

## CHAPTER V

# INTERNATIONAL LEGAL FRAMEWORK

Written by IGLHRC

### INTRODUCTION

CIPAC has analyzed the Costa Rican legal framework and how it relates to discrimination against lesbians –the ways in which it restricts the enjoyment of their rights, the protections it offers and the areas that remain still undefined by law. The following references to the international human rights and comparative legislation are intended as a contribution to broaden our readers’ vision on the intersection between human rights and sexual orientation.

Antidiscriminatory provisions that either explicitly mention “sexual orientation” as a protective category or that “read” the concept of sexual orientation based discrimination into other categories, are a basic tool for demanding (and protecting) equality for lesbians (and gay men) in any context. We will discuss a few outstanding examples of such legislation at the international level and then will provide an overview of antidiscriminatory provisions already in place at the national and state level in different regions of the world.<sup>35</sup>

As CIPAC has proved, the restrictive definition of “family” in Costa Rican law —from which the equally restrictive definitions of “marriage” and “de facto union” are derived-- constitutes the strongest barrier to equality for lesbian families of all kinds. Thus, we will discuss how “family” is defined in different human rights instruments and by human rights experts. And we will also provide some examples of national legislation that protects the rights of non-conventional families around the world.

### ***A. Protections against discrimination and affirmation of equality before the law***

#### ***A 1. International Human Rights Instruments<sup>36</sup>***

---

<sup>35</sup> There are many cities (in countries like Brazil, Canada or the USA) that have passed antidiscriminatory ordinances, and in some cases offer certain kinds of protections to same-sex couples. We are leaving the local level out of this enumeration, for the sake of space, but those interested might consult our web page ([www.iglhrc.org](http://www.iglhrc.org)) for more information at city level or ask for it at [amlac@iglhrc.org](mailto:amlac@iglhrc.org)

<sup>36</sup> Most of the text on this section was taken from the report “Conceiving Parenthood: Parenting and the Rights of Lesbian, Gay, Bisexual, and Transgender People and Their Children”, written by Leslie Minot and edited by Scott Long (IGLHRC, 2000).

Any culture of rights must be predicated on non-discrimination. It stands as one of the core principles of democratic society, and every major human rights treaty is concerned to offer effective protection against discrimination. The International Covenant on Civil and Political Rights (ICCPR) condemns discrimination in two separate articles. Article 2 requires equal enjoyment of all rights contained in the treaty:

*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.*

Article 26 contains a more general affirmation of equality:

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Of overriding importance to lesbian, gay, and bisexual people is the fact that *sexual orientation is understood to be protected by these provisions*. The principle that prohibitions against discrimination include, and preclude, discrimination based on sexual orientation has been established by the United Nations Human Rights Committee, in its 1994 decision in *Toonen v. Australia*. This decision represents the most sweeping affirmation of the rights of lesbians and gay men in international law.

In reviewing a law (in the Australian state of Tasmania) which penalized consensual sexual behavior between adults of the same sex, the Committee found that the law generated unequal treatment based on sexual orientation. It then found that such treatment was banned under the discrimination provisions of the ICCPR, which implicitly included sexual orientation. The Committee observed that “that in its view the reference to “sex” in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.”<sup>37</sup>

In invoking the sweeping language of Article 26 of the ICCPR—dealing with general unequal treatment before the law--the Committee invited sexual orientation based discrimination to be defined and identified broadly. Other treaty-based standards regarding discrimination also invite a broad approach. Model language for defining discrimination occurs in the International Convention on the Elimination of Racial Discrimination (CERD), where it is

---

<sup>37</sup> *Toonen v. Australia*, CCPR/C/50/D/488/1992.

described (Article 1) as “any distinction, exclusion, restriction or preference . . . which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

Still more broadly, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) defines its mandate (Article 1) as including

*any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*

This Convention does not abjure concern with a protected zone of “privacy” separate from public life; it specifically addresses discrimination within the family (Article 16).

In 2000, the UN Committee on Economic, Social and Cultural Rights issued its Commentary 14 – on the Right to the Highest Attainable Standard of Health. Paragraph 18 of Article 12 (Special Topics of Broad Application) provides a reading of the International Covenant on Economic, Social and Cultural Rights (ICESR) that goes in the same direction than the verdict on *Toonen* went for civil and political rights:

*“By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health”<sup>38</sup>.*

Costa Rica has ratified the ICCPR and the ICSECR in 1968, CEDAW in 1986 and CERD in 1967.

---

<sup>38</sup> Committee on Economic, Social and Cultural Rights, General Comment 14, *The right to the highest attainable standard of health*, U.N. Doc. E/C.12/2000/4 (2000).

## ***A2. Regional Human Rights Instruments***

### Europe

Article 13 of the Treaty of Amsterdam (2 October 1997), that modifies the constitution of the European Union, authorizes legislative prohibition of discrimination based on sexual orientation in its member States (is not itself a prohibition)

The Council of Europe has pronounced itself against discrimination based on sexual orientation on several occasions. The first time it did so was in 1981, through Recommendation 924 that assessed the situation of lesbians and gay men in Europe as a group subjected to discrimination. We will summarize below three of the most recent statements from the Council.

