Equal Rights to Marry and Found a Family

International human rights law can be said to be very family-friendly. A basic assumption underlying the entitlement to protection of the family by the state is that "the family is the natural and fundamental group unit of society" – a phrase found in Articles 16 of the Universal Declaration of Human Rights, 23.1 of the International Covenant on Civil and Political Rights and 10.1 of the International Covenant on Economic, Social and Cultural Rights. A slightly expanded wording is found in the 1989 UN Convention on the Rights of the Child, whose Preamble refers to "the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children".

But the family appears to be not just a "unit", be it natural or otherwise. International human rights law instruments that make up the international bill of rights, in the first sentences of their preambles, refer to "the human family", meaning all of humankind as one "family", presumably as opposed to other species. Therefore, apparently, no human person can ever be absolutely orphaned – or is the "human family" here just a metaphor?

So, the question is, unsurprisingly, what is the family? How does it relate to marriage and what type of marriage, if any, has to be recognised as the basis of the family? The notion of the family has changed over time in most contemporary cultures, and this change is far from over. Family laws have been following suit, accordingly. If anything, with the new reproductive technologies, types of adoption, and the evolving forms of marriage, it is almost certain that, in the not too distant future, the "family" will come in even more shapes and sizes than the rich variety of historic units under that name.

Fundamental rights related to marriage and the family in international human rights law include:

(i) The protection from interference with one's family, analogous to and mentioned together with, the protection from interference with one's privacy, home or correspondence – the right to be free from "arbitrary interference" with one's family (Article 12 UDHR); from "arbitrary or unlawful interference" with one's family (Article 17 ICCPR); or the "right to respect for his (…) family life" (Article 8 ECHR).

(ii) The right to marry and found a family (Article 16.1 UDHR, Article 23.2 ICCPR, and Article 12 ECHR, among others).

(iii) Certain other rights construed with reference to the family – including the protection of the family "by society and the state" (Article 16.3 UDHR, Article 23.1 ICCPR, Article 10.1 ICESCR, etc.).

The rights to equality related to marriage and the family have been interpreted to comprise, *inter alia*:

(i) Equality between spouses, i.e. equal rights of spouses "as to marriage, during marriage and at its dissolution" (Article 16. 1 UDHR, Article 23.4 ICCPR, as well as the detailed provisions of Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, which is honoured in the breech in many countries that have made reservations on this article in favour of sharia law or custom).

(ii) Non-discrimination in relation to the right to marry and found a family – the equal rights of each person "of full age" (Article 16.1 UDHR, Article 23.2 ICCPR, Article 12 ECHR), having a protected characteristic, such as race, nationality or religion, to marry and found a family, on an equal basis with persons who do not have that characteristic.

It is this second aspect of family rights equality, protected by common Article 2 of ICCPR and ICESCR and Article 26 ICCPR, as well as regional treaties, which is the focus of this issue of *The Equal Eights Review.* The materials published in these pages tackle some of the key aspects of equality in respect to entering a marriage and founding a family without discrimination. One of the big issues of our time, same sex marriage, is the central topic of two of the articles in the Special section as well as the double Interview. Same sex marriage recognised by law realises the right to equality of each person in the enjoyment and exercise of the right to marry and found a family, without discrimination on the ground of sexual orientation.

At present, many countries around the world are considering the adoption of same sex marriage laws, including the United Kingdom. The Marriage (Same Sex Couples) Bill 2013 opens up access to the institution of marriage to same sex couples through civil ceremonies and allows religious organisations to "opt in" to conducting same sex marriage. The Equal Rights Trust participated in the consultation process, welcoming the Bill but pointing out elements of remaining sexual orientation discrimination in it. In its legal opinion, ERT took issue with the way in which the Bill seeks to balance non-discrimination against lesbian, gay and bisexual persons with religious freedom. In the unique situation of the UK, religious organisations conduct marriages that are recognised and regulated by the state – in contrast to the secular approach of countries like the Netherlands, where religious marriages have no legal value and, as Ian Curry-Sumner points out in this issue, it is a criminal offence to conduct a religious marriage before a civil marriage has taken place. Most British people marry in an Anglican or a Catholic church and this is the only marriage ceremony that takes place for them; no separate civil ceremony is necessary. In our brief to the Parliamentary Committee on the Bill, we argued that when religious organisations conduct marriages which are recognised and regulated by the state they perform a public function and that international human rights law and the UK Equality Act 2010 require such functions to be carried out in a non-discriminatory manner. While religious organisations should be free to conduct *religious ceremonies* in accordance with their beliefs and tenets, when stepping in to act in lieu of the state in a public function – conducting state-recognised marriages – churches should not be permitted to discriminate against people on the protected ground of their sexual orientation. However, the UK government has pre-empted any debate on this issue by making a very strong promise to the established church and other religious organisations that they will never be required to conduct same sex marriages, and that their exemption from the equal treatment principle will be set in stone.

