



The European Region  
of the International  
Lesbian and Gay Association

# Families, Partners, Children and the European Union

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# Families, Partners, Children and the European Union

ILGA-EUROPE POLICY PAPER  
April 2003

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## 1. Introduction

Issues such as marriage, partnership and parenting have been traditionally treated as falling within national legal competence and hence outside the powers of the European Union. However, this situation is now rapidly changing. The boundaries between national and EU competences have gradually blurred over time. The Union is now committed to promoting social inclusion through policies in a wide range of fields such as employment, education, healthcare and housing.<sup>1</sup> Moreover, the creation of the “Area of Freedom, Security and Justice” has demanded much greater involvement of the Union in the coordination of civil law systems, including family law. In this policy paper, we shall examine how various aspects of EU law are impacting upon national rules relating to “personal status” in its broadest sense.<sup>2</sup> By personal status, we mean all those laws and policies that affect the individual and recognition of their partnerships with others, as well as the individual in their role as a parent.

Within EU law, we can observe an expansion of activity in areas that touch directly on personal status. At the constitutional level, the Charter of Fundamental Rights has addressed the right to marry and found a family,<sup>3</sup> together with the right to respect for private and family life.<sup>4</sup> These are also rights found in the European Convention on Human Rights. Although the Union is not a party to this instrument, it has committed itself to respecting its content.<sup>5</sup> Moreover, the Court of Justice takes the Convention into account when interpreting EU law. At the legislative level, the construction of the Area of Freedom, Security and Justice has demanded a range of initiatives on the migration of EU citizens and third country nationals, alongside the construction of European asylum law.<sup>6</sup> Many

**In this policy paper, we shall examine how various aspects of EU law are impacting upon national rules relating to “personal status” in its broadest sense.**

<sup>1</sup> European Social Agenda, [2001] OJ C157/4.

<sup>2</sup> The term “personal status” has been used as an umbrella term in this area by the Council: “Note from Committee on Civil Law Matters to Coreper on the draft Council report on the need to approximate Member States’ legislation in civil matters” Ref 13017/01, Brussels, 29 October 2001, p. 9.

<sup>3</sup> Art 9, [2000] OJ C364/1.

<sup>4</sup> Art 7, *ibid*.

<sup>5</sup> Art 6(2) EU.

<sup>6</sup> Tampere European Council conclusions, *EU Bulletin*, 10-1999.

of the instruments in this area contain definitions of the “family”. There are also measures designed to reduce difficulties for families living in more than one EU state, in particular dealing with the cross-border recognition and enforcement of judgments relating to access to children.<sup>7</sup>

**The challenge for the European Union is to accommodate the diversity of national practices based on an inclusive approach, ensuring that EU laws do not create any new barriers to the recognition of families of LGBT people.**

The growth in the role of the Union coincides with a period of change and reform in national family law systems. A number of trends can be identified. First, there is the decision in the Netherlands and Belgium to open marriage to same-sex couples. Second, there is the adoption in many European states of laws that permit unmarried couples to acquire certain rights and responsibilities. Third, there is the piecemeal award in some states of rights to couples based on an established period of cohabitation, but without the granting of any new legal status. Finally, laws relating to parenting are increasingly subject to revision, often with a view to recognising the parental role of unmarried partners, including the adoption of children by such couples.

The challenge for the European Union is to accommodate the diversity of national practices based on an inclusive approach, ensuring that EU laws do not create any new barriers to the recognition of families of lesbian, gay, bisexual and transgender (LGBT) people.

The rest of this paper is divided into two main sections. The first examines issues relating to partnership rights and the second examines issues relating to the rights of children and other family members. In both parts, we will examine the changes occurring in the Member States and draw the points of connection with areas of EU law that need to take account of the new dynamics.

<sup>7</sup> Commission, “Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation 1347/2000/EC and amending Regulation 44/2001/EC in matter relating to maintenance” COM (2002) 222.

## 2. Partnership Rights and the European Union

This part of the paper focuses on the diverse arrangements for partnership rights found in the Member States of the European Union. It is organised in five sections: (a) marriage; (b) registered partnership; (c) other forms of legally-recognised partnership; (d) rights attached to de facto cohabitation; and (e) fragmentary rights. For each category, we will identify the national level situation and then how this is impacting upon laws at the EU level.<sup>8</sup>

### (a) Marriage

Marriage has been the traditional mechanism for legally recognising partnerships. Its entrenched status is reflected in a variety of EU legal instruments that extend rights only to “spouses”; the clearest example of this is in relation to family reunion rights for EU migrants.<sup>9</sup> The importance attached to marriage can also be found within the European Convention on Human Rights (ECHR), where Article 12 states “men and women of marriageable age have the right to marry and found a family”. Issues arise here concerning EU law and the recognition of marriages where there is one or more transgender partner, as well as marriages involving same-sex couples.

#### (i) Transgender people and marriage

The Court of Human Rights initially took a restrictive approach to the interpretation of the right to marry. In *Rees v UK*, the Court rejected a complaint from a transgender person on the basis that “the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex.”<sup>10</sup> However, in July 2002, in the case of *Goodwin v UK*, the Court changed its approach, declaring that it “finds

<sup>8</sup> The discussion of national law draws on material presented in M Bell, “We are Family? Same-Sex Partners and EU Migration Law” (2002) 9 *Maastricht Journal of European and Comparative Law*.

<sup>9</sup> Regulation 1612/68 on the free movement of workers, [1968] OJ Spec Ed (II)475.

<sup>10</sup> *Rees v UK* (1987)

9 EHRR 56, para. 49.

no justification for barring the transsexual from enjoying the right to marry under any circumstances”.<sup>11</sup> Therefore, it seems likely that the Court of Justice would interpret “spouse” within EU law provisions as including a marriage involving transgender people. Indeed, following the decision in *Goodwin* all states in the Council of Europe are now under a duty to remove any legal impediments to transgender people getting married.

<sup>11</sup> *Goodwin v UK*, Application No 28957/95, judgment of 11 July 2002, para. 103.