- 1) Recommendation 2002) 5 of the Committee of Ministers to Member States on the protection of women against violence (adopted on April 30, 2002). Note 71 of the Explanatory Memorandum for this resolution states that "... The authors wished to point out that victims must be able to benefit from the measures listed in the recommendation without any discrimination (paragraph 44). An indicative (and non-exhaustive) list of motives for discrimination was drawn up. These are: age, sex, sexual orientation, level of education, language, religion, physical and mental capacity, cultural and ethnic origin of the victims. Other forms of discrimination could also be prohibited depending on the case..."
- 2) Recommendation on the Situations of Gays and Lesbians in Council of Europe Member States (September 26, 2000). The Assembly requested the Committee of Ministers to add sexual orientation to the grounds for discrimination prohibited by the European Convention on Human Rights. It also asked to add to the staff of the European Commissioner for Human Rights and in existing fundamental rights protection and mediation structures, an individual with special responsibility for questions of discrimination on grounds of sexual orientation, and to extend the terms of reference of the European Commission against Racism and Intolerance (ECRI) to include such discrimination. It also invited member states to include sexual orientation among the prohibited grounds for discrimination in their national legislation, to revoke all legislative provisions rendering homosexual acts between consenting adults liable to criminal prosecution, and to apply the same minimum age of consent for homosexual as for heterosexual acts.

However, up to now, the criteria of the Committee has been the one outlined by them in Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms: not to add

“non-discrimination grounds (for example, physical or mental disability, sexual orientation or age), not because of a lack of awareness that such grounds have become particularly important in today’s societies as compared with the time of drafting of Article 14 of the Convention, but because such an inclusion was considered unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included. It is recalled that the European Court of Human Rights has already applied Article 14 in relation to discrimination grounds not explicitly mentioned in that provision (see, for example, as concerns the ground of sexual orientation, the judgment of 21 December 1999 in the case of *Salgueiro da Silva Mouta v. Portugal*)”<sup>39</sup>.

- 3) Recommendation No. R (2000) 6 on the status of public officials in Europe. Paragraph 9 states that “There should be no unfair discrimination on the basis of, *inter alia*, age, disability, gender, marital status, sexual orientation, race, color, ethnic or national origin, community background, political or philosophical opinion and religious beliefs, especially concerning the access to public posts and promotion”.

### America

Up to now, there have not been statements by the Interamerican Human Rights Commission (IHR), nor by the Court, such as those we have just considered coming from the European Council. But there are signs that the issue of sexual orientation has started to be considered at least by the Commission.

On May 1999, the IHR admitted its competence in the case of Marta Alvarez, a lesbian who is imprisoned in Colombia and demands to right to conjugal visits with her partner. The Commission stated that the denial of such right by the Colombian government constituted a violation to Article 11 (2) of the Interamerican Human Rights Convention, according to which no one can be subjected to arbitrary or abusive interferences in his or her private life.

On October 16, 2002, the IHR heard testimonies from non-governmental organizations Agua Buena, LACCASO/ACCSI and CEJIL about the situation of People Living with HIV/AIDS in the region, including the specific violations endured by gay men, lesbians, bisexual and transgender people in that regard. Then, the IHR Human Rights Defenders Unit met on

---

<sup>39</sup> Protocol 12 to the European Convention on the Protection of Human Rights and Fundamental Freedoms (adopted on June 26, 2000). Paragraph 20 of the Commentary.

October 19, 2002 and among the issues considered in that meeting were cases of human rights violations against activists working on lesbian, gay, bisexual and transgender rights in the region.

A3. National or Federal Level<sup>40</sup>

CANADA: Canadian Human Rights Act, Revised Statutes of Canada ("sexual orientation" added in 1996).

DENMARK: Penal Code, Article 266b (1987).

ECUADOR: Constitution, 1998, Article 23(3),

FINLAND: Penal Code (as amended by Law 21.4.1995/578), c. 11, para. 9, c. 47, para. 3.

FRANCE: New Penal Code, Arts. 225-1, 225-2, 226-19, 432-7.

HUNGARY: Act on Public Health, Act No. 154 of 1997, Art. 7.

ICELAND: General Penal Code, No. 19/1940, s. 180, as amended by Act No. 135/1996,

IRELAND: Equal Status Act, 2000, No. 8, s. 3(2)(d) bans unfair treatment in education, goods, services, housing. ("sexual orientation" added in 1993).

LATVIA: Article 91 of the Latvian Constitution states that "all people in Latvia are equal before the law and the courts. Human rights shall be exercised without any discrimination" and the Parliamentary Legal Office has confirmed that Article 91 guarantees inter alia protection on grounds of sexual orientation.

LITHUANIA: Penal Code, Art. 169, Law of 26 September 2000, Nr. VIII, 1968.

LUXEMBOURG: Penal Code, Arts. 454-457, added by Law of 19 July 1997,

NETHERLANDS: Penal Code, Arts. 137f, 429 *quater* (inserted by Act of 14 Nov. 1991,

NEW ZEALAND: Human Rights Act 1993, s. 21(1)(m), and s. 145, Second Schedule.

