollect that interracial marriages were banned in many states in the U.S., in Nazi Germany and in apartheid South Africa on the basis that they were against ‘the natural order of things’ should alert us to the fundamental flaw in this argument. In 1912, Seaborn Roddenberry, a Georgia congressman, put forward the following arguments to Congress in favour of a proposed constitutional amendment to ban interracial marriages:

Intermarriage between whites and blacks is repulsive and averse to every sentiment of pure American spirit. It is abhorrent and repugnant to the very principles of a pure Saxon Government. It is subversive to social peace. It is destructive of moral supremacy.⁹²

⁸⁹ See, for example: the Marriage Legislation Amendment Act 2004 (Australia). The Constitution of Uganda specifically prohibits marriage between people of the same sex. For a BBC news report on efforts in Nigeria to outlaw same-sex unions, see news.bbc.co.uk/1/hi/world/africa/4626994.stm

⁹⁰ Sullivan, A., *State of the Union*, The New Republic, May 8, 2000, 18-23, cited in Evan Gerstmann, *Same-Sex Marriage and the Constitution*, Cambridge University Press, 2004, pp. 21-22

⁹¹ For an excellent historical review, see Eskridge Jnr., W., *The History of Same-Sex Marriage*, 79 Virginia Law Review, 1999, p. 1419

⁹² Cited in Stein, E., ‘Past and Present Proposed Amendments to the United States Constitution Regarding Marriage’, 3 *Washington University Law Quarterly* 82, 2004, pp.611-685 at p.647



Similar arguments were adopted by a trial judge who upheld a state law banning interracial marriage (in a judgment that was later overturned by the Supreme Court): “Almighty God created the races white, black, yellow, Malay and red, and he placed them on separate continents...The fact that he separated the races shows that he did not intend for the races to mix.”⁹³ It is such arguments about the ‘natural order’ that have themselves been revealed to be abhorrent and repugnant, and they should hold no sway in any debate concerning discrimination against LGBT families.

Arguments that the drafters of the human rights laws simply did not intend those treaties to apply to LGBT families are also unpersuasive. While it is certainly true that at the time the ECHR and ICCPR were drafted most people would have understood ‘the family’ to refer to a married heterosexual couple and their ‘legitimate’ children, one of the strengths of human rights laws is that they adapt to accommodate changing social values. Human rights tribunals have not been insensitive to the need to be responsive to social developments. The ECtHR, for example, has long acknowledged that the European Convention is a living instrument. It has also noted that “the institution of the family is not fixed, be it historically, sociologically or even legally.”⁹⁴

The idea that the traditional family is fixed has been firmly put to rest by the States that have taken steps to accommodate LGBT relationships within the structure of marriage. The Netherlands was the first country to recognise legal marriage for same-sex couples in 2000. Belgium (2003) and Spain (2005) have since also passed laws recognising same-sex marriages. In 2005, following judgments in which the common law definition of marriage as exclusively heterosexual was held to be discriminatory, the federal Canadian Parliament passed the Civil Marriage Act, which made marriage by same-sex couples legal throughout that country. South Africa followed suit with the Civil Unions Act 2006 – which was passed as a result of a decision by the Constitutional Court declaring that the exclusion of same-sex couples from the institution of marriage was a form of sexual orientation discrimination and therefore unconstitutional. Many more countries have introduced other forms of legal recognition to those in same-sex relationships.⁹⁵

Given the changeable nature of ‘the family’ as a social institution, human rights tribunals inevitably find themselves in the position of answering questions about the nature and purpose of the family that international human rights law protects; vague references to ‘the natural order of things’ when describing the family are shown to be simply insufficient. As Bruce Ryder has said, the “amount of legal architecture that has gone into building the ideal family and supporting heterosexuality is staggering.”⁹⁶ The human rights call for equality demands a rejection of the argument that the traditional family is part of a globally-recognised ‘natural order’ from which LGBT relationships are inherently excluded. Human rights arguments enable us to rid ourselves of such preconceived notions and evaluate LGBT families on their merits. From an early twenty-first century perspective, it seems perfectly possible to argue that the modern functions of the family – which might include the regulation of sexual behaviour; care of children; care of other dependents; nurturing; sharing of economic resources; and the joining of extended families⁹⁷ – can be performed equally as well by same-sex and opposite-sex couples.

