

# Developing Law and Policy: Progressing towards Equal Rights to Family Life

*We are experiencing a period of significant change in the way that states regulate family relationships. In particular, at the national level, new laws are being introduced across the globe to permit same-sex marriage. These moves mark a significant shift towards achieving an equal right to recognition of family relationships, at least for same-sex couples, and this progress is to be welcomed. In some parts of the globe, notably Europe, progress at the national level is developing in part as a result of regional conversations and jurisprudence in which the notion of “family life” is increasingly recognised as extending beyond “traditional” notions of a man and woman in a marriage raising their own biological children. The path of progress in this area has not always been smooth and, while advances have been made, more remains to be done at the national, regional and international levels to ensure that all people, without discrimination, have a right to recognition of and respect for their family life.*

*ERT spoke with Dr Ian Curry-Sumner, owner of Voorts Juridische Diensten, former Senior University Lecturer at Utrecht University in the Netherlands and expert on comparative family and private international law, and Mr Stephen Gilbert MP, Member of Parliament for the Liberal Democrat party in the UK and strong proponent of legislating for same-sex marriage.*

**ERT:** Your interest and expertise on matters relating to equal rights to family life are widely recognised. Dr Curry-Sumner, your expertise in international and comparative family law is well-known and Mr Gilbert, your work on the issue of equal rights for same-sex couples in the UK has been well publicised. How did you become involved in these areas?

**Ian Curry-Sumner:** Having studied family law in my second year at University, I went to the Netherlands on an Erasmus scheme and took an introductory course on Dutch family law. This sparked my interest and I subsequently applied, and was accepted, for a PhD position researching the recognition of established partnerships. Since then, over time I have become increasing-

ly specialised in private international law as well as the comparative law aspects of family law.

**Stephen Gilbert:** On this issue, like many others, my political campaigning has been shaped by my personal experiences. Coming from a working class background and growing up in rural Cornwall made it hugely difficult for me to be open and upfront with my friends and family about my sexuality and it was only in my early twenties that I finally felt able to tell people that I was gay. It's simply not right that many thousands of people



across the country experience that same level of anxiety about telling people about who they are. It's also clear that it can be very damaging to individuals and families with people failing to live their lives to the fullest, and being bullied. We don't accept this level of prejudice in other walks of life, and we shouldn't accept it based on nothing more than whom people love.

**ERT:** A debate about equal marriage rights is taking place in a number of countries at the moment. Most recently this debate has been before Parliament in the UK. Could you say a bit about the current situation as regards the right to equal marriage in the UK and, specifically, your view on the Marriage (Same Sex Couples) Bill 2013?

**Stephen Gilbert:** As the MP who first proposed a policy of equal marriage to the Liberal Democrat Party Conference in September 2010, I am delighted that the Coalition Government has brought forward this legislation that will end a discrimination and send a signal that the House of Commons values everyone in our country equally. Treating people equally is vital if we are going to tackle some of the other problems facing the LGBT community.

**Ian Curry-Summer:** I think that the Bill in the UK is slightly disappointing. It is good that the UK is finally addressing the idea of one



institute with the same name open to both same-sex and opposite-sex couples but the distinctions drawn in the Bill with respect to religious organisations is disappointing. Of course, the religious debate is important in the UK, as it is in other countries such as the Netherlands, Sweden and Denmark, but the UK government has pre-empted any debate on this issue by introducing religious exceptions before these have been properly discussed. It would have been better to have an open discussion before these exceptions were included, and it may have become apparent that not all of these exceptions are required. The government had a similar approach with the Civil Partnership Bill, which I felt was problematic, but which has unfortunately been carried on with the Marriage (Same Sex Couples) Bill.

In sharp contrast to the UK, in the Netherlands, there are no religious marriages – it is a criminal offence to conduct a religious marriage before a civil marriage has taken place. There are some exceptions from the obligation to conduct same-sex marriages for individual civil registrars with strong beliefs against same-sex marriage. My view is that registrars are civil servants and should apply the law, with their own beliefs being irrelevant. However, I am pragmatic about this and recognise that the issue of the interplay between same-sex marriage and religion arises all over the world and needs to be debated and discussed. What is disappointing in the context of the UK Bill is that the UK government has sought to pre-empt such discussion by drafting the Bill as they have.