---

<sup>40</sup> Information on the following sections has been collected from IGLHRC's own files and from the web pages of the International Gay and Lesbian Association ([www.ilga.org](http://www.ilga.org)) and GayLawNet ([www.gaylawnet.com](http://www.gaylawnet.com)). It does not pretend to be exhaustive and we are very glad to receive any updates or additions.

NORWAY: Penal Code, para. 349a as amended by Law of 8 May 1981, nr. 14,  
("homophile inclination, lifestyle or orientation").

SLOVENIA: Penal Code (Law of 29 Sept. 1994,).

SPAIN: Penal Code, Organic Law of 23 Nov. 1995, No. 10/1995, Arts. 314, 511-12.

SOUTH AFRICA: Constitution of the Republic of South Africa (No. 108 of 1996), Sections 9(3), 9(4).

SWEDEN: Penal Code (*Brottsbalk*), SFS 1962:700, c. 16, para. 9, as amended by Law of 4 June 1987, SFS 1987:610, ("homosexual inclination").

SWITZERLAND - Federal Constitution, adopted on 18 April 1999, Article 8(2),

#### A4. State, Province or Federal District Level

ARGENTINA: Buenos Aires (Constitution, 1 Oct. 1996, Article 11).

AUSTRALIA: New Wales South (Sections 49ZF to 49ZR of the NSW Anti-Discrimination Act 1997); South Australia (The Equal Opportunity Act 1984); Tasmania (Anti-Discrimination Act 1998); Victoria (The Equal Opportunity -Gender Identity and Sexual Orientation- Bill - 6 September 2000); Western Australia (The Acts Amendment -Lesbian and Gay Law Reform- Act 2002 passed on 21 March 2002).

BRAZIL: Brasília (Federal District, Law 2615/2000); Ceará (Law 8211/98); Mato Grosso (Constitution, 1989, Article 10.III); Minas Gerais (Law 694/99); Sao Paulo (Law 10.948, November 2001); Rio de Janeiro; Sergipe (Constitution, 1989, Article 3.II)

CANADA: British Columbia (Human Rights Code, 1996, "sexual orientation" added in 1992); Manitoba (Human Rights Code, "sexual orientation" added in 1987); New Brunswick (Human Rights Code, "sexual orientation" added in 1992); Newfoundland (Human Rights Code, "sexual orientation" added in 1997); Northwestern Territories (Human Rights Act, November 2002); Nova Scotia (Human Rights Act, "sexual orientation" added in 1991); Ontario (Human Rights Code, "sexual orientation" added in 1986); Prince Edward Island (Human Rights Act, "sexual orientation" added in 1998); Quebec (Individual Rights and Freedom Act, "sexual orientation" added in 1977); Saskatchewan (Human Rights Code, "sexual orientation" added in 1993),

Yukon Territory (Human Rights Act, 1987). There is only one province or territory in Canada that still does not protect its citizens against discrimination based on sexual orientation – Nunavut – and it is considering to do so.

GERMANY: Berlin (Constitution, 1995, Article 10.2); Brandenburg (Constitution, 1992, Article 12.2); Thuringia (Constitution, 1993, Article 2.3).

MEXICO: Aguascalientes (Penal Code, Art. 205 *bis*, as amended on 11 March 2001); Chiapas (Penal Code, Art. 305 *bis*, June 2001); Federal District -Mexico City – (Penal Code, Art. 281 *bis*, as amended on 2 Sept. 1999),

UNITED STATES: Connecticut (Conn. General Statutes, “sexual orientation”, added in 1991); District of Columbia (D.C. Code, “sexual orientation” added in 1973); Hawaii (Haw. Revised Stat., “sexual orientation” added in 1991); Maryland (2001 Laws of Maryland); Massachusetts (Mass. Gen. Laws, “sexual orientation” added in 1989); Minnesota – (Minn. Stat., “sexual orientation” added in 1993); Nevada (Nev. Rev. Stat., “sexual orientation” added in 1999); New Hampshire – (N.H. Rev. Stat., “sexual orientation” added in 1997); New Jersey – (N.J. Stat., “affectional or sexual orientation” added in 1991); Rhode Island (R.I. Gen. Laws, “sexual orientation” added in 1995); Vermont (Vt. Stat., “sexual orientation” added in 1991); Wisconsin (Wis. Stat., “sexual orientation” added in 1982).

#### A.5 Workplace specific antidiscriminatory legislation

##### *A.5.1. Regional Level*

EUROPE: Council Directive 2000/78/EC of 27 November 2000 [adopted under Article 13 of the EC Treaty] establishes a general framework for equal treatment in employment and occupation. Explicitly includes “sexual orientation” as a protected category. Must be implemented by 2 December 2003 in all fifteen European Union Member States.

MERCOSUR (ARGENTINA, BRAZIL, PARAGUAY AND URUGUAY): Declaration #10, Art. 1 (1998). Guarantees the “effective equality in rights, treatment and opportunity” to every worker “without distinction or exclusion based on ... sex or sexual orientation...”