⁹³ Reported by the U.S. Supreme Court in *Loving v Virginia*, 388 U.S. 1 (1967) at 3. The Supreme Court went on to declare anti-miscegenation laws to be unconstitutional.

⁹⁴ *Mazurek v France*, 1 February 2000, 42 EHRR 9

⁹⁵ For further information see ILGA-Europe survey, n. 56 above.

⁹⁶ Ryder, n. 83 above

⁹⁷ These examples of the function that families can perform are taken from Walker, K., *United Nations Human Rights Law and Same-Sex Relationships: Where to from Here?*, in Wintemute, R. & Andenas, M., eds., *Legal Recognition of Same-Sex Partnerships*, Hart: Oxford, 2001, pp. 743-758



5.2 Religious grounds

It is sometimes suggested that religious prescription demands that 'the family' is understood to refer exclusively to heterosexual unions. Some people believe that their religion can justify, or even require, discrimination against LGBT people. Even in recent years, religious leaders have publicly condemned LGBT relationships. Pope Benedict XVI has said that gay marriage would "obscure the value and function of the legitimate family."⁹⁸ The Archbishop of Nigeria, Peter Akinola, has written that "homosexuality is flagrant disobedience to God, which enables people to pervert God's ordained sexual expression with the opposite sex."⁹⁹

Homophobic views expressed by certain religious leaders are certainly disturbing, particularly as they can have the effect of inflaming violent attacks on LGBT people.¹⁰⁰ However, they cannot disguise the fact that religious groups are far from unanimous about the question of whether same-sex relationships are contrary to religious teaching. The 38th General Council of the United Church of Canada in 2003, for example, asked the Canadian Government to recognise same-sex marriages on the basis that diverse sexuality is part of the "wondrous diversity of creation".¹⁰¹ Numerous other religious groups adopt a respectful approach towards LGBT people and their relationships, and some perform same-sex marriages (or other forms of celebration).¹⁰² There are also a great number of religious LGBT groups that are generating momentum towards greater understanding and respect within organised religion for a diversity of sexual orientations. Some Christians, for example, argue that Leviticus 18:22 – a biblical passage frequently cited to 'prove' that homosexuality is a sin – condemns sexual promiscuity or pagan acts, not same-sex relationships.¹⁰³ Indeed, it has been pointed out that the arguments used by religious proponents to condemn LGBT relationships are less convincing when followed to their logical conclusion:

I trust that no one ... would say, "Bring back the death penalty because Leviticus requires it!" Leviticus, for me, as a human rights lawyer, is a nightmare, and I'm grateful that most of Leviticus is ignored by Christians who otherwise take the texts of the Bible very seriously. Remember that Leviticus would also support the death penalty for cursing one of your parents, committing adultery, committing blasphemy (in which case you should be stoned by your congregation), or being a wizard: in each case, the guilty party "shall surely be put to death." Leviticus is silent as to the penalty for breaching its injunction not to wear "a garment mingled of linen and woollen," but authorizes "eye for eye, tooth for tooth" justice (e.g., the state may cut off the leg of a person convicted of causing the amputation of the leg of another).¹⁰⁴

⁹⁸ For reports of these comments see BBC News Report, *Italians clash on gay 'marriage'*, 14 January 2006, available at news.bbc.co.uk/1/hi/world/europe/4612802.stm

⁹⁹ Akinola., The Most Revd Peter, *Why I Object to Homosexuality*, Church Times, 4 July 2003, www.churchtimes.co.uk/content.asp?id=20653

¹⁰⁰ For recent reports of such attacks see: *Jerusalem Holds Gay Pride Rally*, BBC News Report, 10 November 2006, available at

news.bbc.co.uk/1/hi/world/middle_east/6135778.stm; *Crucible of Hate*, The Guardian, 1 June 2007, available at

www.guardian.co.uk/g2/story/0,,2092840,00.html; *It Was the Second Worst Attack of my Life*, The Guardian, 29 May 2007, available at

www.guardian.co.uk/gayrights/story/0,,2090013,00.html

¹⁰¹ See *Marriage: A United Church of Canada Understanding* (2005), available at www.united-church.ca/files/exploring/marriage/understanding.pdf. See also reports that the Dutch Reformed Church in

