



Doc. 14620

21 September 2018

Private and family life: achieving equality regardless of sexual orientation

Report¹

Committee on Equality and Non-Discrimination

Rapporteur: Mr Jonas GUNNARSSON, Sweden, Socialists, Democrats and Greens Group

Summary

The right to respect for private and family life is a fundamental right, enshrined in Article 8 of the European Convention on Human Rights. This right is of equal importance in everyone's lives, yet progress towards achieving equality in this field regardless of sexual orientation is uneven. This poses real and serious problems in ordinary people's everyday lives. Discrimination unfortunately remains a reality for many rainbow families.

Since the Parliamentary Assembly last examined this issue in 2010, there have been significant developments in European case law, and important advances towards greater equality for rainbow families have been achieved in member States. These developments show that more efforts are however still required from member States in order to achieve equality in the field of private and family life regardless of sexual orientation.

In order to fulfil their responsibility to protect and promote the human rights of all those within their jurisdiction and to eliminate discrimination on all grounds, including sexual orientation, member States should avoid perpetuating discriminatory treatment and should promote activities aimed at eliminating the prejudice in society that enables such discrimination to persist.

1. Reference to committee: [Doc. 13956](#), Reference 4234 of 14 October 2016.



Contents	Page
A. Draft resolution	3
B. Explanatory memorandum by Mr Jonas Gunnarsson, rapporteur	5
1. Introduction	5
2. Why does legal recognition of rainbow families matter?	6
3. Same-sex couples	6
3.1. Legal recognition of same-sex partnerships	6
3.2. Access to rights of same-sex couples	9
4. Rainbow families with children	11
4.1. Situation in member States	11
4.2. European and international case law	12
4.3. Well-being of children in rainbow families	13
5. Trans and intersex people and the legal recognition of family ties regardless of sexual orientation ..	14
6. Is there an obligation on States to recognise same-sex marriage?	15
7. Conclusions	16

A. Draft resolution²

1. The right to respect for private and family life is a fundamental right, enshrined in Article 8 of the European Convention on Human Rights (ETS No. 5). This right is of equal importance in everyone's lives, yet progress towards achieving equality in this field regardless of sexual orientation has often been slower than in other fields.

2. Same-sex couples and other rainbow families exist throughout Europe, whether or not legislation provides for them. These families have the same needs as any other family, yet many are deprived of their rights on the grounds of the sexual orientation or gender identity of the partners or parents. It is crucial and urgent that our legal systems acknowledge this reality and that States work to overcome the discrimination experienced by both adults and children in rainbow families.

3. Since the Parliamentary Assembly last considered these issues in its [Recommendation 1474 \(2000\)](#) on the situation of lesbians and gays in Council of Europe member States and [Resolution 1728 \(2010\)](#) on discrimination on the basis of sexual orientation and gender identity, and since the Committee of Ministers adopted its [Recommendation CM/Rec\(2010\)5](#) on measures to combat discrimination on grounds of sexual orientation or gender identity, there have been significant developments in the case law of the European Court of Human Rights, and important advances towards greater equality for rainbow families have been achieved in member States. These developments throw new light on the extent of the efforts required from member States in order to achieve equality in the field of private and family life regardless of sexual orientation.

4. In the light of the above, and bearing in mind also the relevant recommendations made in its [Resolution 2048 \(2015\)](#) on discrimination against transgender people in Europe and [Resolution 2191 \(2017\)](#) on promoting the human rights of and eliminating discrimination against intersex people, as well as the recommendations made in this field by the Council of Europe Commissioner for Human Rights and numerous treaty bodies of the United Nations, the Assembly calls on Council of Europe member States to:

4.1. ensure that their constitutional, legislative and regulatory provisions and policies governing the rights of partners, parents and children are applied without discrimination on grounds of sexual orientation or gender identity, eliminating all unjustified differences in treatment based on these grounds;

4.2. refrain from adopting changes to their Constitutions and legislation that would prevent the recognition of same-sex marriage or of other forms of rainbow families, and instead leave such decisions to the legislature or the highest court;

4.3. align their constitutional, legislative and regulatory provisions and policies with respect to same-sex partners with the case law of the European Court of Human Rights in this field, and accordingly:

4.3.1. ensure that same-sex partners have available to them a specific legal framework providing for the recognition and protection of their unions;

4.3.2. grant equal rights to same-sex couples and different-sex couples as regards succession to a tenancy;

4.3.3. ensure that cohabiting same-sex partners, whatever the legal status of their partnership, qualify as dependants for the purposes of health insurance cover;

4.3.4. when dealing with applications for residence permits for the purposes of family reunification, ensure that, if same-sex couples are not able to marry, there is some other way for a foreign same-sex partner to qualify for a residence permit;

4.4. ensure that other basic needs which are fundamental to the regulation of a relationship between a couple in a stable and committed relationship are provided for without discrimination on the grounds of sexual orientation, and accordingly:

4.4.1. as regards migration, extend residence rights to same-sex partners on an equal footing with different-sex partners and give equal recognition to same-sex partnerships in the context of applications for citizenship;

4.4.2. as regards situations giving rise to the need for medical care, recognise same-sex partners as next of kin for medical purposes and extend to them entitlements to leave for the purpose of caring for a sick partner or for the sick parent of a partner, without discrimination on the grounds of sexual orientation;

2. Draft resolution adopted unanimously by the committee on 19 September 2018.

4.4.3. as regards property, treat as joint property the possessions acquired by a same-sex couple during their relationship without discrimination on the grounds of sexual orientation;

4.4.4. as regards criminal law, ensure the applicability of statutory protection against domestic violence and guarantee the right to refuse to testify against one's partner in criminal procedures without discrimination on the grounds of sexual orientation;

4.4.5. as regards separation, ensure the applicability to same-sex couples of rules on alimony without discrimination on the grounds of sexual orientation;

4.4.6. as regards death and inheritance, extend access to survivor's pensions to same-sex couples as well as entitlements to compensation for wrongful death of one's partner and entitlements to inherit when one's partner dies intestate, and grant exemption from inheritance tax to same-sex couples, without discrimination on the grounds of sexual orientation;

4.5. protect the rights of parents and children in rainbow families without discrimination based on sexual orientation or gender identity, and accordingly:

4.5.1. in line with the case law of the European Court of Human Rights, ensure that all rights regarding parental authority, adoption by single parents and simple or second-parent adoption are granted without discrimination on the grounds of sexual orientation or gender identity;

4.5.2. provide for joint adoption by same-sex couples without discrimination on the grounds of sexual orientation;

4.5.3. extend automatic co-parent recognition to the same-sex partner of the parent who has given birth in all cases where this would be extended to a mother's male spouse;

4.5.4. where single women are granted access to medically assisted procreation, ensure that such access is granted without discrimination on the grounds of sexual orientation or gender identity;

4.5.5. where unmarried different-sex couples are granted access to medically assisted procreation, ensure that such access is granted to same-sex couples;

4.6. in addition to the recommendations already adopted by the Assembly in [Resolution 2048 \(2015\)](#) and [Resolution 2191 \(2017\)](#) regarding the effects of legal gender recognition of transgender and intersex people on their access to or the continuity of their civil partnership or marriage and of rights of spouses and children, provide for transgender parents' gender identity to be correctly recorded on their children's birth certificates, and ensure that persons who use legal gender markers other than male or female are able to have their partnerships and their relationships with their children recognised without discrimination;

4.7. work actively, in consultation with civil society, to promote acceptance of and respect for rainbow families in our societies.