##### *A.5.2. National or Federal Level*



AUSTRALIA: Workplace Relations Act 1996. Only provides protection in case of dismissal. (For State level Australian provision, see general section on Discrimination above)

CZECH REPUBLIC: Law 155/2000 of 18 May 2000, amending Labor Code, Law 65/1965, Art. 1(4).

DENMARK: Law of 9 June 1971, nr. 289, as amended by Law of 3 June 1987, nr. 357; extended to private employment by Law of 12 June 1996, nr. 459 ("orientación sexual" added in 1987).

FRANCE: Law Proposal Related to the Fight Against All Forms Of Discrimination No.2566/2001 (added to Labor Code).

IRELAND: Employment Equality Act (1998, No. 21, s. 6(2)(d) bans direct and indirect job discrimination based on sexual orientation. The law also prohibits unwelcome, offensive, humiliating or intimidating actions. Religious institutions are exempt from the act in instances where it conflicts with their teachings. Also, Unfair Dismissals Act, 1977, No. 10, s. 6(2)(e), as amended by Unfair Dismissals (Amendment) Act, 1993, No. 22, s. 5(a).

LUXEMBOURG: Penal Code, Art. 455/6 (1997).

NAMIBIA: Labour Act, 13 March 1992, No. 6, s. 107.

NETHERLANDS: General Equal Treatment Act, arts. 1, 5-7 (Act of 2 March 1994); ("hetero- or homosexual orientation").

NORWAY: Law of 4 Feb. 1977, nr. 4, para. 55A, as amended by Law of 30 April 1998, nr. 24 ("homophile inclination or form of cohabitation").

SOUTH AFRICA: Labor Relations Act (No. 66 of 1995), s. 187(1)(f) (dismissal); extended to other aspects of employment by Employment Equity Act (No. 55 of 1998), s. 6.

SPAIN: Penal Code, Art. 314 (amended in 1996). Public or private employers engaging in discrimination at the workplace face six months to two years of imprisonment, or fines and financial redress (Art. 314).

SWEDEN: Law of 11 March 1999, SFS 1999:133 ("sexual inclination").

VENEZUELA: Labor Law Organic Rules (Decree 3.235, Chapter III, Article 8, paragraph e) includes among the “Fundamental principles on the Right to Work” “non-arbitrary discrimination in employment for reasons of gender or sexual preference...”. Entered into force on January 25, 1999.

#### *A.5. 3. State, Province and Federal District Level*

GERMANY: Saxony-Anhalt – Law on Reducing Discrimination Against Lesbians and Gay Men, 22 Dec. 1997 (public sector only).

UNITED STATES: California – (Government Code, ss. 12920, 12921, 12940, 12955, "sexual orientation" originally added to Labor Code in 1992); Connecticut (discrimination on the basis of sexual orientation is prohibited in public and private employment); Hawaii (State law prohibits discrimination on the basis of sexual orientation in public and private employment); Indiana (State employment policy law specifically prohibits job discrimination on the basis of sexual orientation); Rhode Island (State law prohibits discrimination on the basis of sexual orientation in public and private employment). The following states have adopted a policy of not discriminating in state employment on the basis of sexual orientation: Colorado, Delaware, Illinois, Montana, New Mexico, Pennsylvania and Washington.

### ***B. The concept(s) of “FAMILY” and Human Rights legislation<sup>41</sup>***

How do human rights intersect with, and affect, the family?

Parenting, family life, and the rights of children are addressed in a broad range of international and regional human rights instruments. None of these documents explicitly acknowledges the particular situations faced by families headed by lesbian, gay, bisexual, and transgender parents, but neither do they specify a wide range of other common family forms. *This absence of specific reference to family forms and issues which concern homosexual, bisexual, and transgender parents does not exclude LGBT people from enjoying equal rights associated with the family—or any other fundamental human rights.*

Indeed, the breadth of formulations which protect the right to “family life” provides a framework for understanding and progressively including under existing rights

---

<sup>41</sup> Most of the text on this section was taken from the report “Conceiving Parenthood: Parenting and the Rights of Lesbian, Gay, Bisexual, and Transgender People and Their Children”, written by Leslie Minot and edited by Scott Long (IGLHRC, 2000)

protections the many forms of families which have evolved within and among cultures throughout the world, including families formed by lesbian, gay, bisexual, and transgender people.

Human rights instruments suggest that the complex concept of what constitutes a recognizable family form is steadily evolving. In addition to privacy-based protections, the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) include protection of the right to marry and to found a family, usually linked in the same article, providing key early articulations of rights around relationship of emotional intimacy, caring, and nurturing. Article 16 (1) of the UDHR reads:

*Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage, and at its dissolution.*

Article 23 of the ICCPR reiterates this right in similar terms, requiring again the protection of the family “by society and the State.”