<sup>12</sup> K Waaldijk, “Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands”, in R Wintemute and M Andenæs (eds), *Legal Recognition of Same-Sex Partnerships – A Study of National, European and International Law*, (Hart Publishing, 2001).

<sup>13</sup> Law of 13 February 2003 opening up marriage to persons of the same sex and modifying certain provisions of the Civil Code, 28 February 2003, *Moniteur belge*, Edition 3, p. 9880. Available at: [www.moniteur.be/index\\_fr.htm](http://www.moniteur.be/index_fr.htm), electronic item 2003009163. This law will enter into force on 1 June 2003.

<sup>14</sup> Praesidium, “Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50” CHARTE 4473/00 CONVENT 49, Brussels, 11 October 2000, p. 12.

## (ii) Same-sex marriage

In 2001, the Netherlands confronted the status quo by deciding to open marriage to same-sex couples.<sup>12</sup> Belgium has recently decided to take the same step.<sup>13</sup> The Court of Human Rights has not yet been confronted with a case concerning same-sex marriage, nor has the Court of Justice. Arguably, the EU Charter of Fundamental Rights supports an inclusive approach. Article 9 states “the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights”. The explanatory memorandum to the Charter notes under Article 9 that “this article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex”.<sup>14</sup> The main message emerging from the Charter is that marital status is derived from national law. This seems logical given that marriage is a status that cannot be conferred or removed by the European Union. In these circumstances, the most sensible solution would be for the Court of Justice to accept that anyone lawfully married according to national law should also be treated as married for the purposes of EU law.

## (b) Registered Partnership

A status close to marriage, yet legally distinct, has been created in Denmark, Sweden, Finland and the Netherlands, as well as in Norway and Iceland. “Registered partnership” provides most of the rights attached to marriage, with the main distinctions relating to parental rights, such as access to reproductive technologies and adoption.<sup>15</sup> Significantly, these reserved rights are now being gradually extended to registered partners in several states, thus further eroding the distinction between partnership and marriage.<sup>16</sup> It should be noted that registered partnership is only available to same-sex couples in all states except for the Netherlands, where it is also open to opposite-sex couples. A registered partnership law has also been adopted in Germany in 2001, although German registered partners do not enjoy the full range of rights available under the laws described above.<sup>17</sup>

In *D and Sweden v Council*<sup>18</sup>, the Court of Justice had its first opportunity to consider the legal status in EU law of registered partnership. The case concerned the denial of benefits to an employee of the Council, where the benefits were available to “married officials” and *D* was a Swedish national in a registered partnership. According to Swedish law he could not have married another person unless the registered partnership was first dissolved. Nevertheless, the Court draws a clear line between marriage and other legal statuses under national law. First, it notes that “according to the definition generally accepted by the Member States, the term marriage means a union between two persons of the opposite sex”.<sup>19</sup> This then leads to its conclusion: “the fact that, in a limited number of Member States, a registered partnership is assimilated, although incompletely, to marriage cannot have the consequence that, by mere interpretation, persons whose

<sup>15</sup> D Borrillo, “Pluralisme conjugal ou hiérarchie des sexualités: la reconnaissance juridique des couples homosexuels dans l’Union européenne” (2001) 46 *McGill Law Journal* 875, 888.

<sup>16</sup> Denmark, Sweden and the Netherlands now permit joint adoptions by registered partners.

<sup>17</sup> R Schimmel and S Heun, “The Legal Situation of Same-Sex Partnerships in Germany: An Overview”, in R Wintemute and M Andenæs (eds), see above note 12.

<sup>18</sup> Case C-122/99P and 125/99P *D and Sweden v. Council* [2001] ECR I-4319.

<sup>19</sup> Para. 34, *ibid.*

legal status is distinct from that of marriage can be covered by the term married official.”<sup>20</sup>

**Currently, registered partners face a great inconsistency between their treatment in national law and EU law.**

The judgment in *D* makes it manifest that, at this point in time, the Court is not willing to expand terms such as “married” or “spouse” to include registered partners. Therefore, the onus is on the EU legislator to guarantee specific recognition of this legal status within EU law instruments. Currently, registered partners face a great inconsistency between their treatment in national law, which is very similar to being married, and EU law, where they are treated as if they were single. Cases like *D* highlight the barriers this creates to internal migration within the Union. In *D*’s case, by moving from Sweden to Belgium in order to work for the Council, he lost all recognition of his partnership. This creates an undeniable obstacle to the free movement of persons.

Interestingly, the Commission has suggested making specific provision for registered partners in the proposed Family Reunion Directive, which concerns the rights of third country nationals legally resident in the Union to be joined by other third country national family members.<sup>21</sup> Although the Commission wishes to leave it to the discretion of each Member State as to whether they extend family reunion rights to partners other than spouses, a distinction is created between registered partners (who will not need to provide further evidence of their partnership) and unmarried couples (where some factual evidence of the partnership will be required).<sup>22</sup> This demonstrates the potential for incorporating “registered partner” as an acknowledged personal status within EU legal instruments.

<sup>20</sup> Para. 39, *ibid.*

<sup>21</sup> Commission, “Amended proposal for a Council Directive on the right to family reunification” COM (2002) 225.

<sup>22</sup> Art 4(3), *ibid.*

### (c) Other forms of legally-recognised partnership

Beyond registered partnership laws, other laws have emerged that establish more than a set of rights linked to de facto cohabitation, whilst being quite far removed from marriage. In France, the PaCS law introduced in 1999 confers a variety of rights and duties on either same-sex or opposite-sex couples that choose to enter into this form of contract. Many of the rights are attached to property – for example, succession to a tenancy in the event of the death of one partner, or joint liability for debts to third parties. In addition, there are also certain social rights, such as the right to bereavement leave where a partner dies, or for public sector workers to be posted closer to their partner.<sup>23</sup> Yet, conscious efforts are made to distinguish this status from marriage. In particular, the partners' civil status does not change; they remain single.<sup>24</sup> A very weak form of partnership law exists in Belgium.<sup>25</sup> Whilst “statutory cohabitation” allows the symbolic recognition accorded through registration of a partnership between two persons of the same-sex or opposite-sex, the rights conferred (mainly relating to property relations) are more comparable to legislation found in several European states concerning the rights of cohabitants (see below).