5. The Assembly emphasises that intolerance that may exist in society towards people's sexual orientation or gender identity can never be used as a justification for perpetuating discriminatory treatment, as this serves, unacceptably, to legitimise violations of human rights. States must on the contrary work vigorously to combat the prejudice that enables such discrimination to persist, in order to fulfil their responsibility to protect and promote the human rights of all those within their jurisdiction and to eliminate discrimination on all grounds, including sexual orientation or gender identity.

B. Explanatory memorandum by Mr Jonas Gunnarsson, rapporteur

1. Introduction

1. The right to respect for private and family life is a fundamental right, enshrined in Article 8 of the European Convention on Human Rights (ETS No. 5, “the Convention”). This right is of equal importance in everyone’s lives, yet progress in this field towards achieving equality regardless of sexual orientation has often been slower than in other fields.

2. In its [Recommendation 1474 \(2000\)](#) on the situation of lesbians and gays in Council of Europe member States, the Parliamentary Assembly called on member States to “adopt legislation which makes provision for registered partnerships”. It again noted in its [Resolution 1728 \(2010\)](#) on discrimination on the basis of sexual orientation and gender identity, that the denial of rights to *de facto* “LGBT families” in many member States needed to be addressed. The Assembly subsequently dealt with a number of key issues affecting the private and family lives of transgender people in its [Resolution 2048 \(2015\)](#) on discrimination against transgender people in Europe (focusing on discrimination based on gender identity), and affecting the private and family lives of intersex people in its [Resolution 2191 \(2017\)](#) on promoting the human rights of and eliminating discrimination against intersex people (focusing on discrimination based on sex characteristics). However, it has not examined discrimination in the field of private and family life based on sexual orientation since 2010, and some additional issues have come to light since the adoption of the aforementioned resolutions.

3. For its part, in 2010, the Committee of Ministers adopted [Recommendation CM/Rec\(2010\)5](#) on measures to combat discrimination on grounds of sexual orientation and gender identity. The standards set out in this recommendation as regards respect for private and family life were for the most part based on the case law of the European Court of Human Rights (“the Court”) as it then stood, and essentially recommended that member States should ensure that whatever legislation was in place should be applied without discrimination.

4. Since the adoption of these texts, the Court has been called upon to deliver judgments in a number of cases concerning various aspects of the right to private and family life of lesbian, gay, bisexual, transgender and intersex (LGBTI) people and their children, and there have been significant developments in its case law. In the course of the same period, many Council of Europe member States have adopted legislation extending marriage to same-sex couples or granting them other forms of legal recognition, for example in the form of civil partnerships or unions. Others have extended the set of rights granted to same-sex couples under national legislation. There have also been developments extending the possibilities for adoption or co-adoption by persons living in same-sex couples. These important advances towards greater equality for rainbow families have however at times been accompanied by vocal protests from some parts of society, and some member States have changed their Constitutions or laws in order to prohibit same-sex marriage.

5. In parallel, other countries around the world, as well as other regional human rights bodies (notably the Inter-American Court of Human Rights) and the United Nations, are increasingly recognising the need to guarantee genuine equality for rainbow families, and changing their laws or adopting new standards to this end.

6. This report takes as its starting point the reality that same-sex couples and other rainbow families exist throughout Europe, whether or not legislation provides for them, and that the lives of human beings are adversely affected every day when these families are deprived of rights. I believe it is crucial and urgent that our legal systems acknowledge this reality and that we work to overcome the discrimination experienced by both adults and children in rainbow families. I wish both to highlight the standards that already clearly apply to Council of Europe member States, and that should be implemented by all of them, and to explore additional paths forward to achieving full equality in the field of private and family life, regardless of sexual orientation.

7. I wish to note from the outset that although this report primarily focuses on rainbow families composed of same-sex partners, with or without children, or of individual lesbian or gay persons who are parents or who wish to raise children, there are many other forms of rainbow families. Nothing in this report should be understood as limiting the notion of rainbow families to the forms just described. Moreover, while I have used the term “same-sex partners” and similar variants throughout this report, as they are the terms familiar to most readers, it should be recognised that the term “same-gender partners” is more accurate. This term is not yet widely used, but is, rightly, becoming increasingly common.

2. Why does legal recognition of rainbow families matter?

8. Rainbow families have the same needs as any other families. Yet differences in treatment between rainbow families and other families abound. For instance, same-sex partnerships or marriages recognised in one country are not always recognised when borders are crossed; States sometimes hinder the recognition of same-sex partnerships in other countries where this is available, by refusing to provide necessary documents; children being raised by same-sex couples do not always benefit from equal legal relationships with both parents; in many cases, neither adoption nor co-adoption by persons living in same-sex couples are provided for; freedom of movement is in practice denied to families with a transgender parent whose gender is not legally recognised.

9. When same-sex partnerships are not recognised, couples are deprived of rights that different-sex partners take for granted. When one partner dies, their same-sex partner may be denied a survivor's pension, and may even lose the home the couple shared, although a different-sex partner in the same situation could have remained. Partners may be denied the right to see each other when one partner receives emergency care – depriving them of the care and support they most need in difficult times, and that would not have been refused to different-sex partners. Same-sex partners may also be denied access to family allowances or more favourable rules with respect to taxation. Children of same-sex couples may likewise be deprived of the care of the person who has always been a parent to them, if one partner dies or the couple separates. Moreover, if the couple itself is not recognised, there is generally also no legal framework to regulate the partners' rights and mutual obligations in the event that they separate.³

10. These differences not only pose real and serious problems in ordinary people's everyday lives, but are unjustified and constitute clear discrimination. As politicians, we have a responsibility to eliminate such violations of human rights. At the same time, we must vigorously combat the prejudice that enables these forms of discrimination to persist.

3. Same-sex couples

11. To take stock of where member States presently stand and of the current state of the case law of the European Court of Human Rights in this field, I will first look at how relationships between same-sex couples are regulated. I will look at the rights of same-sex couples and single gay or lesbian persons raising or wishing to raise children in the next chapter of the report.

3.1. Legal recognition of same-sex partnerships

3.1.1. Legal recognition in member States

12. Thirty years ago, only a handful of European countries recognised any rights to cohabiting same-sex couples, for example in the fields of migration law, rent law or inheritance tax.⁴ In 1989, Denmark became the first country in the world to grant legal recognition to same-sex couples as such in the form of registered partnerships. In 2001, the Netherlands became the first country to allow same-sex couples to marry. Since then, legal recognition of same-sex partnerships in Europe has constantly increased. By 2010, six Council of Europe States had granted same-sex couples equal access to marriage and 13 had passed some kind of legislation allowing same-sex couples to register their partnerships. By 2015, these numbers had grown to 11 and 18 respectively.⁵

13. As of August 2018, amongst Council of Europe member States, 15 recognise same-sex marriage⁶ and 22 provide for forms of registered partnerships.⁷ Ten of these 22 States also provide for same-sex marriage; the remaining 12 member States provide for registered partnerships but do not recognise same-sex marriage. Of these 12 States, 10 provide for registered same-sex partnerships (civil unions) having rights similar to

3. See notably Council of Europe Commissioner for Human Rights, "Access to registered same-sex partnerships: it's a question of equality", Human Rights Comment, 21 February 2017; Waaldijk K (ed.) (2017), "More and more together: Legal family formats for same-sex and different-sex couples in European countries: Comparative analysis of data in the LawAndFamilies database", Families and Societies Working Paper Series 75; see also the views adopted by the United Nations Human Rights Committee in *C. v. Australia*, 28 March 2017, CCPR/C/119/D/2216/2012, finding a violation of the International Covenant on Civil and Political Rights where an Australian national married abroad to her same-sex partner was unable to divorce in Australia.