The *Toonen* decision (see Section A1) —taken in the context of other international standards on discrimination—strikes against unequal treatment not just in political life narrowly conceived, but across the range of activities and spheres which comprise human existence.<sup>42</sup> It provides a basis for opposing two kinds of discrimination in the family sphere:

1. Discrimination against individuals in their access to rights and powers associated with family relationships, including their recognition as parents;
2. Discrimination against particular family forms or structures in their access to recognition and rights, on the basis of the sexual orientation (or other status) of the members.

The obligation which these provisions and precedents place upon states is clear.

Thus, in the ICCPR, Article 2 should be understood to bar discrimination in the specific right “to found a family” (stipulated in Article 23); Article 26 affirms the necessity of equality in all other areas where family life is affected or protected by the law.

---

<sup>42</sup> Other United Nations human-rights bodies have interpreted *Toonen* to mandate work addressing sexual orientation-based discrimination. The Committee on the Rights of the Child has raised to Austria the question of persisting unequal ages of consent for homosexual and heterosexual relations in Austria; the Human Rights Committee has also found the relevant legislation discriminatory: see Austria, HRC report, CCPR/C/79/Add.103 1998, at 13.

The Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) have further developed the interpretation of these rights, as regards both traditionally-recognized family forms and family forms that may be understood as “non-traditional.” CEDAW attends particular to discrimination both *in regard to* marriage rights and discrimination *within* the marriage relationship. Article 16 provides a comprehensive framework for addressing both, requiring states to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.” Including in the measures mandated are “the same right to enter into marriage.” Specifically with regard to the care of children, the Convention requires the enjoyment of “The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children”; it also affirms “the same rights and responsibilities with regard to guardianship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation.”<sup>43</sup> The Convention also states that “in all cases the interests of the children shall be paramount.”

The Convention on the Rights of the Child constitutes, as a whole, a guide to understanding how states may locate and define those “best interests.” The preamble of the Convention on the Rights of the Child provides perhaps the clearest and most expansive statement of the relationship of family protection to the broader human rights goals and protections of the United Nations. The preamble states that the people of the United Nations have reaffirmed their “faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom.” It describes the family as “the natural environment for the growth and well-being of all its members” and further recognizes “that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.” Finally, it considers that “the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.”

While the *form* of family life is not stipulated above, its nature and goals are described. Indeed the Convention, while in no way contravening the assertions of the UDHR that the family is the “natural and fundamental group unit of society,” offers a fuller way of understanding its essence: not as an independent good but as a purposeful entity, meant among other things to prepare its members (as well as children) for a complete civil existence. The family life that is protected and promoted is one sustaining the “growth and well-being of *all* its members,” as is consonant with the recognition of the “dignity and worth of the human person.” The ideals against which a “family life” appropriate for children are to be measured are not a particular form or a particular set of members, but its ability to provide “an

---

<sup>43</sup> Convention on the Elimination of All Forms of Discrimination Against Women, U.N.G.A.R. 34/180, December 18, 1979.

atmosphere of happiness, love and understanding” conducive to raising children “in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.”

The Committee on the Rights of the Child has in varying ways confirmed that no single model of family life meets these needs. In an outline for a General Discussion of “The role of the family in the promotion of the rights of the child,” the Committee noted:

*When considering the family environment, the Convention reflects different family structures arising from various cultural patterns and emerging family relationships. In this regard, the Convention refers to the extended family and the community and applies in situations of nuclear family, separated parents, single-parent family, common-law family and adoptive family. Such situations deserve to be studied in the framework of the rights of the child within the family.<sup>44</sup>*

The United Nations Human Rights Committee has also stressed the importance of latitude in defining the family—and has observed that the requirement to “protect” the family implies protecting all its flexible array of forms, not protecting (and pitting) one form against another. In General Comments on the ICCPR, the Committee has noted 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. However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in Article 23 [see above]. Consequently, States Parties should report on how the concept and the scope of the family is construed or defined in their own society and legal system. Where diverse concepts of the family, ‘nuclear’ and ‘extended,’ exist within a State, this should be indicated with an explanation of the degree of protection afforded to each. In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, States Parties should also indicate whether and to what extent such types of family and their members are recognized and protected by domestic law and practice.<sup>45</sup>*

---

<sup>44</sup> Committee on the Rights of the Child, Report on the Fifth Session, January 1994, CRC/C/24, Annex V, p. 63.

<sup>45</sup> U.N. Human Rights Committee, General Comment 19, HRI/GEN/1/Rev.2, p. 29).

The 1994 United Nations Conference on Population and Development, in its Program for Action, noted with concern occasions “when policies and programmes that affect the family ignore the existing diversity of family forms.” It urged that “Governments should maintain and further develop mechanisms to document changes and undertake studies on family composition and structure, especially on the prevalence of one-person households, and single-parent and multigenerational families.” It placed this recommendation specifically in the context of a call to take “effective action to eliminate all forms of coercion and discrimination in policies and practices.” The 1995 United Nations Fourth World Conference on Women also observed that “In different cultural, political and social systems, various forms of the family exist,” noting in this light that “The rights, capabilities and responsibilities of family members” in these different forms “must be respected.”<sup>46</sup>

Pursuing a comparable argument, Radhika Coomaraswamy, the UN Special Rapporteur on Violence against Women, has written,