November 2004 apologised for its discrimination against LGB people: www.rainbownetwork.com/News/detail.asp?iData=22162&iCat=29&iChannel=2&nChannel=News

¹⁰² For a useful discussion of religious groups that perform marriages or commitment ceremonies for same-sex couples, see

http://en.wikipedia.org/wiki/Status_of_same-sex_marriage. Words of support from religious leaders to the LGB community can be found on the web-site of Human Rights Watch see

www.hrc.org/Template.cfm?Section=Home&CONTENTID=21772&TEMPLATE=/ContentManagement/ContentDisplay.cfm. The Religious Coalition for Equal Marriage Rights is a coalition of Canadian religious organisations that has issued a statement of belief

"that, as a matter of individual and religious freedom, anyone who wishes to participate in a civil same-sex marriage recognized by law should have the right to do so" see

www.religious-coalition.org

¹⁰³ For a useful discussion of this biblical passage, see www.religioustolerance.org/hom_bi_bh.htm

¹⁰⁴ Wintemute, n. 31 above, pp. 531-2.



Far from being a common cause around which religions unite, the question of LGBT relationships is a source of considerable division in religious communities. Much of the heat in that debate is generated by the backlash against the increasing recognition of the rights of LGBT people.

Ultimately, the question of whether LGBT relationships are contrary to religious teaching is a matter for theologians to debate. When religious arguments are put forward in support of discriminatory laws, the primary question to ask is whether they have a valid contribution to make in matters of legal analysis. It is true that judges have sometimes used moral or religious arguments condemning homosexuality as *legal* justification for discrimination against LGBT people. In *Bowers v Hardwick*, for example, the U.S. Supreme Court suggested “millennia of moral teaching could protect sodomy laws.”¹⁰⁵ But it is quite clear that such reasoning should be rejected: legal arguments are distinct from moral and religious arguments. Human rights laws, which are based on secular values of human dignity and equality, do not have to submit to any ideology that offers a permanent prescription of moral superiority of one group over another. It is not the function of human rights laws to interpret religious texts or uphold and impose religious doctrine, particularly where that doctrine discriminates against certain groups.

In the 17th century John Locke argued that matters of individual conscience are unsuited to legal control. The “whole jurisdiction of the magistrate,” he argued, “neither can nor ought in any manner to be extended to the salvation of souls.”¹⁰⁶ Human rights laws draw from such liberal ideas about freedom of conscience. One function of human rights laws is to allow people to live in accordance with their own religious or moral beliefs, in so far as those beliefs are compatible with the freedom of others. Consequently, while human rights laws allow individuals considerable freedom of conscience, the price of that freedom is that individuals cannot demand that their own beliefs are enforced on others. Human rights therefore reject religious dogma and preordained sets of moral values, and release us from being tied to any belief system that is put forward without rational justification.

The ECtHR has frequently stated that “pluralism, tolerance and broadmindedness” are the hallmarks of a democratic society.¹⁰⁷ In relation to conflicts over matters of individual conscience, the Court has said the following:

[The Court] considers that the State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed... and that it requires the State to ensure mutual tolerance between opposing groups... Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.¹⁰⁸

While cultural morality and social norms are constantly developing, international human rights laws must contribute to the promotion of tolerance by rejecting the prioritisation of moral or religious standards that discriminate against LGBT people. As the U.S. Supreme Court held in *Lawrence v Texas*, a judgment that referred to the *Bowers v Hardwick* decision on sodomy laws, “Bowers was not correct when it was decided, it is not correct today.”¹⁰⁹

¹⁰⁵ 478 US 186 (1986)

¹⁰⁶ John Locke, *A Letter Concerning Toleration* (1689), available at www.constitution.org/jl/tolerati.htm

¹⁰⁷ See *Handyside v UK*, 7 December 1976, 1 EHRR 737, and *Lingens v Austria*, 8 July 1986, 8 EHRR 103. See also *Young, James and Webster v UK*, 13 August 1981, 4 EHRR 38