4. Waaldijk K (Ed.) (2017), *op. cit.*, p. 43.

5. See *Schalk and Kopf v. Austria*, Application No. 30141/04, judgment of 24 June 2010, paragraphs 27 and 28; *Oliari and others v. Italy*, Application No. 18766/11, judgment of 21 July 2015, paragraphs 53 and 54.

those of married couples.⁸ The other two States provide for the legal recognition of same-sex partnerships, but with limited rights compared with those of married couples.⁹ In total, 27 of the Council of Europe's 47 member States currently provide some form of legal recognition of same-sex partnerships, and 25 of these provide either full marriage equality or rights similar to those of married couples.

14. The trend towards increasing legal recognition of same-sex couples moreover continues, as additional countries change their laws to provide legal recognition where it did not previously exist, or to provide a higher level of recognition than previously. In December 2017, the Austrian Constitutional Court repealed the legal provisions that denied same-sex couples access to marriage. The ruling will take effect from 31 December 2018 (unless the legislator acts to repeal or amend the impugned provisions earlier), bringing the number of Council of Europe member States recognising same-sex marriage to 16.¹⁰

15. It is important to note that the impetus for the above changes has essentially been driven from within member States, based on societal demand. In some States, it is the government that has introduced legislation to ensure marriage equality or provide for registered partnerships for same-sex couples; in others, a private member's bill has been at the origin of such legislation. Sometimes, court judgments finding discrimination in individual cases have prompted States to act. In Ireland, marriage equality was achieved through a referendum, about which Ireland's Minister for Children and Youth Affairs, Katherine Zappone, spoke in detail at the Conference on private and family life for LGBTI people held, under the auspices of the Danish Chairmanship of the Committee of Ministers, in Copenhagen on 2 March 2018.¹¹

16. At the same time, it must be acknowledged that these changes have not occurred overnight or without debate, in particular as concerns marriage equality. In France, large rallies were organised to contest the introduction of marriage equality in 2013. Similar demonstrations against the introduction of same-sex civil unions were held in Italy in 2016. In Hungary, registered partnerships have been available to same-sex couples since 2009, but the new Constitution that came into effect in 2012 limited marriage to different-sex couples. In Croatia, registered same-sex partnerships were introduced in 2014, but only after a referendum had been held in 2013 that modified the Constitution so as to define marriage as being between a man and a woman.¹² In Slovenia, where same-sex partnerships have enjoyed legal recognition since 2005, the National Assembly passed a bill in March 2015 amending the Marriage and Family Relationships Act so as to express marriage in gender-neutral terms. However, the amendment was rejected by referendum in December 2015 (albeit with only 36% participation). A more inclusive form of civil partnerships was nevertheless approved by parliament and came into effect in February 2017.¹³ In these two cases, the referendum to limit marriage to a union between a man and a woman was called following an initiative of civil society. A similar initiative in the Slovak Republic in February 2015 failed, however, due to low voter turn-out (21.4%).

17. In other countries, no form of legal recognition of same-sex partnerships exists. Amendments have moreover been proposed or made to the Constitution in some of these countries in order to restrict the definition of marriage to cover (only) marriages between a man and a woman. In Armenia, such amendments were introduced as part of a wide-ranging package of constitutional amendments approved by referendum in December 2015.¹⁴ In Romania – in parallel to the highly publicised court battle of a Romanian-American gay couple married in Belgium and seeking to move together to Romania (see section 3.2.1 below) – a popular initiative to hold a referendum in order to modify the Constitution to define marriage as a union between a man and a woman collected 3 million signatures in 2016, and a referendum has been announced for 7 October 2018. Recent reports moreover suggest that, if passed, the referendum would redefine the family itself as based on marriage between a man and a woman, a definition that would be in clear conflict with the case law

6. Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, United Kingdom (except in Northern Ireland).

7. Andorra, Austria, Belgium, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Slovenia, Spain, Switzerland, United Kingdom (except in Northern Ireland).

8. Andorra, Austria, Croatia, Cyprus, Greece, Hungary, Italy, Liechtenstein, Slovenia, Switzerland.

9. Czech Republic and Estonia.

10. Decision G 258/2017 ua; for a summary of the judgment and its consequences, see the press release of the Constitutional Court, https://www.vfgh.gv.at/medien/Ehe_fuer_gleichgeschlechtliche_Paare.en.php.

11. Conference on private and family life for LGBTI people, co-organised by the Danish Chairmanship of the Committee of Ministers, the Danish Parliament and the Committee on Equality and Non-Discrimination, *AS/Ega (2018) PV 02 add*.

12. *Le Courrier des Balkans*, "La Croatie vote à 65% contre le mariage gay", 1 December 2013; "LGBT: la Croatie dit oui aux unions civiles homosexuelles", 16 July 2014.

13. *Le Courrier des Balkans*, "Slovénie: les Slovènes ont dit 'non' au mariage pour tous", 19 December 2015; "Slovénie: les premiers couples de même sexe se sont dit 'oui'", 5 March 2017.

14. RFE/RL, "Armenian Constitution to Ban Same-Sex Marriage", 4 December 2015.

of the European Court of Human Rights.¹⁵ In Georgia, the constitutional definition of marriage was recently changed to mean “a union of a woman and a man for the purpose of founding a family” as part of a series of constitutional amendments made by parliament and that will come into force following the next presidential election in 2018.¹⁶

18. In the Russian Federation, where legislation prohibiting so-called “gay propaganda” is in force, a gay couple who married in Denmark and whose marriage, having been legally contracted abroad, was registered in Moscow in January 2018, faced a wide-scale and violent backlash when their story was broadcast in the media, including hate speech by politicians, police intimidation and death threats. In fear for their safety, the couple was forced to leave the country. Moreover, the civil servant who had registered the marriage was sacked.¹⁷

19. It is fair to say that there are currently contrasting positions among Council of Europe member States as regards the highest level of legal recognition available to couples, namely marriage equality. However, there is equally a clear trend towards granting increased recognition of same-sex partnerships – both as regards the legal status of the partnerships themselves and as regards the access to other rights that such partnerships entail. These societal changes have moreover occurred very fast. In 2001, when the Netherlands introduced same-sex marriage, no one could have imagined that such a short time later, so many other countries would have followed suit or taken such great strides in this direction.

3.1.2. Case law of the European Court of Human Rights on the right to private and family life and the need for legal recognition and protection of the relationships of same-sex couples¹⁸

20. It has been established for more than 40 years that a person’s sexual life is an important part of their private life within the meaning of the European Convention on Human Rights.¹⁹ In 1981, the European Court of Human Rights found that the existence of legislation criminalising homosexual acts between consenting adults constituted in itself a breach of the right to private life.²⁰ Such legislation is no longer in force in any Council of Europe member State.