The common thread between these laws is the creation of a new personal status, normally through a process of registration. Based on the decision in *D*, it can be assumed that the Court would not regard these statuses as marriages for the purposes of EU law. Therefore, similar difficulties exist for these partners where they seek to exercise EU law rights dependent on marriage. Moreover, the same obstacles to free movement can be identified; acquired partnership rights may be lost by moving elsewhere in the Union. This problem is not only confined to situations where legally-recog-

<sup>23</sup> D Borrillo, “Le Pacte civil de solidarité: une reconnaissance timide des unions de même sexe” (2001) *Aktuelle juristische Praxis* 299, 304.

<sup>24</sup> D Borrillo, “The ‘Pacte Civil de Solidarité’ in France: Midway Between Marriage and Cohabitation”, in R Wintemute and M Andenæs (eds), see note 12.

<sup>25</sup> O de Schutter and A Weyembergh, “‘Statutory Cohabitation’ Under Belgian Law: A Step Towards Same-Sex Marriage?”, in R Wintemute and M Andenæs (eds), see note 12.

nised or registered partners move to states such as Ireland or Greece with no formal recognition for unmarried couples. The diversity of the national laws means that even moving to a state with a partnership law will render the personal status acquired in the country of origin invisible. For example, a Swedish registered partnership will not be recognised in France, nor will a French PaCS be recognised in Sweden. An important exception to this dilemma, however, is the agreement between Denmark, Sweden, Norway and Iceland to recognise partnerships registered in any of these states.<sup>26</sup>

Of course, a Swedish couple moving to France would be ultimately free to create a PaCS. However, the PaCS law contains time limits in relation to certain rights. For example, couples acquire exemption from specific taxes on gifts between partners after two years, and joint taxation of incomes only applies three years after concluding the PaCS.<sup>27</sup> Moreover, in some cases, at least one member of the couple will need to establish habitual residence in the state before they are allowed to enter into a partnership. A French couple in a PaCS moving to Sweden would not only find that their PaCS becomes meaningless, but also that one of them must reside in Sweden for two years before they can create a registered partnership there (although this time requirement does not apply to nationals of Denmark, Iceland, Norway or the Netherlands).<sup>28</sup>

<sup>26</sup> S Jensen, “La reconnaissance des préférences sexuelles: le modèle scandinave”, in D Borrillo (ed), *Homosexualités et droit*, (PUF, 1998), 265.

<sup>27</sup> Borrillo (above note 24) 485.

<sup>28</sup> H Ytterberg, “‘From Society’s Point of View, Cohabitation Between Two Persons of the Same Sex is a Perfectly Acceptable Form of Family Life’: A Swedish Story of Love and Legislation”, in R Wintemute and M Andenæs (eds), see note 12

## (d) Rights attached to de facto cohabitation

Laws on “de facto” cohabitation can be distinguished from the laws described above, because the rights and duties are attached to couples normally after a certain period of cohabitation, without the need for any positive act of registration. For example, in 1988, the Swedish Homosexual Cohabitees Act extended most of the rules regulating heterosexual cohabitation to same-sex couples. Cohabitation “characterised by a certain permanence” falls within the scope of the Act, which principally concerns ownership of joint home and household goods.<sup>29</sup> More recently, in 2001, Portugal adopted a law on de facto unions, extending the pre-existing rights attached to opposite-sex couples living together for more than two years to same-sex couples.<sup>30</sup> A similar process was also followed in France, where the introduction of the PaCS was accompanied by the inclusion of same-sex couples in the rights attached to cohabitation (*concubinage*).<sup>31</sup> Such cohabitation laws can be also found in certain regions of Spain.<sup>32</sup>

Again, it is evident that these partnerships are not currently accorded any legal recognition for the purposes of EU law. Given the nature of these arrangements, the rights acquired are not easily portable to another jurisdiction. Where no act of registration takes place, then it may be difficult to establish any specific status rather than entitlement to a loose bundle of rights. It is also clear that requirements of prolonged cohabitation will limit the possibility for couples from other Member States to access such rights, at least during their initial period of residence. In particular, more detailed research would be necessary to determine whether previous cohabitation outside the state would be sufficient to meet the legal requirements.

<sup>29</sup> H Ytterberg, “Sweden – Additional Regulations Besides the Registered Partnership” (2001) *Aktuelle juristische Praxis* 287.

<sup>30</sup> M Freitas, “The New Portuguese Law on Same-Sex Unions” (2001) *Euro-Letter*, no 88, available at: [www.steff.suite.dk/eurolet.htm](http://www.steff.suite.dk/eurolet.htm).

<sup>31</sup> Borrillo (above note 15) 900.

<sup>32</sup> The laws in Aragon and Navarre are a kind of hybrid between this category and the former; whilst it is possible to register partnerships, the rights attached will in any case be acquired after a period of cohabitation (two years in Aragon and one year in Navarre). Valencia accords certain limited rights to de facto couples after one year of cohabitation, such as civil service employment entitlements. However, in this case, the cohabitation must be accompanied by an act of registration.