**ERT: How does the situation in the UK compare to that of other countries in terms of equal marriage rights, and is there a particular country (or countries) which you believe is a positive example in this respect?**

**Ian Curry-Summer:** The position on the issue of recognition of same-sex couples in most countries has evolved over time and there are a variety of approaches. The Netherlands is not a good example and I strongly recommended that our system should not be replicated elsewhere. We have two formal relationship institutes next to each other – marriage and registered partnership. Anyone can choose to enter into either, and in terms of content they are virtually the same, but the name of the institute is different. This can create huge issues with, for example, the international recognition of a relationship.

In Sweden, Norway and Denmark, there were two institutes (marriage for opposite-sex couples and civil unions for same-sex couples), but over time these were both combined into marriage. These systems are better than that of the Netherlands, but not perfect as they do not give couples the opportunity to choose how to name their relationship. Some people want legal recognition of their relationship but do not want to be married.

I am a strong supporter of the South African system. Essentially, it provides for one institute which any couple can enter into. However, unlike Sweden, Norway and Denmark, in South Africa couples can determine whether they wish to call their partnership a marriage or a civil union. This allows couples to have a say in the naming of their relationship, whilst avoiding problems which arise as a result of having separate institutes such as the inherent possibilities of discrimination where different rights attach to different institutes. Instead, everyone concerned is in an equal position.

**Stephen Gilbert:** It's great news that many countries are making the move toward equal marriage and, in fact, many other

parts of the world are further ahead than most European countries. We've seen rapid progress in jurisdictions across South America as well as in many North American states, and of course South Africa and Australia. Clearly, it confounds the critics of this progressive move that the end-of-world warnings that have come from opponents just haven't happened. In many ways the trail-blazing countries are just showing that, after the initial furore has died down, equal marriage soon just becomes part of the furniture and means that other discrimination issues affecting people can be more effectively tackled.

**ERT: Can you say a bit about some of the issues around the regulation of the adoption/custody of children with regards to the sexual orientation of the parents?**

**Ian Curry-Summer:** From a global perspective, it is very interesting to compare the position in Europe to that in the United States. In Europe, we appear to have less difficulty with granting rights to the couple themselves. We see an evolution in the granting of rights. Countries always begin with rights that are restricted to the parties themselves, e.g. property rights, tax rights, name law, nationality law, i.e. things which have no influence beyond the couple. Normally the last area European countries legislate upon are aspects which relate to children within those relationships. The US is the opposite. In the US many states permit same-sex adoption, or even foster care by same-sex couples, but the couples are not permitted to formalise their relationships. This can be extremely unfair to the children and the law will need to catch up with the reality that children are growing up in same-sex relationships and have been for quite some time.

In most countries in the world it is only possible for two people to have custody of a child. This means that situations where children are raised by other than their biological parents, or where a third party is also involved, as in the case of children raised by a male same-sex couple where the child is born outside of the marriage for example, are very difficult to regulate. Unusually, in the UK, more than two people can share parental responsibility for a child, which arguably provides a more effective way of dealing with the complex situations that can arise when a child is being raised in same-sex families, as well as when relationships break down.

As a child advocate, I believe that the starting point should be the child's perspective – what does the child need to know, and to have? They should know their biological origins, which can be important for a number of reasons, including medical reasons, and also who is caring for them. The two are not necessarily the same. Social reality needs to be reflected in a more flexible approach in this area, in order to ensure that the interests of the child are protected.

**Stephen Gilbert:** From a policy perspective, the most important thing that children need is love and support and it's quite clear that same sex-couples are as able to provide that as opposite-sex couples are.

**ERT: What about the issues around assisted reproduction?**

**Stephen Gilbert:** The reality is that much will depend on the individuals concerned and their specific circumstances so it's difficult to make a generalised statement. Suffice to say that there are, of course, circumstances when it will be appropriate for

same-sex couples to be able to access reproductive services.