21. In 2010, in its judgment in the case of *Schalk and Kopf v. Austria*, the Court noted that same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships, and unanimously held that the relationship of a cohabiting same-sex couple living in a stable de facto partnership fell within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would.²¹ The fact that same-sex couples enjoy the right to family life is now well-established case law.²² In 2013, the Court further found that there was no justification for barring same-sex couples from entering into civil unions that had been created as an alternative to marriage for different-sex couples; doing so was thus in breach of the Convention.²³

22. The Court has made clear that same-sex couples are in need of legal recognition and protection of their relationship. In 2015, it moreover concluded that States have a positive obligation to ensure that same-sex partners have available a specific legal framework providing for the recognition and protection of their unions, a finding reaffirmed in 2017.²⁴ It has emphasised that the absence of such a framework leaves couples in a legal vacuum and fails to take account of social reality.²⁵

15. *Le Courier des Balkans*, “Roumanie: trois millions de signatures contre le mariage homosexuel”, 25 May 2016; “Roumanie: un référendum pour interdire le mariage homosexuel”, 12 September 2017; *digi24.ro*, “Referendum privind redefinirea familiei în Constituție, pe 7 octombrie”, 1 September 2018.

16. *Legislative Herald of Georgia*, texts of current and future constitutions, <https://matsne.gov.ge/en/document/view/30346>.

17. Marc Bennetts, “Gay married couple flee Russia after receiving death threats”, *The Guardian*, 29 January 2018.

18. I wish to thank here Professor Robert Wintemute, King’s College London, for the presentation on the Court’s case law made to our committee at the Conference on private and family life for LGBTI people, held in Copenhagen on 2 March 2018.

19. *X. v. Federal Republic of Germany*, Application No. 5935/72, decision of 30 September 1975.

20. *Dudgeon v. the United Kingdom*, Application No. 7525/76, judgment of 22 October 1981.

21. *Schalk and Kopf v. Austria*, Application No. 30141/04, judgment of 24 June 2010.

22. See, *inter alia*, *Gas and Dubois v. France*, *X. and others v. Austria*, *Vallianatos and others v. Greece*, *Hämäläinen v. Finland*, *Oliari and others v. Italy*, *Pajic v. Croatia*, *Orlandi and others v. Italy* (citations below).

23. *Vallianatos and others v. Greece*, Applications Nos. 29381/09/09 and 32684/09, judgment of 7 November 2013.

24. *Oliari and others v. Italy*, Applications Nos. 18766/11 and 36030/11, judgment of 21 July 2015; *Orlandi and others v. Italy*, Applications Nos. 26431/12 and others, judgment of 14 December 2017.

25. *Orlandi and others v. Italy* (2017).

23. The Court considered in the above cases that no prevailing community interest had been shown to outweigh the need of same-sex couples to have their partnerships legally recognised or to justify the situation where the applicants' relationship was devoid of any recognition and protection. It is in my view impossible today to imagine any circumstances in which such a prevailing interest could be demonstrated – even in countries where there is strong opposition to same-sex marriage. Indeed, while it has not to date found there to exist an obligation under the Convention for States to take the specific step of recognising same-sex marriage,²⁶ the Court has repeatedly found that the protection of the traditional family (usually the main reason advanced for depriving same-sex couples of rights) is not a reason capable of justifying different treatment on grounds of sexual orientation as regards access to rights of same-sex couples.²⁷ It has moreover stressed States' obligation, in their choice of means designed to protect the family, to take into account developments in society and changes in the perception of social, civil status and relational issues, including the fact that there is not just one way or one choice when it comes to leading one's family or private life.²⁸

24. It is also worthy of note that at United Nations level, the Committee on Economic, Social and Cultural Rights has called on a number of European countries in recent years, including Bulgaria, the Russian Federation, the Slovak Republic, and "the former Yugoslav Republic of Macedonia", to provide legal recognition to same-sex couples and/or to extend to them benefits reserved to married couples.²⁹ The Committee on the Elimination of Discrimination Against Women has also in recent years called on European States to complete the adoption of pending regulations or legislation recognising same-sex partnerships (Estonia, Serbia) and emphasised the importance of equal treatment of same-sex and other partnerships (Liechtenstein, Luxembourg).³⁰

3.2. Access to rights of same-sex couples

25. Whatever the specific framework within which legal recognition is made available to same-sex couples, the most immediate issue at stake for them is their access to substantive rights. Being deprived of rights that different-sex couples take for granted – such as being able to visit one's partner in emergency care, not losing one's abode when one's partner dies, or being able to reside in the same country as one's partner – has a direct impact on same-sex couples' lives. This may be more important on a practical level than the name (marriage, registered partnership, civil union, etc.) that is used to refer to a relationship in law.

3.2.1. European and international case law on access to rights of same-sex couples

26. Same-sex couples are frequently deprived of access to specific rights on the sole grounds of their sexual orientation. The Court's case law has however made clear that where sexual orientation is at stake, differences in treatment can only be justified by particularly convincing and weighty reasons, including in the field of private and family life. States' margin of appreciation in this field is thus narrow, and measures taken must not only pursue a legitimate aim but must also be shown to be necessary to achieve that aim.³¹

27. The Court has thus made clear that unmarried same-sex couples must have access to the same rights and duties as unmarried different-sex couples in the context of *succession to a tenancy*, and that the blanket exclusion of persons living in a homosexual relationship from succession to a tenancy cannot be accepted as necessary for the protection of the family viewed in its traditional sense.³²

28. In the field of *health insurance cover*, it has found that a legal provision that qualified as dependants only a close relative of the insured person or their cohabitee of the opposite sex – excluding the insured person's cohabiting same-sex partner – was discriminatory and in breach of the Convention.³³

26. See most recently *Orlandi and others v. Italy* (2017).

27. *Karner v. Austria*, Application No. 40016/98, judgment of 24 July 2003 and *Kozak v. Poland*, Application No. 13102/02, judgment of 2 March 2010 (in the context of succession to a tenancy); *X. and others v. Austria*, Application No. 19010/07, judgment of 19 February 2013 (second-parent adoption); *Taddeucci and McCall v. Italy*, Application No. 51362/09, judgment of 30 June 2016 (residence permit for family reunification). See further below.

28. *Bayev and Others v. Russia*, Application No. 67667/09, judgment of 20 June 2017.

29. See respectively E/C.12/BGR/CO/R.4-5, paragraph 17, 11 December 2012; E/C.12/RUS/CO/6, paragraph 23, 16 October 2017; E/C.12/SVK/CO/2, paragraph 10, 8 June 2012; E/C.12/MKD/CO/2-4, paragraph 26, 15 July 2016.

30. See respectively CEDAW/C/EST/CO/5-6, paragraph 39, 18 November 2016; CEDAW/C/SRB/CO/2-3, paragraph 39, 30 July 2013; CEDAW/C/LIE/CO/5, paragraph 42, 23 July 2018; CEDAW/C/LUX/CO/6-7, paragraph 52, 14 March 2018.

31. This principle has been repeatedly stated, but see for example *Karner v. Austria* (2003), *Kozak v. Poland* (2010), and the numerous sources cited therein.