**The Court of Justice has twice had to consider the situation in EU law of unmarried couples with no legal recognition at the national level.**

## (e) Fragmentary rights

In the remaining states of the Union – Ireland, the UK, Austria, Luxembourg, Greece and Italy, as well as most regions in Spain – the picture is one of no legal recognition or rights for unmarried couples, or else a rather haphazard and fragmentary award of rights in certain areas.<sup>33</sup> For example, in Ireland, no partnership law exists, but the regulations on the nomination of a person to take decisions on your personal care in the event of your mental incapacity have been framed in wide language that would allow the nomination of an unmarried partner, regardless of sex.<sup>34</sup>

The Court of Justice has twice had to consider the situation in EU law of unmarried couples with no legal recognition at the national level. In *Reed*,<sup>35</sup> the Court was confronted with an unmarried opposite-sex couple of British nationality and Reed sought a residence permit to stay with her partner in the Netherlands. Regulation 1612/68 on the free movement of workers only extends the right to be joined by one's "spouse"<sup>36</sup> and the Court was not prepared to interpret "spouse" as including an unmarried partner. In *Grant*,<sup>37</sup> a British woman employed by a railway company argued that the denial of a free travel pass to her same-sex partner, in circumstances where other employees received the free travel pass for married and unmarried opposite-sex partners, was unlawful sex discrimination and in breach of her fundamental rights. The Court again rejected this submission, concluding that:

*in the present state of law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex.*<sup>38</sup>

<sup>33</sup> Draft legislation to introduce partnership rights for unmarried couples is under discussion in Luxembourg and England and Wales.

<sup>34</sup> J Mee and K Ronayne, "Partnership Rights of Same-Sex Couples" (Equality Authority, 2000) p. 43. See also, Adults with Incapacity (Scotland) Act 2000.

<sup>35</sup> Case 59/85 [1986] ECR 1283.

<sup>36</sup> Art 10(1)(a), Regulation 1612/68 on the free movement of workers, [1968] OJ Spec Ed (II)475.

<sup>37</sup> Case C-249/96 [1998] ECR I-621.

<sup>38</sup> Para. 35, *ibid.*

### 3. Partnerships and the European Union: Avenues for Progress?

The survey of the legal situation at the national level conducted above reveals a high level of dynamism in national law. Across the Union, many states are developing new legal arrangements in order to accommodate better the social reality that many people no longer choose to found stable relationships on marriage. Moreover, there is a manifest recognition in many states that LGBT people do form stable relationships and these need to be addressed by the law.

In contrast to the innovation in national law, the EU has been slow to react. There are very few examples in EU legislation of any partners other than spouses being recognised. The first step towards a broader concept of partner was taken by the Temporary Protection Directive<sup>39</sup> in July 2001. The Directive concerns the protection of persons in the case of a mass influx where it is difficult to apply the normal asylum process, at least in the short term (for example, during the wars in Bosnia or Kosovo). Article 15(1) permits family reunification under certain circumstances in a single state. Family members are defined as:

*the spouse of the sponsor or his/her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens ...*

This formulation can be found also in Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers.<sup>40</sup> Moreover, it has been proposed for a variety of instruments on asylum, immigration and the free movement of persons.<sup>41</sup> Although

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<sup>39</sup> Directive 2001/55/EC, [2001] OJ L212/12. This does not apply to Denmark and Ireland.

<sup>40</sup> Article 2(d)(i), [2003] OJ L31/18. This does not apply to Ireland and Denmark.

<sup>41</sup> See further, ILGA-Europe Policy Paper on “Promoting equality for lesbian, gay, bisexual and transgender persons: EU Justice and Home Affairs policies” (ILGA-Europe doc. # 6/2001), November 2001, available at: [www.ilga-europe.org](http://www.ilga-europe.org).

**The Court of Human Rights has shown an increasing willingness to recognise that unmarried couples also enjoy the right to respect for their family life.**

this provides evidence of small progress, it is quite limited in its effects. In essence, unmarried partners would only enjoy migration-related rights in those states where national law already provides a high level of recognition and protection for unmarried couples. In states where unmarried partners enjoy no or few legal rights, EU law would impose no obligation to admit such couples for free movement or immigration purposes. As described above, around half of the existing Member States do not provide legal recognition for unmarried couples, or else provide a very rudimentary set of rights. Moreover, there are very few examples of partnership rights for unmarried couples in any of the candidate countries for enlargement.<sup>42</sup>

So how can we make progress in this area? The starting point has to be an acceptance that the status quo is not tenable. Existing EU law was built around defining couples by reference to marriage, however, the proliferation of different statuses at the national level has eroded the relevance of this approach. It is clear that EU law does not currently accommodate persons in registered partnerships, other forms of legally recognised partnership or those who are simply living in a durable relationship. This is intolerable for a number of reasons.

### **(a) The right to respect for family life**

This right is recognised in both the ECHR and the EU Charter. The Court of Human Rights has shown an increasing willingness in recent years to recognise that unmarried couples also enjoy the right to respect for their family life and that this cannot be confined to partnerships based on marriage.<sup>43</sup>

<sup>42</sup> One exception is Hungary where same-sex partners can enjoy a limited range of rights on the basis of an established period of cohabitation: L Farkas, "Nice on Paper: The Abort-ed Liberalisation of Gay Rights in Hungary" in R Wintemute and M Andenæs (eds), see note 12.

<sup>43</sup> Para. 36, *X, Y and Z v UK* (1997) 24 EHRR 143; Admissibility Decision on Application No 37784/97, *Saucedo Gómez v Spain*, 26 January 1999.

## (b) The right to non-discrimination

Apart from the Netherlands and Belgium, same-sex couples are barred from marriage in all European states. Moreover, the *Goodwin* case confirmed that there remain many European states where transgender people face legal barriers to marrying.<sup>44</sup> Given that there is discrimination in access to marriage, then making rights conditional on marriage results in further discrimination on grounds of sexual orientation and gender identity.

## (c) The right to free movement

It is beyond doubt that the lack of recognition of non-marital partnerships in EU law forms an obstacle to the free movement of persons. Where an EU national couple enjoy legal recognition of their relationship in their country of origin, but will lose this by moving to another EU state, this is a deterrent to exercising free movement rights. Where an EU national has a third country national partner, it may be difficult or impossible for the partner to gain residency rights in another EU state. Again, this is likely to dissuade the couple from exercising their free movement rights. In the next section, we will also see how differences in national laws relating to unmarried couples and parental responsibility matters generate further barriers to free movement. For example, even though registered partnership is permitted in both Sweden and Finland, adoption of children by same-sex couples is only provided for in the former. This creates barriers surrounding the recognition of such adoptions where a family move, even between states with partnership laws.