¹⁰⁸ *Leyla Sahin v Turkey*, Grand Chamber Judgment, 10 November 2005, 44 EHRR 5

¹⁰⁹ 539 U.S. 558 (2003)



5.3 The family is for procreation

Some people believe that the primary purpose of the family is to procreate and to raise children. Some argue that because same-sex couples are inherently unable to produce children that are biologically related to both parents their relationships cannot be equated with those of heterosexual couples. They would conclude that it is natural for heterosexual couples to be favoured in law because they are able to fulfil the invaluable function of procreation, upon which society depends.

The first reason this argument fails is because there has never been a demand made on couples – whether heterosexual or not – that they have children before their relationship is recognised in law. There are very many heterosexual couples who cannot have their own biological children, and yet more who choose not to. Yet it would never be seriously argued that those couples should be denied the right to marry on the basis of their childlessness. The idea, for example, that fertility checks should be a prerequisite to marriage is clearly repugnant in a modern democratic society. In fact, the ECtHR has specifically rejected the idea that the ability to procreate is a prerequisite of marriage. In *Goodwin v United Kingdom* it held that the “inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to [marry].”¹¹⁰ The Court could not have pronounced more clearly on this issue.

In the event, it is clear that increasing numbers of LGBT people are bringing children into their families. There are a number of ways in which this happens. LGBT people may have the opportunity to adopt or foster children, and they may have children from previous heterosexual relationships. They may also have children conceived through self-insemination, surrogacy or other private arrangements. Advances in medical technology are increasing the options available for LGBT couples, who may now be offered medically supervised donor insemination and IVF treatment. In other words, there are a number of potential routes to LGBT parenthood. This has led to a something of a ‘gayby boom’, as increasing numbers of children are being raised in LGBT families.

In the cases discussed earlier in this report we saw that the ECtHR is just beginning to grapple with the issues raised by such diverse family forms. The Court has certainly now recognised on a number of occasions that families are not only made up of parents and their biological offspring. One of the main achievements of the Court’s recognition of the de facto family has been to acknowledge the importance of non-biological parents. In *X, Y & Z*, for example, we saw that the Court recognised that family ties existed between a transsexual father and the children born to his partner by alternative insemination. In the recent case of *Evans v UK*, the Court addressed a claim that Ms Evans had a right to have her embryos implanted using IVF against the wishes of her former partner. The matter was particularly important to her because those embryos represented the only chance she had of having a child that was genetically related to her. In denying her claim, the Court emphasised that conceiving with those embryos was not Ms Evans’ only opportunity to become a mother “in a social, legal, or even physical sense.”¹¹¹

¹¹⁰ 11 July 2002, 32 EHRR 18, at para. 98

¹¹¹ *Evans v UK*, application no. 6339/05, GC judgment, 10 April 2007



The ECtHR, in common with European States, does not consider the passing on of genes to be an essential aspect of parenthood: the inability of families to produce children genetically related to two parents – whether LGBT or not – should therefore not be a reason to discriminate against them. Furthermore, it does not seem a sensible strategy for human rights law to simply ignore the reality of a rapidly developing social phenomenon. The simple fact is that in Europe and elsewhere increasing numbers of children are being raised in LGBT families. It is no one's interests for those children to be raised in families that exist outside of the framework of protection that human rights law can offer.



5.4 The best interests of the child

Discrimination against LGBT parents is one of the most complex and sensitive issues facing human rights tribunals. Transnational legal cultures often contain firmly entrenched ideas about parenthood, which are challenged by the very concept of LGBT families with minor children. National States are obliged by international law to make the best interests of the child a primary consideration in all actions concerning children.¹¹² It is often generally presumed to be in a child's best interest to be raised in a 'traditional family' unit consisting of two biological parents, a father and a mother, or failing this a family as close to that ideal as possible. Such ideals can spawn prejudice concerning whether it can be in the best interests of children to be raised in LGBT families.