32. *Karner v. Austria* (2003); *Kozak v. Poland* (2010).

33. *P.B. and J.S. v. Austria*, Application No. 18984/02, judgment of 22 July 2010.

29. Regarding access of same-sex partners to *survivors' pensions*, the Court has not so far considered any of the cases that have come before it to amount to violations of the European Convention on Human Rights. This position falls short, however, of that taken by the Court of Justice of the European Union in a series of judgments.³⁴ The United Nations Human Rights Committee has also made clear that, in making survivor's pensions available to heterosexual unmarried couples but not to homosexual unmarried couples, States Parties to the International Covenant on Civil and Political Rights had violated the prohibition on discrimination enshrined in Article 26 of the Covenant.³⁵ The Inter-American Court of Human Rights has also found such an exclusion to constitute a breach of human rights.³⁶

30. In today's increasingly globalised world, more and more people, regardless of sexual orientation, are finding a life partner with a nationality different from their own and/or moving with their partner to work in another country. The Court has found that reserving to different-sex couples the possibility of applying for a *residence permit for family reunification* constitutes a violation of the Convention,³⁷ as does making it impossible for a same-sex partner to meet the definition of "spouse" under national law for the purposes of the grant of a residence permit.³⁸ The Court of Justice of the European Union has also recently ruled that, within the meaning of European Union *freedom of movement* provisions, the term "spouse" must be understood to include spouses of the same sex. This is so regardless of whether same-sex marriages can be concluded in the country to which the spouses move.³⁹

31. More generally, the European Court of Human Rights has found, in its examination of the rights of same-sex couples, that "basic needs which are fundamental to the regulation of a relationship between a couple in a stable and committed relationship [include], *inter alia*, the mutual rights and obligations they have towards each other, including moral and material support, maintenance obligations and inheritance rights".⁴⁰ This finding should guide all Council of Europe member States in their regulation of the rights of same-sex couples.

3.2.2. Other rights frequently recognised in domestic law

32. Of course, it is only cases that have not been resolved to the applicants' satisfaction at domestic level that reach the Strasbourg Court. States however have the power to extend same-sex couples' access to a far broader range of substantive rights than those discussed above – and many do. In addition to the rights examined above, a large number of other rights and responsibilities that generally apply between different-sex couples are widely recognised to same-sex couples across a number of European States. Thus, a recent study covering the situation in 2015/2016 in 23 jurisdictions in 21 European States found a high level of consensus among these jurisdictions in granting a series of rights (and imposing some duties) on same-sex couples in fields such as income, migration, "troubles", splitting up and death.⁴¹

33. The highest level of consensus concerned taking a partner's income into account when calculating entitlements to social benefits – in other words, reducing such benefits for same-sex couples, as is done for different-sex couples. 93% of jurisdictions applied such rules to same-sex couples. This compared with 80% consensus as regards entitlement to lower income tax rates for same-sex couples than for two individuals without a partner. (On the latter point, I should however note that in some countries, such as my own, different-sex couples also do not benefit from lower income rates than individuals.)

34. See cases C-117/01, C-267/06 and C-147/08.

35. *Young v. Australia*, 6 August 2003, CCPR/C/78/D/941/2000; *X. v. Colombia*, 30 March 2007, CCPR/C/89/D/1361/2005.

36. *Duque v. Colombia* (Preliminary Exceptions, Merits, Reparations and Costs), judgment of 26 February 2016, Series C No. 310.

37. *Pajic v. Croatia*, Application No. 68453/13, judgment of 23 February 2016.

38. *Taddeucci and McCall v. Italy*, Application No. 51362/09, judgment of 30 June 2016.

39. *Coman and Others v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, Case No. C-673/16.

40. *Oliari and others v. Italy* (2015), paragraph 169.

41. The jurisdictions covered in the survey for the LawsAndFamilies Database (www.LawsAndFamilies.eu) are Austria, Belgium, Bulgaria, Czech Republic, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Sweden, United Kingdom (England and Wales, Scotland, Northern Ireland). For a brief summary of the results of the survey, see Waaldijk K. (2018), *Extending rights, responsibilities and status to same-sex families: trends across Europe*, Ministry of Foreign Affairs of Denmark. For more detail, see Waaldijk K. (Ed.) (2017), *op. cit.* I have considered 80% consensus to constitute a high level of consensus across jurisdictions. Such a high level of consensus has also been reached for two issues discussed in section 3.2.1 above: succession to a tenancy and residence rights for the foreign partner of a national citizen.

34. In between these two (high) levels of consensus, a series of other rights not already dealt with in the case law of the Court are today very widely granted to legally recognised same-sex partners, and the number of States that extend the recognition of these rights to same-sex couples has grown significantly over the last ten years. These rights include:

- as regards migration: residence rights for the non-European same-sex partner of a non-European residing in the country; recognition of the partnership in the context of an application for citizenship;
- as regards “troubles”: recognition of the same-sex partners as next-of-kin for medical purposes; entitlement to leave in order to care for a sick partner; entitlement to leave in order to care for the sick parent of a partner; the applicability of statutory protection against domestic violence; the right to refuse to testify against one’s partner in criminal procedures;
- as regards splitting up: the applicability to same-sex couples of rules on alimony; the consideration as joint property of possessions acquired by the couple during their relationship;
- as regards death: entitlement to compensation for wrongful death of one’s same-sex partner; entitlement to inherit when one’s partner dies intestate; exemption from inheritance tax; the consideration as joint property of possessions acquired by the couple during their relationship.

There is also a high level of consensus (88%) as regards granting a survivor’s pension to the surviving partner of a same-sex couple.

35. I consider the rights listed above to fall within the “basic needs which are fundamental to the regulation of a relationship between a couple in a stable and committed relationship”, to use the language of the Court. Thus, in addition to the rights already recognised by the Court, the above rights should also be recognised to same-sex couples throughout the Council of Europe area. This is not about granting special privileges or advantages to LGBTI people – it is simply a question of affording equal recognition to stable and committed same-sex couples, who have the same needs as any other couple.

4. Rainbow families with children

36. International human rights instruments recognise the right to found a family and to decide freely on the number and spacing of one’s children.⁴² These fundamental rights are crucial for all people, regardless of their sexual orientation, gender identity or sex characteristics. I nonetheless consider it as beyond the scope of the present report to examine questions regarding access to medically assisted procreation and gestational surrogacy, except in so far as any laws that already exist in member States are applied in a discriminatory way. For example, where single women are granted access to medically assisted procreation, this access should be granted equally to everyone who is able to give birth, regardless of their sexual orientation; in the few Council of Europe member States where surrogacy is possible, equal access should again be granted to all, without discrimination.⁴³

37. It is however crucial to recognise that today, many children are growing up in rainbow families. They need their relationships with their parents to be recognised and protected by law. Whether or not parental authority is recognised not only has a direct impact on everyday practical questions such as who can collect a child from school or agree to medical treatment on behalf of the child, but also determines the level of protection given to a child’s relationship with their same-sex parents when life-changing events occur, including the separation of their parents or the death of one of them. Adoption rights are also crucial here.