Whilst the case for change is strong, initial experience in the negotiation of laws on asylum, immigration and

**The lack of recognition of non-marital partnerships in EU law forms an obstacle to the free movement of persons.**

<sup>44</sup> *Goodwin v UK*, Application No 28957/95, judgment of 11 July 2002, para. 57.

free movement suggests a lack of consensus amongst the Member States over how to take this issue forward. This presents great barriers to achieving legislative change, especially where decisions require unanimity in the Council. ILGA-Europe remains committed to ensuring protection and legal recognition for all families, including those based on marriage, registered partnership, a durable relationship or a single parent with children. As steps in that direction, there are at least two short-term strategies that the Union must pursue.

### (d) Mutual recognition

The *mutual recognition* principle ensures that the specific arrangements in national law remain at the discretion of each individual Member State. However, when dealing with persons coming from other states, each receiving State would be obliged to admit any partnership legally recognised according to the laws of the country of origin. Therefore, all states would be free to continue to exclude same-sex couples from marriage, but each would have to admit any couples (same-sex or opposite-sex) legally married in another EU Member State. Moreover, all states would be free to choose whether or not to create a law conferring rights on unmarried couples, but each state would have to admit any couple legally recognised in another EU Member State.

The mutual recognition approach has been recently approved by the European Parliament, in its first reading of the proposed Directive on the Free Movement of EU Citizens.<sup>45</sup> Similarly, with regard to its own staff, the Commission has proposed to surmount the diversity of national legislation by recognising any couple producing “a legal document recognised as such by a Mem-

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<sup>45</sup> Resolution of 11 February 2003 on COM (2001) 257; amendments 14-16.

ber State acknowledging their status as non-marital partners”.<sup>46</sup>

### **(e) Coordination of the different statuses**

The mutual recognition approach outlined above will help to ensure that their partners in other EU states can join EU citizens. However, what status do they enjoy once residence is established? For example, in the *D* case, the problem was not that his partner was denied admission to Belgium, but that his employer there refused to recognise their Swedish registered partnership. This dimension is much more challenging and there is no easy solution to hand. Nonetheless, the EU should be exploring arrangements to guarantee that where couples move between countries with different systems of partnership recognition, these are as compatible as possible. This is not an agenda for harmonising national partnership laws, but rather to provide processes allowing (for example) a French PaCS to be converted into a German “Registered Life Partnership”. Alternatively, mechanisms could be created to allow “upgrading” from a PaCS to a registered partnership, where the couple move from France to Finland. Evidently, this is a complex agenda that requires attention to the detailed coordination of the differences between the statuses, as well as ensuring that partners are aware of any change in the balance of their rights and responsibilities. Nonetheless, it is a problem that cannot be resolved on the national level and where Union level action is the only practical response.

<sup>46</sup> Commission, “Proposal for a Council Regulation amending the Staff Regulations of officials and the conditions of employment of other servants of the European Communities”, [2002] OJ C 291 E/33 at 66.

## 4. Children and Other Family Members

**In this section, we will explore the extent to which the Union has sufficiently taken account of children where one or more of the parents are lesbian, gay, bisexual or transgender.**

As with family law and policy in general, it is often assumed that children's rights fall outside the legal competence of the European Union. Yet, there are various areas where EU activity impacts directly on children.<sup>47</sup> For example, the EU has intervened in order to regulate children's employment, to protect children from sexual exploitation and to address the situation of migrant and refugee children. In this section, we will explore the extent to which the Union has sufficiently taken account of children where one or more of the parents are lesbian, gay, bisexual or transgender. It begins with an overview of the diverse child-parent relationships that can exist in the Union, followed by an examination of the fundamental rights principles that should guide the Union's interventions here. The focus then shifts to consider two of the areas of EU activity where children with LGBT parents have not been fully considered to date: migration law and the mutual recognition of judgments relating to children. Finally, we consider briefly the situation of other family members beyond children.

### (a) Children with LGBT parents

In the past, it was not unusual for the assumption to be made that LGBT people did not have children. However, the falseness of this is increasingly recognised. Some children have biological parents who are lesbian, gay, bisexual or transgender. LGBT parents may be living in a relationship with the child's other biological parent, or it may be that this relationship has since dissolved. In some cases, the other biological parent is anonymous. This can occur where a woman has conceived with the assistance of reproductive technologies. In other instances, one or both biological parents

<sup>47</sup> For an overview, see Contribution by Euronet, CHARTE 4240/00 CONTRIB 113, 19 April 2000: <http://europeanchildrensnetwork.gla.ac.uk/Information/Documents.htm>

may have chosen not to play a parenting role in the child's upbringing. This can be true of surrogacy. In many cases, one or more of a child's parents may not share a biological link. For example, in the case of a lesbian couple, the child may be biologically linked to one parent only. In cases of adoption, there may or may not be a biological link between the child and their adoptive parents. In some states, transgender people are required to accept forced surgical infertility as part of the gender reassignment process, thus forfeiting the capacity to become biological parents. Paradoxically, even where national law permits recognition of the person's gender identity, this is forfeited if a transgender man becomes pregnant.

Biology does not determine who in practice performs the parenting role in relation to a child. In *X, Y and Z v UK*, the Court of Human Rights had to consider the refusal of the UK authorities to register a transgender man as the father of a child born by assisted reproduction to his partner. Although the Court ultimately concluded that this was not in breach of the Convention, it accepted that the man, his partner and his daughter formed a family:

*X was involved throughout that [assisted reproduction] process and has acted as Z's "father" in every respect since the birth ... In these circumstances, the Court considers that de facto family ties link the three applicants.*<sup>48</sup>

LGBT people often face barriers to exercising full parental rights. *Salgueiro da Silva Mouta v Portugal* highlights the difficulties that LGBT biological parents can face: the father was denied custody of his daughter by the Portuguese courts on the basis of his homosexuality.<sup>49</sup> The Court of Human Rights subsequently

**Biology does not determine who in practice performs the parenting role in relation to a child.**

48 Para. 37, *X, Y and Z v UK* (1997) 24 EHRR 143.

49 *Salgueiro da Silva Mouta v Portugal*, Application No 33290/96, judgment of 21 December 1999, [2001] 1 *Family Court Reporter* 653.