In addition, ERT highlighted that the Bill contains further problematic distinctions between same sex and opposite sex couples, by preserving concepts such as adultery and consummation as solely heterosexual, indicating a lower value for homosexual fidelity. It is of course not because we are worried about adultery and consummation as such – and frankly, we would prefer to see these obsolete institutes evaporate from the law altogether and be confined to the museum of social control. But as long as adultery and consummation remain in the law, they should be used in a way that would not allow a differentiation on grounds of sexual orientation. On the other hand, the Bill, by making no amendments to the Civil Partnership Act 2004 open only to same sex couples, in effect discriminates against opposite sex couples in that it denies them access to civil partnerships. Thus, full marriage equality, regardless of sexual orientation, will not yet be achieved in the UK when this Bill is adopted, and we will continue to point at other countries, such as South Africa, for best practices where there is maximum choice of options and no sexual orientation discrimination related to marriage.

Marriage and family inequalities based on gender identity or intersex (assuming that the former does not cover the latter) are explored in Wieringa's article about Indonesia in the Special section, and in the Testimony section where we publish the reflections of Gina Wilson, an Australian intersex advocate; while Ariel Dulitzky's commentary on the case *Artavia Murillo y Otros (Fecundación* in vitro*) v Costa Rica* presents the reasoning of the Inter-American Court of Human Rights on the issue of non-discrimination, and equality in realising the wish (the emerging right?) of raising biological children – both aspects of the right to found a family. In October 2012, ERT and the University of Texas at Austin, where Professor Dulitzky is based, intervened in this case before the Inter-American Court of Human Rights.

We argued that Costa Rica had violated the rights to equality and non-discrimination recognised under Articles 1(1) and 24 of the American Convention on Human Rights. The Inter-American Court found violations of Article 1(1), reflecting arguments on gender-based, disability and other discrimination put forward in our joint brief. This case concerned the decision of the Constitutional Chamber of the Supreme Court of Costa Rica that a presidential decree authorising and regulating *in vitro* fertilisation (IVF) for married couples was unconstitutional, primarily on grounds that the practice violated the right to life of embryos as a result of the "high embryo loss rate". The applicants were married couples who were unable to conceive naturally but who were either prevented from accessing IVF due to the declaration of the Constitutional Chamber, or whose IVF treatment was interrupted by it. Some chose to travel abroad to access IVF in other countries. The Court concluded that the absolute prohibition on IVF violated a number of rights contained in the Convention, in particular the right to protection of physical integrity (Article 5(1)), to personal liberty (Article 7), to respect for private and family life (Article 11(2)) and to raise a family (Article 17(2)).

The Court also examined whether the prohibition contravened Article 1(1), which prohibits discrimination in the exercise of the rights contained within the Convention. The Court held that the prohibition on IVF violated Article 1(1) in the enjoyment of the right to respect for one's private and family life and the right to raise a family on three protected grounds: disability, gender and economic status. Reviewing the definition of "infertility" provided by the World Health

Organisation and the definition of "disability" in the Convention on the Rights of Persons with Disabilities, the Court concluded that infertility was "a functional limitation recognised as a disease". It found that the prohibition on IVF created barriers for persons with this particular disability in the enjoyment of the rights contained within the CRPD, including the right to access the necessary techniques to solve reproductive health problems. In relation to gender, the Court held that the prohibition on IVF disproportionately affected women, as infertile men might have other options (such as artificial insemination) while for infertile women IVF may be the only option for raising biological children. Further, for those couples who had already started to undergo IVF, women were disproportionately affected as they had received hormone stimulation for ovulation induction. Finally, in relation to economic status, the Court held that the prohibition of IVF had a disproportionate impact on poorer infertile couples who did not have the financial means to undergo IVF in another country.

This issue provides only a narrow glimpse into the vast area of equality rights related to marriage and family life. Many further issues had to be left untouched – polygamy, adoption, non-traditional parenting patterns and a host of other matters around the family. But we are committed to continuing the discussion in the future.

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