4.1. Situation in member States

38. As is the case with same-sex partnerships, there is growing recognition of adoption rights in Council of Europe member States. Joint adoption by same-sex couples – meaning adoption by both members of the couple, where both are unrelated to the child – was allowed in eight Council of Europe member States in 2010; by 2015, this number had grown to 12. Second-parent or co-adoption by same-sex couples – in which one member of the couple adopts the child of the other without the first parent losing their legal rights – was

42. Universal Declaration of Human Rights (Article 16), European Convention on Human Rights (Article 12), Convention on the Elimination of All Forms of Discrimination against Women (Article 16).

43. Along similar lines of reasoning to the European Court of Human Rights in *E.B. v. France* (Application No. 43546/02, judgment of 22 January 2008), in which the Court found that where a State allows a single woman to adopt a child, there must be no discrimination on grounds of sexual orientation.

allowed in 11 Council of Europe member States in 2010; this number had grown to 15 by 2015. By 2015, seven States also provided for automatic co-parent recognition, meaning that there were no barriers to a child born to a same-sex couple being recognised from birth as the child of both partners.⁴⁴

39. Today, joint adoption by same-sex couples is provided for in 17 member States;⁴⁵ second-parent or co-adoption by same-sex couples is provided for in 18 member States, of which 16 also provide for joint adoption,⁴⁶ and 10 States (all of which provide for at least one form of adoption) provide for automatic co-parent recognition.⁴⁷ In total, 19 Council of Europe member States today grant legal recognition to the relationship between a child and their non-biological parents in same-sex parented rainbow families – up from a total of 11 States in 2010 and 16 in 2015.

40. There is thus a growing trend towards legal recognition of the parenting rights and responsibilities of same-sex couples in our geographical area (up from 23% of member States in 2010 to 38% at present). However, the right to family life of same-sex parented rainbow families is still not recognised in more than 60% of member States, leaving children and their parents in these countries exposed to all the risks described above.

4.2. European and international case law

4.2.1. Case law of the European Court of Human Rights

41. As is the case with same-sex partnerships, the Court has been called upon to examine the human rights aspects of relationships between LGBTI parents and their children in numerous cases. The situations covered are varied, and reflect the realities of our societies.

42. As regards *parental authority*, in 1999, the Court found that sexual orientation could not be cited as a negative factor in deciding which parent should have custody of a child after a heterosexual marriage ended in divorce.⁴⁸ The relationship between a homosexual parent and their child from a previous relationship is thus protected under the Convention.

43. In 2008, the Court found that refusing, on the grounds of sexual orientation, to allow a *single LGBTI parent to adopt a child genetically unrelated to them* in a country where single-parent adoptions are permitted, constituted discrimination, in violation of the European Convention on Human Rights.⁴⁹

44. Regarding *simple or second-parent adoption* – by means of which the biological parent of a child retains parental authority and their partner is legally recognised as also having parental authority – the Court found in 2012 that restricting second-parent adoption to married spouses, even where same-sex couples are excluded from marriage, was not in violation of the Convention.⁵⁰ However, in 2013, it found that where second-parent adoption is possible for unmarried heterosexual couples, but not for unmarried same-sex couples, this constitutes an unjustified distinction (i.e. discrimination) based on sexual orientation. No weighty and convincing reasons had been adduced to show that excluding second-parent adoption by an unmarried same-sex couple, while allowing that possibility for an unmarried different-sex couple, was necessary for the protection of the family in the traditional sense or for the protection of the interests of the child.⁵¹

45. The Court has not to date found any obligation on States to grant automatic recognition as the child's second parent to the female partner of a woman who has given birth to a child ("co-parent recognition"), even where the women are living in a registered partnership and where a woman's husband would be legally presumed to be the biological father of a child born in (heterosexual) wedlock, regardless of whether this was in fact the case.⁵² I wish to stress here that – just as for the recognition of same-sex marriage or indeed as regards any other right – nothing prevents a State from going beyond the Court's case law and taking a

44. See ILGA-Europe Rainbow Map (Index), May 2015 and May 2010.

45. Andorra, Austria, Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom.

46. Andorra, Austria, Belgium, Denmark, Finland, France, Germany, Iceland, Luxembourg, Malta, Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, Switzerland and the United Kingdom.

47. Austria, Belgium, Denmark, Finland, Malta, Netherlands, Norway, Portugal, Spain and the United Kingdom. Work is also under way in Ireland to introduce co-parent recognition.

48. *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, judgment of 21 December 1999.

49. *E.B. v. France*, Application No. 43546/02, judgment of 22 January 2008.

50. *Gas and Dubois v. France*, Application No. 25951/07, judgment of 15 March 2012.

51. *X. and others v. Austria*, Application No. 19010/07, judgment of 19 February 2013.

52. *Boeckel and Gessner-Boeckel v. Germany*, Application No. 8017/11, decision of 7 May 2013.

position that is more favourable, both to the same-sex partner of the child's mother and to the child, and which ensures that both of the parents who will be raising the child are recognised, from the child's birth, as the child's parents. This is clearly in the child's interests and has already been done, for example, by Belgium.

4.2.2. Other international case law

46. The Inter-American Court of Human Rights also found in 2012 that sexual orientation is not a ground that justifies depriving LGBTI of the custody of their children. In reaching this finding, it emphasised, *inter alia*, that considerations based on stereotypes of sexual orientation were not admissible, and that, for the purpose of guaranteeing the protection of the child's best interest, it was not appropriate to base custody determinations on unfounded and stereotyped assumptions about the parent's capacity and suitability to ensure and promote the child's well-being and development; that States could not use societies' intolerance towards people's sexual orientation as a justification for perpetuating discriminatory treatments; and that the law and the State must help to promote social progress, otherwise there would be a grave risk that they would be legitimising and consolidating different forms of discrimination that violate human rights.⁵³

4.3. Well-being of children in rainbow families

47. One of the arguments most frequently raised against granting legal recognition to same-sex partnerships is that doing so will "open the door" to same-sex couples raising children, and that this will harm children. Such arguments are however fallacious, on at least two very basic grounds. First, same-sex couples are already raising children, and second, research has consistently shown that children raised in rainbow families have the same levels of well-being as other children.

48. At the conference held in Copenhagen on 2 March 2018, one teenager bore powerful, uplifting, personal witness to his positive experience of growing up in a rainbow family in Spain. Professor Robert Wintemute of King's College London recalled his experience of speaking at a 2012 conference of the Network of European LGBTIQ* Families Associations (NELFA), which was attended by over 300 happy and much loved children of LGBT parents, and wishing that he could take all these children to Strasbourg, so that the judges could look at the evidence before them.

49. At the hearing held by our committee in Paris on 5 June 2018 we examined the situation of children in rainbow families through a scientific lens, thanks to the presentation by Ms Kia Aarnio of a recent research project on the well-being and experiences of children in rainbow families financed by the Finnish Ministry of Education and Culture.⁵⁴ This study, which involved 129 children aged 7 to 18 growing up in rainbow families and their parents, showed that it was not parental gender or sexual orientation that affected children's well-being but the functioning of the family. Children in rainbow families had similar numbers of friends, similarly positive school experiences, similar family lifestyles and similar symptoms of anxiety or depression to their peers. LGBT parents were found to be very committed to parenthood, and supported and encouraged their children a lot. The same vulnerabilities affected children in rainbow families as other children, for example if their parents had divorced.