**LGBT parents without a biological link to their children also face legal difficulties.**

determined that this was a breach of Article 14 ECHR as it was discrimination on the ground of sexual orientation.

LGBT parents without a biological link to their children also face legal difficulties. Within the EU, same-sex second parent adoption is permitted in Denmark,<sup>50</sup> the Netherlands<sup>51</sup> and Sweden.<sup>52</sup> This permits a married or registered partner to adopt the child of his or her partner. Joint adoption (e.g. where the child has no biological link to either parent) by same-sex couples is only permitted in Sweden,<sup>53</sup> the Netherlands,<sup>54</sup> and England and Wales.<sup>55</sup>

## **(b) Children's rights and EU law**

It is only recently that discussion of children's rights in EU law has come to the fore. The key turning point was undoubtedly the EU Charter. Article 24 states:

- 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters that concern them in accordance with their age and maturity.*
- 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.*
- 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.*

The Charter draws on the principles found within the 1989 UN Convention on the Rights of the Child, which all Member States and candidate countries have

<sup>50</sup> | Lund-Andersen, "The Danish Registered Partnership Act, 1989: Has the Act Meant a Change in Attitudes?", in R Wintemute and M Andenæs (eds), see note 12.

<sup>51</sup> Waaldijk (see above note 12) 450.

<sup>52</sup> *Euro-Letter* No 98 (2002), available at: [www.steff.suite.dk/eurolet/eur\\_98.pdf](http://www.steff.suite.dk/eurolet/eur_98.pdf).

<sup>53</sup> *Ibid.*

<sup>54</sup> Waaldijk (see above note 12) 450.

<sup>55</sup> S. 144(4), Adoption and Children Act 2002.

signed. The 1989 Convention places an emphasis at its outset on the non-discrimination principle. Article 2(1) provides that:

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

**Discrimination on grounds of the sexual orientation or gender identity of the child's parent or guardian should be regarded as incompatible with the Convention.**

There are two points to note about this provision. First, it is non-exhaustive – forbidding discrimination of “any kind”. This is important because although sexual orientation and gender identity are not explicitly mentioned, these are well-recognised grounds of discrimination (at least within the ECHR and EU law) and should be presumed to fall within the scope of this guarantee. Second, it is clear that discrimination on grounds of the sexual orientation or gender identity of the child's parent or guardian should be regarded as incompatible with the Convention.

The Charter and UN Convention provide the foundation for a children's policy that takes full account of children with LGBT parents. It is clear that this should be guided by non-discrimination, the best interests of the child and ensuring the right of the child to maintain personal contact with their parents. Children will most directly fall within the scope of EU law when they seek to cross EU internal or external borders, or where their parents are living in more than one state. In the next two sections, we examine existing EU law and consider how effectively it respects the fundamental rights of children.

## (c) Children and migration

Most existing EU legal instruments link the right of a child to move to dependence on an adult migrant.<sup>56</sup> It is not yet clear whether children can invoke autonomous free movement rights based purely on their status as EU citizens.<sup>57</sup> Therefore, establishing recognition of the parent-child relationship will be often crucial to maintaining family unity. Regulation 1612/68 lays down the basic rules governing EU migrant workers' children. A worker may be joined by "his spouse and their descendants who are under the age of 21 years or are dependents".<sup>58</sup> The Directive does not further define the term "descendant", however, it is clear that those children with whom the worker and/or their spouse have biological links will most easily satisfy this. In particular, there may be difficulties in regarding a child as a "descendant" if the worker is not legally responsible for the child. This situation is exacerbated by the exclusion from the Directive of unmarried partners, and hence their children. It will prove especially problematic where the unmarried partner and children are of third country nationality and consequently do not enjoy any autonomous free movement rights.

**Establishing recognition of the parent-child relationship will be often crucial to maintaining family unity.**

The Commission's proposal to replace Regulation 1612/68 with a single Directive on the Free Movement Rights of EU Citizens would permit the EU citizen to be joined in another state by:

- (a) the spouse;*
- (b) the unmarried partner, if the legislation of the host Member State treats unmarried couples as equivalent to married couples and in accordance with the conditions laid down in any such legislation;*
- (c) the direct descendants and those of the spouse or unmarried partner as defined in point (b).<sup>59</sup>*

<sup>56</sup> H Stalford, "The Citizenship Status of Children in the European Union" (2000) 8 *International Journal of Children's Rights* 101, 110.

<sup>57</sup> An argument to this end would have to be founded on the right to free movement for EU citizens in Art 18 EC.

<sup>58</sup> Art 10(1)(a).

<sup>59</sup> Art 2(2), COM (2001) 257.

The Commission unhelpfully add the word “direct” to “descendant” in paragraph (c), without explaining the intended meaning of this qualification. Moreover, it is clear that EU citizens will only have the right to be joined by their unmarried partner and the descendants of their partner when moving to a state that treats unmarried partners as equivalent to married partners in domestic law. For example, consider the situation of a French woman living with her Canadian partner and raising two children together, but where these children are biologically linked only to the Canadian woman. If the French national gets posted by her employer to work in Greece, she has no right under Community law to bring her partner or the children they are raising together.

Viewed from the perspective of children’s rights, the proposed revisions to Regulation 1612/68 do not seem to put the best interests of the child first, nor do they fully respect the right of the child not to be discriminated against on grounds of the sexual orientation or gender identity of their parents. Under the proposed Directive, the right of children to remain with both parents will vary according to whether the parents are married and where they are moving within the Union. Significantly, at its first reading the European Parliament amended this aspect of the proposal, seeking to include all children of registered partners and the children of unmarried partners according to the mutual recognition principle.<sup>60</sup>

The situation is even more difficult for the children of an unmarried couple of third country nationality. The Commission’s 2002 amended proposal for a Directive on the right to family reunification addresses the situation of third country nationals legally resident in the Union.<sup>61</sup> Married couples will be entitled to be joined

<sup>60</sup> Resolution of 11 February 2003 on COM (2001) 257; amendments 17 and 18.