*Throughout the world, there exist divisions between the dominant, normative ideal of the family and the empirical realities of family forms. Whether the ideal is the nuclear family or a variation of the joint or extended family, such ideals in many cases are not wholly consistent with the realities of modern family forms. These family forms include, in increasingly large numbers, female-headed households in which women live alone or with their children because of choice (including sexual and employment choices), widowhood, abandonment, displacement or militarization.*<sup>47</sup>

That these norms are often structurally based on a specific vision of gendered role is made explicit in the cases and examples she cites. Coomaraswamy explains the coercive role of such structural norms and their role in promoting gender-based violence, stating:

*Despite such differences, however, the culturally-specific, ideologically dominant family form in any given society shapes both the norm and that which is defined as existing outside of the norm and, hence, classified as deviant. Thus, the dominant family structure - whether it is dominant in fact*

---

<sup>46</sup> U.N. Fourth World Conference on Women, Platform for Action, A/CONF.177/20, October 17, 1995, at 29.

<sup>47</sup> U. N. Commission on Human Rights, Fifty-fifth session, Item 12 (a) of the provisional agenda; UN Document E/CN.4/1999/68, March 10, 1999, at 8.

*or merely in theory - serves as a basis against which relationships are judged.*<sup>48</sup>

Such an analysis is particularly useful in addressing such non-traditional families as LGBT relationships, and Coomaraswamy explicitly includes the right to non-traditional forms of sexual expression and behavior within her discussion of gender-based oppression.<sup>49</sup>

Moreover, Coomaraswamy explains,

*All international human rights texts underscore the notion of choice (i.e. free and full consent) as the basis for forming a family. The Convention on the Elimination of All Forms of Discrimination against Women took a significant additional step in calling for the elimination of "discrimination against women in all matters relating to marriage and family relations", not only in terms of the right to enter into marriage with free and full consent and equal rights and responsibilities during marriage and its dissolution, but also in terms of equal rights with respect to reproduction, child-rearing, custody, property and protection against child marriage (art. 16)*

This emphasis on “free and full consent,” in conjunction with the characteristics of family life enumerated in the Convention on the Rights of the Child, provides a rich and complex basis for better addressing family issues—including those of non-traditional family forms—from a human rights perspective.

Indeed, legal systems as well as policymakers in many states have undertaken redefinitions of the family in terms both progressive and inclusive, with social-welfare agencies—which have less room to evade facing the variety of family forms in practice—often taking the lead in both the realism and the flexibility of their formulations. In South Africa, for instance, the Department of Social Welfare, in a 1996 White Paper, defines a “family” as: “Individuals who either by contract or agreement choose to live together intimately and function as a unit in a social and economic system. The family is the primary social unit, which ideally provides care, nurturing and socialization for its members. It seeks to provide them with physical, economic, emotional, social, cultural and spiritual security.”<sup>50</sup> The influence of the South African Constitution on such formulations, and in ensuring general equality,

---

<sup>48</sup> Commission on Human Rights, Fifty-fifth session, Item 12 (a) of the provisional agenda; UN Document E/CN.4/1999/68, March 10, 1999, at 9.

<sup>49</sup> Commission on Human Rights, Fifty-fifth session, Item 12 (a) of the provisional agenda; UN Document E/CN.4/1999/68, March 10, 1999, at 12.

<sup>50</sup> Government Gazette No. 16493, February 2, 1996; quoted in National Coalition for Gay and Lesbian Equality, “Project 110: The Review of the Child Care Act: Comment on the Parent-Child Relationship,” April 20, 1999.

has been--and will continue to be--profound.<sup>51</sup> It deserves to be a model for other states' action.

Definitions such as the above, which emphasize not the prescribed composition or the preferred formal structure of the family, but rather the functions of care it fulfils (and which implicitly propose that any family be judged simply by its adequacy in serving those ends) should also be taken as a general model. They should be inscribed in democratic law as well as policy.

### **C. Rights recognition for same-sex couples and families created by lesbians and gay men.**

#### **C.1 Same sex couples**

##### **C.1.1. Regional Level**

EUROPE: (Council of Europe's) Recommendation on Homosexuals' Immigration and Asylum (June 30, 2000) asks Member States to review their policies on social rights to ensure that homosexual and heterosexual partnership and families are treated on the same basis and that bi-national couples are accorded the same residence rights, regardless of sexual orientation.