The development of international law has been influenced by 'traditional family' notions regarding the type of parents able to provide a suitable environment for children. In Article 12 of the ECHR, the right to found a family is reserved to "men and women". The 1967 European Convention on Adoption states that: "The law shall not permit a child to be adopted except by either two persons married to each other, whether they adopt simultaneously or successively, or by one person."¹¹³ In *X, Y & Z v UK* the ECtHR said that it was not clear that it would be in a child's best interests to have her transgender father recognised as her lawful parent.¹¹⁴ In *Fretté v France*, it will be recalled, the Court noted that there was no consensus in the scientific community regarding the effect which gay parents have on their children.¹¹⁵ On this basis, and considering the primacy of the child's best interests, the Court found that it was not unlawful to deny a gay man the possibility of adopting a child on the basis of his sexual orientation.

International human rights tribunals have been reluctant to recognise that LGBT families can provide suitable environments in which to raise children, but this approach is increasingly out of touch with current understanding. We are witnessing a gradual change in attitudes about the suitability of non-traditional family environments for raising children. A number of European countries, as well as some US States, Australian States, Canada, and South Africa, now permit same-sex couples to adopt children together, and many more permit single people to adopt regardless of their sexual orientation.¹¹⁶ Many domestic courts are now happy to make parenting orders¹¹⁷ in favour of same-sex couples. The Ontario Court of Justice, in a case concerning legislation which banned same-sex couples from adopting, considered a great deal of evidence on the issue and concluded:

If...a stable, secure and caring family environment is in a child's best interests and is, in fact, the most significant and beneficial component in the healthy development of a child,... there is no rational connection whatsoever between the goals of this legislation [to promote the best interests of children primarily within the context of the family] and a provision in that legislation that contains an absolute prohibition against adoption by homosexual couples... There is no cogent evidence that homosexual couples are unable to provide the very type of family environment that

¹¹² Article 3(1), CRC

¹¹³ Art 6(1)

¹¹⁴ Application no. 9369/81, Cm Dec. 3 May 1983, at para. 47

¹¹⁵ 26 February 2002, 38 EHRR 21, at para. 42

¹¹⁶ The Israeli Supreme Court has also granted lesbian parents the right to adopt their partner's biological children: see, *Israel Grants Rights to Lesbian Mothers*, The Guardian, 30 May 2000, available at www.guardian.co.uk/international/story/0,,319876,00.html

In November 2002, the Adoption and Children Act passed into law and for the first time allowed unmarried couples in the UK, including same-sex couples, to apply for joint adoption. For further details, see ILGA-Europe survey, n. 56 above.

¹¹⁷ Adoption by LGBT families or individuals may take one of the following forms –

(a) *individual adoption*: A lesbian or gay person seeks to adopt as an unmarried individual. Any partner the individual might have acquires no parental rights as a result of the adoption;
(b) *second-parent adoption*: One member of a same-sex couple living together as partners seeks to adopt the child of the other partner, so that both partners have parental rights vis-à-vis the child;
(c) *joint adoption*: both members of a same-sex couple seek to jointly adopt a child with no prior genetic, legal or social connection with either partner, so that both partners simultaneously acquire parental rights vis-à-vis the child.



the legislation attempts to foster, protect and encourage, at least to the same extent as "traditional" families, parented by heterosexual couples...

When one reflects on the seemingly limitless parade of neglected, abandoned and abused children who appear before our courts in protection cases daily, all of whom have been in the care of heterosexual parents in a "traditional" family structure, the suggestion that it might not ever be in the best interests of these children to be raised by loving, caring and committed parents, who might happen to be lesbian or gay, is nothing short of ludicrous.¹¹⁸

In 2002, the South African Constitutional Court held that denying same-sex couples the opportunity of joint adoption was, in itself, contrary to the best interests of the child, as it "deprives children of the possibility of a loving and stable family life."¹¹⁹

Contrary to the finding in *Fretté*, studies do consistently suggest that children raised in LGBT families are not inevitably damaged or harmed in any way. In fact, there have been more than 50 reputable studies, which are unanimous that children suffer no negative consequences from being raised by lesbian or gay parents, compared with children raised by heterosexual parents. LGBT families are just as able to provide the financial and emotional support which children need, and children can adapt remarkably well to a variety of home situations.¹²⁰ One of the sensitive societal concerns about LGBT families is the psychological effect which may ensue on a child: the often unspoken concern is that LGBT parents are more likely to raise children who themselves identify as LGBT. Even if such concerns could be considered to constitute a problem, they are nevertheless unfounded. As the Canadian court in *Re K* found, after hearing a great deal of evidence on the matter, children raised in LGBT families differ little in terms of their psychological development from children raised in traditional families:

There is no evidence at all that families in which both parents are of the same sex are any more unstable or dysfunctional than families with heterosexual parents. There is no evidence that children raised by homosexual parents are any more likely to develop gender roles or identities inconsistent with their biological sex than children raised by heterosexual parents. There is no evidence at all that children raised by homosexual parents will be significantly any different than children raised by heterosexual parents in all areas of their psychological development.¹²¹

Indeed, LGBT relationships may provide a good role model for the 21st century family by breaking down the traditional gender roles that are inherent in the traditional family. Research has shown, for example, that lesbian couples are more successful at evenly distributing household and parenting tasks than their heterosexual counterparts.¹²²

The effects of the traditional family ideal on international law do, however, seem to be changing, in tandem with the arguable evolution of the ideal itself. The more recent human rights treaties make fewer assumptions about the ideal family environment for children, and explicitly recognise that many children are raised by parents other than their biological parents. The Convention on the Rights of the Child, for example, takes a flexible view of the family, and of

¹¹⁸ *Re. K*, (1995) 23 Ontario Reports (3d) 679, paras 101-5

¹¹⁹ *Du Toit & De Vos v Minister for Welfare and Population Development*, Case CCT 40/01, judgment of 10 September 2002

¹²⁰ Tasker, F. and Golombock, S., 'Children Raised by Lesbian Mothers', 21 *Family Law*, 1991, p.184

¹²¹ *Re. K*, n. 118 above, at para. 46

¹²² Dunne, G., 'Balancing Acts: Lesbian Experiences of Work and Family Life', in Sperling, L. and Owen, M., eds., *Women and Work: The Age of Post-Feminism?*, Ashgate: Aldershot, 2000, pp. 109-132



who might be concerned in raising a child.¹²³ The CRC provisions on adoption also make no assumption that it is in the child's best interests for adoption to be open only to married couples and single people.¹²⁴ The CRC's approach to family reflects modern evolution in law and assumptions of family units.

The traditional family ideal in many European and other democratic societies would seem to have evolved over the last few decades; in keeping with this, human rights law must change to accommodate new family units. It should be the role of human rights law to ensure legal protection of such family units. Many same-sex couples are co-parenting children regardless of the legal status for the non-biological parent, and this may complicate the position of the parent, but more importantly it compromises the security of the child. Legal recognition would serve to normalise and add stability to an existing arrangement. In the absence of objective evidence to show that LGBT parents cannot provide children with an adequate level of care, it is axiomatic that their family rights should be treated on a basis of equality with more traditional family forms. The 'best interest of the child' should not be used as a device for prescribing one idealised form of upbringing for a child, and it will often be in the best interests of the child to ensure a legally protected and secure LGBT environment where one is provided.

5.5 Summary

The discrimination that LGBT families face has no legitimate justification. It is a matter of urgent concern that international human rights law has not explicitly and unreservedly recognised this and asserted the equal worth and validity of LGBT families' forms. Moreover, separate is seldom if ever equal. The perpetration of any distinction or difference in treatment only reiterates the belief that one form of family is superior to the others and is thus worthy of more protection. Unless the various gaps in the recognition of LGBT families are addressed international human rights will keep failing its promise to deliver rights on the basis of equality and respect for human dignity for all.

¹²³ Article 5

¹²⁴ Articles 20-21







6. Recommendations

6.1 To all States

States are required by international human rights law to ensure that they respect human rights on the basis of equality, without discrimination. To this end all States should review national laws and policies to ensure any discrimination based on sexual orientation or gender identity is eliminated. In particular, all States should end discrimination relating to marriage, partnership, adoption and parental responsibility. In particular:

States should recognise everyone's right to marry:

- States should enact laws to make marriage available to all couples, regardless of their sexual orientation or gender identity;
- States must end any discriminatory provisions that place preconditions on the right of transgender people to marry;
- States should not oblige transgender people to divorce existing spouses as a precondition for their gender to be legally recognised.