<sup>61</sup> COM (2002) 225.

by “the minor children of the applicant and of his/her spouse, including children adopted”.<sup>62</sup> In contrast, Member States have the discretion to choose to admit “the unmarried partner, being a third country national, with whom the applicant is in a duly attested stable long-term relationship, or of a third country national who is bound to the applicant by a registered partnership ... and the unmarried minor children, including adopted children, of such persons.”<sup>63</sup> In this case, there is a wide gap between the situation faced by children with married parents and that confronted by those with unmarried parents. The former have a legal right to join their parents inside the Union, whereas the latter find themselves at the discretion of each individual Member State. This does not accord with the explicit recognition in the Charter of the right of every child “to maintain on a regular basis a personal relationship and direct contact with both his or her parents.”<sup>64</sup>

An even more stark inequality of treatment can be found within EU asylum law, specifically in the Temporary Protection Directive.<sup>65</sup> People enjoying temporary protection status are entitled to be joined in the Union by a limited range of family members. With regard to children, Article 15(1)(a) extends reunion rights to “the minor unmarried children of the sponsor or of his/her spouse, without distinction as to whether they were born in or out of wedlock or adopted.” This creates a discriminatory distinction between children of unmarried couples and children of married couples. Whilst the children of married couples are protected whether they were born before or after the couple were married, no provision is made for children where the parents are still not married. The blatant discrimination in the Directive is likely to breach Article 8 (the right to family life) and Article 14 (non-discrimination) of the ECHR. In *Marckx v Belgium*, the Court of Human Rights stressed the obli-

<sup>62</sup> Art 4(1)(b), *ibid*. The Justice and Home Affairs Council agreed to adopt this definition of the family at its meeting on 27/28 February 2003.

<sup>63</sup> Art 4(3), *ibid*.

<sup>64</sup> Art 24(3).

<sup>65</sup> Directive 2001/55/EC, [2001] OJ L212/12.

gation on all states to ensure that there is no discrimination against children born outside marriage.<sup>66</sup>

At the same time, the Temporary Protection Directive can be praised in other respects. Article 15(4) requires Member States to “take into consideration the best interests of the child” when applying the Directive’s provisions. It is also notable that both the Temporary Protection Directive and the proposed Family Reunion Directive seek to ensure adopted children are expressly catered for (albeit only where their parents are married). In contrast, the proposed Free Movement of EU Citizens Directive does not directly refer to adopted children. Whilst it may be presumed that these are included in the term “descendants”, a specific mention could be useful to ensure clarity on this point.

#### **(d) Cross-border application of judgments affecting children**

Another consequence of growing mobility within the European Union is situations where parents of children find themselves in different states. This raises potentially difficult issues where the parents cannot agree on matters relating to child custody and maintenance. The EU does not currently enjoy the competence to introduce harmonised legal provisions on such aspects of family law. However, Article 61(c) EC requires the Council to take measures “in the field of judicial cooperation in civil matters” in order to realise the Area of Freedom, Security and Justice. Article 65 EC explains that this covers cooperation between courts, especially in the cross-border “recognition and enforcement of decisions in civil and commercial cases”. The initial intervention of the Union in this area was to lay down clearer rules on the court responsible for matters relating to divorce, legal separation, marriage annulment

<sup>66</sup> (1979) 2 EHRR 330, para. 34.

and “parental responsibility over a child of both spouses”.<sup>67</sup> This was obviously disappointing from the perspective of children with LGBT parents, many of whom fell outside the scope of the Regulation. Therefore, it is encouraging that subsequently the Commission proposed a new Regulation that would cover children of both married and unmarried couples.

The Commission’s new proposal would determine which court had jurisdiction for a case concerning “the attribution, exercise, delegation, restriction or termination of parental responsibility”, in situations where the parents are located in two different states of the Union.<sup>68</sup> Furthermore, it will determine the rules concerning the cross-border enforcement of such decisions – for example, ensuring that a decision on child custody obtained in France can be enforced in Germany. This is particularly designed to assist with cases where one parent removes a child to another state and then seeks to frustrate the implementation of a court decision in the first state. The Regulation does not, however, cover issues relating to child maintenance, nor will it apply in Denmark.

From the LGBT perspective, it is welcome that the proposed Regulation restates at the outset the children’s rights principles found in the EU Charter.<sup>69</sup> Article 28 of the Regulation only allows courts to refuse to implement a decision made by a court in another state “if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child”.<sup>70</sup> There are two situations in which this may be relevant to cases involving LGBT parents. First, where an LGBT parent is awarded custody or access, but a court in another state refuses to recognise the decision on the grounds of public policy. The decision of the

<sup>67</sup> Art 3(1), Council Regulation 1347/2000/EC on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, [2000] OJ L160/19.

<sup>68</sup> Art 1, Commission, “Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation 1347/2000 and amending Regulation 44/2001 in matters relating to maintenance”, COM (2002) 222.

<sup>69</sup> Arts 3 and 4, *ibid*.

<sup>70</sup> Art 28(a), *ibid*.

Court of Human Rights in *Salgueiro* forms a strong foundation for arguing that discriminatory reasons cannot be invoked under the proposed Regulation as a legitimate public policy ground for refusing to recognise a judgment from another state.

A different situation would emerge where a decision on child custody in the first state was adversely influenced by the sexual orientation or gender identity of one of the parents. Could a court in another state refuse to recognise a discriminatory judgment? It could be argued that such discrimination is incompatible with the ECHR and that this forms a legitimate public policy reason for non-enforcement of the decision. At the same time, Article 31 of the proposed Regulation must be kept in mind, as this provides that “under no circumstances may a judgment be reviewed as to its substance”. This reveals the limits of the Regulation. It does not seek to harmonise the rules governing how decisions are made in each Member State on the award of child custody; it seeks simply to coordinate aspects relating to jurisdiction and cross-border enforcement. Yet, this may create tensions given the wide diversity of national laws on recognising LGBT parents.