##### **C.1.2. National or Federal Level**

---

<sup>51</sup> *Jurisprudence based on the South African Constitution appears likely to apply equality to the family in a number of ways, not least by possibly extending full marriage rights to gay and lesbian couples in the near future. As one step, a groundbreaking recent decision of the Constitutional Court of South Africa instructs that the definition of "spouse," for immigration purposes, be extended to include such couples: National Coalition for Gay and Lesbian Equality and Others v. the Ministry of Home Affairs and Others, unreported decision, December 2, 1999. Moreover, this decision criticizes both discrimination based on sexual orientation and discrimination on the basis of marital status in deciding the sharing of residency and citizenship under immigration law: it notes that "marriage represents but one form of life partnership." The decision states: "A notable and significant development in our statute law in recent years has been the extent of express and implied recognition the legislature has accorded same-sex partnerships. A range of statutory provisions have included such unions within their ambit. While this legislative trend is significant in evincing Parliament's commitment to equality on the ground of sexual orientation there is still no appropriate recognition in our law of the same-sex life partnership, as a relationship, to meet the legal and other needs of its partners." In foreseeing such recognition, the decision suggests that South African law is moving in a multiple and fascinating course: not only toward redefining marriage on a more open and equal basis, but toward redefining the previously close connection between the legal concept of "marriage" and that of "family." In a future toward which the decision possibly points, family relationships not only may no longer require the stamp and seal of marriage, but may no longer need to be modelled or patterned after nuclear, heterosexual marital relationships, in order for the state to see them as valid. The degree and direction of this movement in coming years will be of the highest importance for other states and other legal systems to watch.*



AUSTRALIA: Australia is one of the few countries in the world in which the Migration Program allows Australian citizens, Australian permanent residents and eligible New Zealand citizens to sponsor their same-sex partner to remain in or migrate to Australia on the basis of their relationship. An Interdependent Relationship is defined by the Australian Migration Program as "a relationship which is genuine and continuing between two people who are not in a prohibited degree of relationship (brothers, sisters, parents, children, uncles, aunts, cousins etc), who have both turned 18 years of age, and who both have a mutual commitment to a shared life to the exclusion of any spouse relationship or any other interdependent relationship, who live together or do not live separately and apart on a permanent basis". An Interdependent relationship does not have to be between people of the same sex. However this is the category of visa upon which visas are granted because of same-sex relationship between an applicant and an Australian citizen, permanent resident or eligible New Zealand citizen.

AUSTRIA: Criminal Code (as amended in 1998, "persons living with each other in a community of life").

BELGIUM: Law passed on November 23, 1998 "statutory cohabitants").

CANADA: Modernization of Benefits and Obligations Act, Statutes (S.) of Canada 2000, chapter (c.) 12, "common-law partners").

DENMARK: Law on Registered Partnership 7 June 1989, nr. 372, ("registered partners"). All marriage rights except access to reproductive technologies in public health services, adoption of foreign children and church weddings. Foreigners can enter a registered partnership if both have stayed in the country for at least two years.

FINLAND: On September 2000, a partnership law was passed – granting all conjugal rights, except adoption, access to reproductive technology and church weddings.

FRANCE: Law No.99-944, November 15 1999 Civil Pact of Solidarity ("partners"). Immigration rights, employment benefits, succession in housing, income and inheritance tax benefits.

GERMANY: Law of 16 Feb. 2001 on Ending Discrimination Against Same-Sex Communities: Life Partnerships ("life partners").

HUNGARY: Civil Code, Article 685/A, as amended by Act No. 42 of 1996: "Partners— if not stipulated otherwise by law – are two people living in an emotional and economic community in the same household without being married.". Gay couples who live together and have sex will have all the rights of heterosexual spouses—including to inheritance and pensions—but will not be allowed to adopt children.

ICELAND: Law on Confirmed Cohabitation, 12 June 1996, nr. 87, ("parties to a confirmed cohabitation"). All marriage rights, except for access to reproductive technologies, joint adoption and religious wedding.

NETHERLANDS: Act of 21 December 2000 amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening Up of Marriage), nr. 9 ("spouses").

NEW ZEALAND: Family Proceedings Amendment Act 2001 ("de facto partners"); Administration Amendment Act 2001 ("de facto partners"). Residence Policy amended in 1999, to grant equality between same-sex and straight couples in term of immigration rights.

NORWAY: Law on Registered Partnership (30 April 1993, nr. 40, ("registered partners"). Same legal obligations and rights as entering into marriage except that adoption rights are excluded (Section 4), medically assisted conception is not available to lesbian couples, and a church wedding is not possible. Also, a partnership may only be registered if one or both of the parties is domiciled in the Norway and at least one of them has Norwegian nationality.

PORTUGAL: Law 7/2001, May 11. Protection of de facto unions ("de facto unions").

SOUTH AFRICA: Special Pensions Act, No. 69 of 1996 ("spouses"); Basic Conditions of Employment Act No. 75 of 1997 ("life partners"); Employment Equity Act No. 55 of 1998, (definition of "family responsibility") ("partners"); Domestic Violence Act No. 116 of 1998, (definition of "domestic relationship"); Medical Schemes Act No. 131 of 1998 (definition of "dependant")

("partners"); Revenue Laws Amendment Act No. 59 of 2000, (definition of "spouse") ("partners"). Immigration rights, employment and pension benefits.

SPAIN: Law on Urban Leasing of 24 Nov. 1994, Articles 12, 16, 24, housing rights granted to a person cohabiting "in a permanent way in an emotional relationship analogous to that of spouses, without regard to its sexual orientation.

SWEDEN: Homosexual Cohabitees Act 1987:813; Law on Registered Partnership 23 June 1994, SFS 1994:1117, ("registered partners"). All conjugal rights except adoption, access to reproductive technologies and church weddings.