50. The negative aspects of living in rainbow families related to other people's attitudes – annoying questions from peers, offensive comments from other family members or other adults. Ten- to twelve-year-olds in rainbow families were bullied more than their peers, but they nonetheless had the same levels of psychological well-being as their peers, possibly due to more motivated parenting and good friendships. One in seven children had a grandparent who had ceased contact with the child's family because of the parent's sexual orientation or gender; however, in many cases, other family members or close friends of the child's family replaced this negative relationship, and the child expressed no negative consequences as a result. When asked what they would like to change in the world to make life even better for them in a rainbow family, children wished that other people would know more about sexual minorities and rainbow families and would accept diversity.

51. The conclusions of this study correspond to the conclusions of many other studies carried out internationally in the past decades.⁵⁵ According to a recent analysis of 79 scholarly studies on the well-being of children with gay or lesbian parents, 75 of these studies had found that children of gay or lesbian parents fared no worse than other children. These studies had used standard research methods in the fields of sociology and psychology; while some had small sample sizes, this meant that there was a limit to how far

53. *Atala Riffo and daughters v. Chile* (Merits, Reparations and Costs), judgment of 24 February 2012, Series C No. 239.

54. Aarnio K. et al. (2017), *Sateenkaariperheiden lasten ja nuorten hyvinvointi ja kokemukset (The well-being and experiences of children in rainbow families)*, Väestöliitto, Helsinki.

they could be generalised, but did not invalidate their findings. Moreover, a 2010 study on the school advancement of 3 500 children with same-sex parents had found no significant differences between these families and families with different-sex parents. Another study in this group had been based on nationally representative, longitudinal data using a sampling pool of over 20 000 children, of which 158 lived in a household with same-sex parents. Only four studies had concluded that children of gay or lesbian parents faced added disadvantages. However, all of these four studies had taken their samples from children who had experienced the break-up of their family. Such groups are known to face increased risks and these four studies have therefore been considered as unreliable by many scholars. In short, this research shows that there exists an overwhelming scholarly consensus, through more than 30 years of peer-reviewed research, that having gay, lesbian or bisexual parents is not harmful to children.⁵⁶

52. To put it another way, research consistently shows that it is not same-sex parents but societies that are not accepting of diversity that harm children in these families. We must base our public policy decisions as regards rainbow families, not on misconceived notions of “traditional” families as the only, irreplaceable, family format that can provide a healthy upbringing for a child – a notion that can also be harmful to children in single-parent families and in blended (step-)families – but on the need both to ensure acceptance of the diverse families, whether “traditional” or “non-traditional”, that exist in all our societies, and to promote a discrimination-free environment for all parents and children. Indeed, as the Inter-American Court of Human Rights has made clear, and as was already implicit in the reasoning applied by the European Court of Human Rights nearly 20 years ago, a parent’s sexual orientation has no bearing on their capacity to raise and provide for a child.⁵⁷

5. Trans and intersex people and the legal recognition of family ties regardless of sexual orientation

53. Trans and intersex people may be lesbian, gay, bisexual or heterosexual or have any other sexual orientation. It is crucial to ensure that their right to respect for their private and family life is also guaranteed regardless of sexual orientation. All of the rights discussed above apply also to trans and intersex people, whatever their sexual orientation. However, some additional issues may arise where the above human rights intersect with issues arising around the recognition of gender identity or where discrimination occurs on the grounds of sex characteristics.

54. In 2014, the Court found that requiring a transgender person to convert their marriage into a registered (same-sex) partnership in order to obtain the full recognition of their new gender, in a country where same-sex marriage was not provided for but registered partnership provided similar rights to marriage, was not in breach of the Convention. The United Nations Human Rights Committee has however since found that requiring a transgender person to divorce their spouse in order to change the sex indicated on their birth certificate was discriminatory and in breach of the International Covenant on Civil and Political Rights.⁵⁸

55. The Assembly has already called on States to remove any restrictions on the right of transgender people to remain in an existing marriage upon recognition of their gender, to ensure that spouses and children do not lose certain rights in such cases, and to abolish sterilisation requirements – which impair trans people’s sexual and reproductive health rights – for access to gender reassignment and legal gender recognition.⁵⁹ All of these matters raise particular issues as regards the right to respect for private and family life under the European Convention on Human Rights. Serious issues may also arise for trans parents and their children when the former are registered on their children’s documents according to the gender assigned to them at birth. For example, in 1997, the Court recognised the family ties between a trans man and his child born

55. See for example Knight K. W. et al. (2017), “The kids are OK: it is discrimination, not same-sex parents, that harms children”, *Medical Journal of Australia* (MJA), 207 (9), 6 November 2017; Hočevar A. (2014), “Children in rainbow families”, *Ljetopis socijalnog rada* 2014, 21 (1), pp. 85-104 str; and sources cited therein.

56. Cornell University What We Know Public Policy Research Portal, “What does the scholarly research say about the well-being of children with gay or lesbian parents?”, updated December 2017: <https://whatweknow.inequality.cornell.edu/wp-content/uploads/2018/04/PDF-Parenting-wellbeing-1.pdf>. See also Gross M. (2015), “Gay, lesbian and trans families through the lens of social science: A revolution or a pluralisation of forms of parenthood?”, *Enfance, familles, generations* 23 (2015), p. 84.

57. In their respective judgments in *Atala Riffo and daughters v. Chile* (2012) and *Salgueiro da Silva Mouta v. Portugal* (1999).

58. See, respectively, *X., Y. and Z. v. the United Kingdom*, Application No. 21830/93, judgment of 22 April 1997, *Hämäläinen v. Finland*, Application No. 37359/09, judgment of 16 July 2014, and *G. v. Australia*, 17 March 2017, CCPR/C/119/D/2172/2012.

59. [Resolution 2048 \(2015\)](#) on discrimination against transgender people in Europe.

through artificial insemination, but refused to grant the man recognition as the child's father. I wish to stress that States have a responsibility to resolve these issues as well, by providing for trans parents' gender identity to be correctly recorded on their children's birth certificates.

56. Where gender recognition procedures for minors are lacking or excessively complex, rainbow families with transgender children often opt against travelling abroad in order to avoid being exposed to discrimination and degrading treatment. This effectively hinders the freedom of movement of these families.

57. The Assembly has emphasised that intersex people also need simple, quick and accessible legal gender recognition procedures and has called on States to ensure that intersex people are not prevented from entering into a civil partnership or marriage or from remaining in such a partnership or marriage as a result of the legal recognition of their gender.⁶⁰

58. States which take or have taken the step – as recommended by the Assembly⁶¹ – of recognising gender markers other than “male” or “female” must also ensure that persons (whether trans or intersex or neither) who identify outside these two categories and who thus do not fit “traditional”, heteronormative definitions of marriage are able to have their stable and committed relationships, and their relationships with their children, legally recognised in exactly the same ways as discussed for other couples in this report.

6. Is there an obligation on States to recognise same-sex marriage?

59. The European Court of Human Rights has noted that it no longer considers that the right to marry enshrined in Article 12 of the Convention must in all circumstances be limited to marriage between two persons of the opposite sex.⁶² It has so far considered, however, that the Convention does not place a positive obligation on Contracting States to grant same-sex couples access to marriage, whether under Article 12 of the Convention or under Article 14 taken in conjunction with Article 8. This finding, first made in 2010, when only six Council of Europe States granted same-sex couples the right to marry, has been reiterated several times since. However, it is important to note that in drawing its conclusions on issues where there is not yet an obvious consensus throughout Europe, the Court looks at the balance found in European societies, and its position is likely to evolve as an increasing number of States recognise this right.