Whilst the Regulation makes a first step towards equal protection for the children of unmarried couples, there is little recognition of the specific circumstances facing children with LGBT parents. This is most manifestly revealed in the legal form to be completed when administering decisions under this Regulation. Under “holders of parental responsibility”, the form only provides for the entry of “mother”, “father” and “other”.<sup>71</sup> The idea of a child having two mothers or two fathers is not foreseen in the official form, nonetheless, this is already legally possible in the Netherlands, Sweden, England and Wales. A linked issue is the possibility for

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<sup>71</sup> Annex V, *ibid.*

children with transgender parents to amend birth certificates to recognise that both parents share the same gender.

### (e) Other family members

**Given the diversity of family structures, there are strong arguments in favour of enhancing the rights of dependent relatives from the current position in EU law.**

Finally, it must not be ignored that the difficulties encountered by children in the absence of a legally recognised relationship extend to other members of the family. This concerns a wide range of potential relatives – parents, siblings, etc. For example, individuals undergoing gender reassignment may be required to divorce any existing spouse.<sup>72</sup> Yet, although the legal relationship between the two may have been terminated, the emotional bonds may endure. As it stands, EU free movement law only provides for two categories of dependent (other than spouse or children). Article 10(1)(b) of Regulation 1612/68 permits reunion with “dependent relatives in the ascending line of the worker and his spouse”. Therefore, the parents of both spouses are clearly covered, but the parents of an unmarried partner would not be included. There is no requirement for the receiving state to admit any other relatives, but Article 10(2) states that “Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country from whence he comes.” Yet, this is a discretionary duty; it does not impose any enforceable legal obligation on the Member States to admit other family members. Given the diversity of family structures (as discussed in this paper), there are strong arguments in favour of enhancing the rights of dependent relatives from the current position in EU law.

<sup>72</sup> For example, para. 15, *Sheffield and Horsham v UK*, Applications No 22985/93 and No 23390/94, European Court of Human Rights judgment of 30 July 1998.

## 5. Conclusion

Many aspects of family law remain part of national legal competence and cannot be changed by the European Union. However, this paper has demonstrated that EU law increasingly impacts on issues relating to partners, children and families. The duty on the Union is to ensure that those areas falling within its control do not discriminate on grounds of sexual orientation and gender identity. Moreover, it is essential that EU law accommodates the changing nature of national family law systems and in particular new institutions, such as registered partnership.

General human rights principles provide important points of guidance in this field. The Court of Human Rights has established benchmarks for non-discrimination in matters such as child custody and access to marriage for transgender people. The EU Charter also contains norms that could be usefully applied, not least in relation to the rights of children. Yet, the vague status of human rights guarantees within EU law remains an underlying weakness. Incorporation of the EU Charter into the founding Treaties as well as accession by the EU to the European Convention on Human Rights is an essential foundation for ensuring non-discrimination in matters relating to partners, children and families.

## 6. Recommendations

### To the Member States and candidate countries:

- ▼ All states should review national laws and policies to ensure any discrimination based on sexual orientation or gender identity is eliminated. In particular, all Member States should end any discrimination relating to marriage, partnership, adoption and parental responsibility.
- ▼ All states should remove immediately any remaining restrictions on transgender marriage in compliance with the decision of the European Court of Human Rights in *Goodwin v UK*.
- ▼ No state should oblige transgender people to divorce existing spouses as a precondition for recognition of the person's gender identity.

### To the European Union:

#### General recommendations

- ▼ The Union should make the Charter of Fundamental Rights legally binding through incorporating its provisions in the founding EU Treaties.
- ▼ The Union should accede to the European Convention on Human Rights.
- ▼ In developing new laws and policies, as well as revising existing measures, the Union should always ensure an inclusive definition of the family in all its diversity.

#### Recommendations on the rights of partners

- ▼ Rights conferred by EU law should not be limited to married partners. They should be extended to

include partners with a legally recognised status in national law as well as de facto partnerships evidenced by a durable relationship.

- ▼ Anyone legally married in a Member State should be regarded as married for the purposes of EU law.
- ▼ As a first step, Member States should be obliged to provide the right to enter, reside and work to any couple with a legally recognised partnership in their country of origin.
- ▼ The Commission should undertake a comprehensive study of national laws relating to the family with a view to identifying any issues affecting EU law and policy.
- ▼ The EU institutions should support cooperation between Member States in order to coordinate existing and future national partnership laws.

### **Recommendations on the rights of children and other family members**

- ▼ All measures affecting children should be guided by the best interests of the child and should ensure no discrimination based on the sexual orientation or gender identity of the parents.
- ▼ EU law should treat children equally, regardless of whether:
  - their parents are or were married;
  - they are adopted;
  - they share a biological link with their parents.
- ▼ EU law should take into account the possibility of a child having more than two parents and the possibility of a child having parents of the same sex.
- ▼ Definitions of the family in EU law should be based on the social and emotional reality of family ties, not

simply those families accorded legal recognition in national law.

▼ To this end, the right to free movement within the EU and the right to family reunion for third country nationals should be extended to include:

- any children for whom the migrant shares parental responsibility;
- any children of the migrant's spouse, registered partner or unmarried partner;
- any other dependent of the migrant or their spouse, registered partner or unmarried partner.

Issues such as marriage, partnership and parenting have been traditionally treated as falling within national legal competence and hence outside the powers of the European Union. However, this situation is now rapidly changing. The boundaries between national and EU competences have gradually blurred over time. The Union is now committed to promoting social inclusion through policies in a wide range of fields such as employment, education, healthcare and housing. Moreover, the creation of the “Area of Freedom, Security and Justice” has demanded much greater involvement of the Union in the coordination of civil law systems, including family law.

In this policy paper, we examine how various aspects of EU law are impacting upon national rules relating to “personal status” in its broadest sense.