UNITED KINGDOM: Any UK citizen is allowed by law to sponsor the residency application of her/his same-sex partner.

#### *C.1.3. State, Province or Federal District Level*

AUSTRALIA: Capital Territory (Domestic Relationships Act 1994); New South Wales (Property –Relationships- Legislation Amendment Act 1999); Queensland (Property Law Amendment Act 1999, "de facto spouses" and Industrial Relations Act 1999, Schedule 5); Victoria (Statute Law Amendment –Relationships- Act 2001 -"domestic partners").

CANADA: British Columbia – (Medical and Health Care Services Act, S.B.C. 1992, c. 76, "spouses"; Family Relations Amendment Act, 1997, "spouses"; Definition of Spouse Amendment Act, 1999, "spouses"; Definition of Spouse Amendment Act, 2000, S.B.C. 2000, "spouses"); Manitoba (An Act to Comply with the Supreme Court of Canada Decision in *M. v.H.*, 6 July 2001 -"common-law partners"); New Brunswick – (Family Services Act, N.B. Acts,c. F-2.2, section (s.) 112(3), as amended in 2000, spousal support obligations of unmarried persons living in a family relationship); Newfoundland (An Act to Amend the Family Law Act, S.N. 2000, c. 29,"partners"); Nova Scotia (Law Reform (2000) Act, S.N.S. 2000, c. 29,"common-law partners", "[registered] domestic partners"); Ontario (Amendments Because of the Supreme Court of Canada Decision in *M. v. H.* Act, S.O. 1999, c. 6, "same-sex partners"); Quebec (An Act to amend various legislative provisions concerning de facto spouses, S.Q. 1999, c. 14, 1st session, 36th legislature, No. 32"de facto spouses"); Saskatchewan (Miscellaneous Statutes -Domestic Relations-

Amendment Acts, 2001, "common-law partners", or persons "cohabiting as spouses" or "cohabiting in a spousal relationship"); Yukon Territory (Dependant's Relief Act, Revised (as amended in 1998 "common law spouses"; Family Property and Support Act, R.S.Y. as amended 1998, "spouses"; Estate Administration Act, S.Y. 1998, c. 7, ss. 1, 74 "common law spouses").

SPAIN: Catalonia (Law 10/1998, July 15, "stable unions of couples"- All rights except adoption); Aragón (Law 255, March 26 1999- "unmarried stable couples"- All rights except adoption); Navarra (Law 6/2000, July 3, "stable couples"); Valencia (Law no. 93, April 9 2000, "de facto unions").

SWITZERLAND: Geneva (Law 7611, February 15 2001, "partners").

UNITED KINGDOM: Scotland (Adults with Incapacity Act 2000, s. 87(2) ("nearest relative"); Housing Act 2001, s. 108 ("family members" or "spouses").

UNITED STATES: California (Cal. Statutes 1999, chapter 588, "domestic partners"); District of Columbia (D.C. Code section (s.) 36-1401 11 June 1992, D.C. Law 9-114, "domestic partners"); Hawaii (Hawaii Revised Stat., 572C-4 1997 "reciprocal beneficiaries"); Maine (A state law requires health insurance companies to offer benefits to domestic partners if they offer them to married couples. All state and University of Maine employees have domestic partner benefits); Vermont (An Act Relating to Civil Unions, 2000 Vermont Stat. No. 91, 26 April 2000, "parties to a civil union", included in "spouse", "family", etc.).

## C.2 Access to assisted fertilization, adoption and rights of non-legal parents

### *C.2.1 National or Federal Level*

AUSTRALIA: In July 2000 the Federal Court ruled that Victoria state law banning participation of single women in reproductive technology programs was in conflict with the Federal Sex Discrimination Act, which makes it unlawful to discriminate on the basis of sex or marital status.

DENMARK: A partner in a registered partnership can adopt the children of her/his partner unless the child is adopted from a foreign country.

ICELAND: Law on Confirmed Cohabitation, 12 June 1996, nr. 87, gives same sex couples joint custody of the children of either partner. Both partners then become the children's guardians and should the natural parent die, the other partner the children's step parent - automatically becomes their sole guardian.

NETHERLANDS: From 1 April 2001, the law in the Netherlands permits adoption by same-sex couples

NORWAY: A same-sex couple who have registered their partnership may share parental authority.

NEW ZEALAND: Health Funding Authority permits lesbian couples and single women to access state-funded fertility treatments (July 2000).

UNITED KINGDOM: Unmarried people and same-sex couples are allowed to adopt children (November 2002)

#### *C.2.2 State, Province or Federal District Level*

CANADA: Joint adoption by same sex couples allowed in Alberta, British Columbia (also allows both members of same-sex couples to register as parents on a child's birth certificate), Manitoba, Northwest Territories, Newfoundland, Nova Scotia, Ontario and Quebec.

UNITED STATES: California (The state's adoption law allows gay couples to jointly adopt using the same process as married couples; partners who register with the secretary of state's office can adopt a partner's child from 1 January); Vermont (second-parent adoption is lawful).