60. The European Commission for Democracy through Law (Venice Commission) has recently cautioned against changing a Constitution so as to exclude same-sex marriage, emphasising that letting the ordinary legislator decide such matters is satisfactory and preferable, and leaves more room for future developments. The Venice Commission has also emphasised, in view of the case law of the European Court of Human Rights, that if any such constitutional changes are nonetheless made, they should in no case be interpreted as prohibiting the legal recognition of same-sex partnerships.⁶³

61. Many opponents of same-sex marriage argue that the institution of marriage is designed to enable the founding of families and, in particular, to protect procreation. This is however a fallacy: marriages of infertile couples, couples who choose not to have children and couples too elderly to procreate are perfectly legal, and are not called into question by those who militate against same-sex marriage. Other opponents argue that children raised in rainbow families are placed at risk by the mere fact of having LGBTI parents. This is also untrue, as discussed above. Others still argue that because international law provisions on the right to marry refer expressly to men and women, whereas other provisions use terms such as “all human beings”, or “everyone”, this proves that only marriages between a man and a woman are protected under international law. In fact, the *travaux préparatoires* of the Universal Declaration of Human Rights (which served as strong inspiration in many subsequent human rights instruments, such as the European Convention on Human Rights) show that the inclusion of specific references to “men” and “women” in what became Article 16 of the Declaration had nothing to do with the sexual orientation of the spouses. Rather, it was designed to guarantee women's equality in the field of marriage – something that was by no means a reality at the time in many countries (and, as we know, unfortunately still is not a reality everywhere).⁶⁴

60. [Resolution 2191 \(2017\)](#) on promoting the human rights of and eliminating discrimination against intersex people.

61. See [Resolution 2048 \(2015\)](#) and [Resolution 2191 \(2017\)](#).

62. *Schalk and Kopf v. Austria* (2010).

63. Venice Commission, Georgia – Opinion on the draft revised constitution, adopted by the Venice Commission at its 111th Plenary Session (Venice, 16-17 June 2017), CDL-AD(2017)013, paragraph 63.

64. Waaldijk K. (2018), “The gender-neutrality of the international right to marry: Same-sex couples may still be excluded from marriage, but their exclusion – and their foreign marriages – must be recognised”, draft chapter for the forthcoming book Ziegler A. (Ed.) *International LGBTI Law*, available since 23 July 2018 at SSRN: <https://ssrn.com/abstract=3218308>, pp. 6-10, and sources cited therein.

62. The Inter-American Court of Human Rights has pointed out repeatedly that “the presumed lack of consensus within some countries regarding full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to reproduce and perpetuate the historical and structural discrimination that such minorities have suffered”.⁶⁵ It has moreover underlined that there is no purpose acceptable under the American Convention on Human Rights for which differentiated treatment regarding the ways in which heterosexual and same-sex couples can form a family could be considered necessary or proportionate. While religious and philosophical convictions play an important role in the life and dignity of those who profess them, the secular and religious spheres must coexist peacefully in democratic societies, and States’ role is to recognise the sphere inhabited by each of them, not to force one into the sphere of the other. In the Inter-American Court’s view, creating an institution specifically for same-sex couples that produces identical effects to marriage but that is given a different name would moreover serve to stigmatise and belittle these couples, by drawing attention to their difference from heteronormative stereotypes, and would constitute discrimination based on sexual orientation. The free and autonomous choice to enter into a permanent and marital relationship, whether *de facto* or formal, forms part of the dignity of each person and merits equal rights and protection whatever the sexual orientation of the parties. The Inter-American Court has therefore called on States to promote, in good faith, the legislative, administrative and judicial reforms necessary to adapt their laws, interpretations and practices to this reality.⁶⁶

63. I wish to stress that granting marriage equality in no way diminishes the rights of heterosexual couples and “traditional” families. Moreover, the enormous symbolic significance of recognising same-sex marriage must not be ignored, for it not only carries with it the guarantee of equality and inclusion but also sends a strong message of acceptance by society and of refusal to countenance discrimination on grounds of sexual orientation. This is why, although my focus in this report has not been on the merits of specific forms of legal recognition but on how to ensure the necessary protection of the concrete rights and responsibilities of same-sex partners and their children, I make no secret of my personal belief that full marriage equality should be the ultimate goal in all Council of Europe member States.

7. Conclusions

64. This report is not about abstract, theoretical debates but about real human beings – LGBTI partners and parents and their children – whose lives are harmed every day by the failure of societies and laws to provide adequately for their needs.

65. More than half of the member States of the Council of Europe have made giant strides forwards towards achieving equality in the field of private and family life, without discrimination on grounds of sexual orientation, since Denmark first introduced registered partnerships in 1989. There is a clear and positive trend both as regards the number of States that have granted legal recognition to the relationships of same-sex couples and as regards the extent of the rights recognised to these couples.

66. The case law of the European Court of Human Rights has also evolved, in particular over the last ten years, as have other international standards. The Court has recognised that same-sex couples are protected by the right to family life enshrined in the European Convention on Human Rights and set out some clear minimum standards that all States should apply. It has acknowledged that same-sex couples are in need of legal recognition and protection of their relationship, and that States have a positive obligation to provide a legal framework by which to achieve this. It has indicated some basic elements which need to be covered as regards the mutual rights and obligations of the partners, such as moral and material support, maintenance obligations and inheritance rights. It has also found that, even in States where marriage equality is not recognised, a legal framework must be established to provide for the recognition of same-sex marriages contracted abroad. As regards children, the Court has also established that a number of rights available to unmarried different-sex couples must be available without discrimination to unmarried same-sex couples. It has found that States’ margin of appreciation when interfering in a marriage in the event of gender recognition has limits and must not lead to a loss of rights of spouses or children. In reaching these conclusions, the Court has not revolutionised Europe but has reflected real and ongoing change in our societies.

67. I believe that it is crucial to continue working at national level to ensure that rainbow families benefit from the protection they need to guarantee their well-being in daily life. There may be many different paths to achieving equality, but what is certain is that failing to respect the right to private and family life of LGBTI

65. Advisory Opinion OC-24/17 of 24 November 2017, requested by the Republic of Costa Rica: Gender Identity and Equality and Non-Discrimination of Same-Sex Couples, paragraph 219, footnote 413 and previous judgments cited therein.

66. *Ibid.*, paragraphs 220-228.

people can have drastic human consequences for the persons concerned. Moreover, the reality is that today, throughout Europe, many children are growing up in rainbow families, and they need their relationships with their parents to be recognised and protected by law, as this is fundamental to their well-being.

68. I recognise that controversy often surrounds these issues in public debates – in particular when it comes to marriage equality – and that societal change takes time. But these debates must not be allowed to harm rainbow families or obscure their very real needs and rights. I firmly believe that it is our duty as legislators and our governments' obligation to ensure that the societies we live in, and those that we build for the future, are societies that avoid stigmatisation, prejudice and hate and that promote inclusion, acceptance and respect for all. We all deserve to live in societies where our families, and all families, are respected and their well-being is promoted.