States must respect family life, without discrimination:

- States should provide for other forms of legal recognition of partnerships, including the possibility for two persons of the same sex to obtain the same legal status, rights and responsibilities as people of different sex;
- No State should deny anyone the benefits and rights available to those in *de facto* relationship on the basis of their sexual orientation, gender identity or gender expression;

All States must respect the rights of all children, without discrimination:

- It is the responsibility of all States to ensure that no child experiences discrimination on the basis of their parent(s) sexual orientation, gender identity or gender expression;
- States should eliminate the restrictions on the rights and responsibilities of parents based on sexual orientation, gender identity or gender expression;

- States should ensure that all children can enjoy a relationship with their parent(s) that is recognised and protected in law, regardless of whether they share a biological link with their parents;
- States are required to ensure that laws and policies on adoption and fostering are based on the best interests of the child. Such laws and policies should therefore only take into account the suitability of prospective parents to adopt or foster a child, and should not exclude people on the basis of their sexual orientation, gender identity or gender expression.

States should respect everyone’s right to found a family:

- No one should be denied access to fertility treatment or assisted reproduction based on their sexual orientation or gender identity;

States’ laws and policies governing family matters should take into account the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*¹²⁵:

Principle 24

Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members.

States shall:

- Take all necessary legislative, administrative and other measures to ensure the right to found a family, including through access to adoption or assisted procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity;
- Ensure that laws and policies recognise the diversity of family forms, including those not defined by descent or marriage, and take all necessary legislative, administrative and other measures to ensure that no family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members, including with regard to family-related social welfare and other public benefits, employment, and immigration;
- Take all necessary legislative, administrative and other measures to ensure that in all actions or decisions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration, and that the sexual orientation or gender identity of the child or of any family member or other person may not be considered incompatible with such best interests;
- In all actions or decisions concerning children, ensure that a child who is capable of forming personal views can exercise the right to express those views freely, and that such views are given due weight in accordance with the age and maturity of the child;

¹²⁵ The Yogyakarta Principles were adopted by a group of international law experts in November 2006. They contain various references to LGBT families’ rights. Although these principles are non-binding, they were drafted by a panel of experts including a former United Nations High Commissioner for Human Rights, as well as UN independent experts, members of UN treaty bodies, judges, activists, and academics; the principles therefore have considerable authority. States should recognise that these principles represent an authoritative statement and explication of what is entailed in recognising the international rights of LGBT people, including the rights of LGBT families.



- Take all necessary legislative, administrative and other measures to ensure that in States that recognise same-sex marriages or registered partnerships, any entitlement, privilege, obligation or benefit available to different-sex married or registered partners is equally available to same-sex married or registered partners;
- Take all necessary legislative, administrative and other measures to ensure that any obligation, entitlement, privilege or benefit available to different-sex unmarried partners is equally available to same-sex unmarried partners;
- Ensure that marriages and other legally-recognised partnerships may be entered into only with the free and full consent of the intending spouses or partners.



6.2 To all human rights tribunals and other law and policy makers

- All human rights tribunals and other law and policy makers must uphold the rights of LGBT families on a basis of equality with other family forms;
- Family rights conferred by international human rights law should not be limited to heterosexual partnerships. It should be explicitly recognised that they belong to all families, regardless of sexual orientation or gender identity;
- To this end, the definition of the family in international human rights law should be inclusive and based on the social and emotional reality of family ties, not simply those families accorded legal recognition in national law;
- International human rights tribunals and other international law and policy makers should recognise that the right to marry extends to everyone, regardless of their sexual orientation or gender identity;
- All measures affecting children should be guided by the best interests of the child and should ensure that children are not discriminated against because of their parents' sexual orientation or gender identity;
- International human rights tribunals and other international law and policy makers should recognise that children may have LGBT parent(s). Children should be treated equally, regardless of whether their parents are or were married; whether they are adopted; or whether they share a biological link with their parents;
- In particular, children should never be separated from their families on the basis of the sexual orientation or gender identity of their parents.