**Ian Curry-Sumner:** Some positive measures have been taken at a national level in some jurisdictions in the appropriate regulation of assisted reproduction. However, the issue needs to be discussed at the international level. There are various domestic approaches but assisted reproduction techniques cannot necessarily be limited to national cases – in reality, you may have a sperm donor from one country, an egg donor from another and the child may be born in yet another country. The legal approach is far too nationalistic and people are not aware that the international ramifications can be enormous. This has even led, in some cases, to people being stranded in embassies or consulates, for example because they are in a foreign country which requires them to leave due to visa restrictions, but their surrogacy arrangements are not recognised in their country of origin. This is clearly not in anybody’s best interests and the position needs to change.

**ERT: Are there other ways in which people are currently excluded from family life, on grounds of sexual orientation (or indeed other grounds), which you would like to draw attention to?**

**Ian Curry-Sumner:** Of course, in some parts of the world, some countries still have the death penalty for same-sex relationships. However, within Europe, due in part to the European Convention for the Protection of Human Rights and Fundamental Freedoms and, in the European Union, the Charter of Fundamental Rights of the European Union, certain minimum standards have arisen, which are very proactive towards sexual orientation laws. The discussion is now focussed around relationship laws, rather than

issues of criminalisation, which is a drastic improvement. With “family life” as a human rights convention concept, the court in Strasbourg has made enormous steps. From an academic perspective, I can see that overall there is development and positive progress, although I imagine that some activists would disagree with this because there is still work to be done in certain areas.

**Stephen Gilbert:** In the same way that extending the vote to women or ending apartheid wasn’t the end of the issues facing those communities, delivering equal marriage isn’t the end of the road of fighting for equality for LGBT people. There’s still work to do in tackling homophobic bullying, promoting good health and good mental health, encouraging diversity in the work place and delivering media images that reflect the reality. By ending the mantra of separate but equal, which gave a “wink and nod” that gay and lesbian people were somehow different, it does mean that all these other issues can be more easily tackled.

**ERT: In your view, from a global perspective, which have been the most significant changes in recent years in relation to advancing the equal right to family life?**

**Ian Curry-Sumner:** A lot of the most significant changes have come about following judgments from the European Court of Human Rights and, to a lesser extent, the Court of Justice of the European Union. A number of seminal cases have been heard by the European Court of Human Rights, for example *Goodwin v United Kingdom*. In some ways, it could be said that the courts are making slow progress but they understand that they have to strike a balance between all of the various member states. If they went too far, they might face a political backlash.

Sometimes, to achieve progress, it must be accepted that there will be times when movement appears relatively limited from the point of view of certain jurisdictions, whereas the same developments appear very liberal to other states.

**ERT: Apart from issues relating to family life, what have been some of the most effective recent strategies for effecting change and advancing the rights of those who have been marginalised on the basis of their sexual orientation?**

**Stephen Gilbert:** It's clear that one of the most significant ways of getting legislative change is to get openly LGBT law-makers into office. There is some great research underway showing a direct correlation between the measures a territory takes to end discrimination and the number of openly gay, lesbian, bisexual or transgendered law makers.

**Ian Curry-Sumner:** A lot of progress has been made through the work of activist groups lobbying parliament. As an academic rather than a lobbyist, I can't comment on specific strategies of activists when lobbying or of their relative efficacy, but it is certainly clear that lobbying is a useful strategy. I would also say that the internet has been instrumental in connecting marginalised groups from different counties, and this has contributed to effecting change. Activist

groups and sexual orientation lawyers have formed vast networks in recent years, which are kept up to date on developments all over the world. For example, when a new law was passed permitting same-sex marriage in Argentina, people elsewhere were informed about it very quickly through such networks. This communication is very powerful and provides more ammunition for making equality arguments.

**ERT: What would you most like to see in terms of change over the next few years?**

**Ian Curry-Sumner:** I think that attention must be paid to cross-border recognition of relationships within the EU. We currently have a number of regulations dealing with cross-border jurisdiction in relation to divorce, and recognition of divorce proceedings, but not the relationships themselves. It needs to be addressed by the EU in relation to both same-sex and opposite-sex relationships. This, for me, is the most important area in which change is necessary in order to avoid discrimination against couples in having their relationships regulated across borders.

**Stephen Gilbert:** I want to see equal marriage delivered in the UK and then the Government to come forward with a comprehensive strategy to tackle the other issues facing the LGBT community. Equal marriage is a step in the right direction, but the battle is far from over.

Interviewer on behalf of ERT:  
Richard Wingfield