

## **EQUALITY FOR LGBT FAMILIES: EUROPEAN AND COMPARATIVE CASE LAW**

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### **"Families is plural: broadening concepts, narrowing prejudices"**

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#### **I. Council of Europe Law: European Convention on Human Rights (1950)**

##### A. Same-sex couples

##### 1. Access to the rights of unmarried different-sex couples

- *Siegmund KARNER v. Austria* (24 July 2003) (judgment of the European Court of Human Rights, "ECtHR", <http://www.echr.coe.int/ECHR/EN/hudoc>, or FR)
- *Horst SCHALK & Johan Kopf v. Austria* (24 June 2010) (ECtHR judgment):

"94. In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Article 8 [of the European Convention on Human Rights]. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would."

##### 2. Access to the rights of married different-sex couples

- no favourable judgments yet
- *Horst SCHALK & Johan Kopf v. Austria* (24 June 2010) (ECtHR judgment) (4-3)
- compare the law of the European Union, Directive 2000/78/EC
- Case C-267/06, *Tadao MARUKO v. Versorgungsanstalt der deutschen Bühnen* (1 April 2008) (judgment of the Court of Justice of the European Union, "CJEU", <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> or PT)
- Case C-147/08, *Jürgen RÖMER v. Freie und Hansestadt Hamburg* (CJEU, 10 May 2011)

##### 3. Access to legal marriage (different-sex couple; one partner is transsexual)

- *Christine GOODWIN v. United Kingdom* (11 July 2002) (ECtHR judgment)

##### 4. Access to legal marriage (same-sex couple; neither partner is transsexual)

- no favourable judgments yet
- the reasoning is ready (*Christine Goodwin*, paragraph 98, the right to marry does not require capacity to procreate without assistance), but only 7 of 47 member states of the Council of Europe have opened up legal marriage to same-sex couples

- *Horst SCHALK & Johan Kopf v. Austria* (24 June 2010) (ECtHR judgment)
- *Stéphane CHAPIN & Bertrand CHARPENTIER v. France* (No. 40183/07) (ECtHR, pending)
- *Helena PAIXÃO & Teresa PIRES v. Portugal* (Application No. 6788/10), withdrawn on 27 June 2010 (because of their marriage on 7 June 2010!)

## B. Individual access to parenting

### 1. Custody of a child born during a prior different-sex marriage

- *João Salgueiro da Silva MOUTA v. Portugal* (21 December 1999) (ECtHR judgment) (cited to Inter-American Court of Human Rights in *Karen ATALA v. Chile*, hearing of 23-24 Aug. 2011, Bogotá, Colombia)
- *P.V. v. Spain* (30 Nov. 2010) (ECtHR judgment), paras. 30, 36 (decision regarding transsexual parent's contact with child based on her temporary emotional instability, not on her transsexuality; *Mouta* distinguished)

### 2. Access to adoption by an unmarried individual

- *Philippe FRETTE v. France* (26 February 2002) (ECtHR judgment) (3-4)
- *E.B. v. France* (22 January 2008) (ECtHR judgment) (principle: 14-3; circumstances: 10-7)

<b><u>Europe: Statements of national courts</u></b>	<b><u>Chile: Statements of Supreme Court</u></b>
considered evidence of discrimination based on sexual orientation, violating the European Convention on Human Rights	(majority of 3 of 5 judges) in its <i>Fallo</i> of 31 May 2004
"[t]he child should live ... in a <u>traditional</u> Portuguese family"; "homosexuality ... is an <u>abnormality</u> and children should not grow up in the shadow of <u>abnormal</u> situations" - <i>Mouta v. Portugal</i> (1999), paras. 33-34	"a family structured <u>normally</u> ... according to the <u>traditional</u> model"; "[the children's] <u>exceptional</u> family environment" - <i>Fallo</i> , paras. 20 and 18
court "warned [Mr. Mouta] not to adopt conduct which might make the child realise that her <u>father was living with another man</u> 'in conditions resembling those of man and wife'" - <i>Mouta</i> , para. 35	"put[ting] her own interests ahead, postponing those of her daughters, especially by starting a <u>cohabitation with her homosexual partner</u> in the same home in which takes place the raising and care of her daughters" - <i>Fallo</i> , para. 16
"lack of a <u>paternal ... referent</u> in the household" - <i>E.B. v. France</i> (2008), para. 73	"the lack in [Ms. Atala's] home of a <u>parent of masculine sex</u> " - <i>Fallo</i> , para. 17
"if <u>the children</u> are educated according to the religious teaching of the Jehovah's Witnesses, they <u>will become social outcasts</u> " - <i>Hoffmann v. Austria</i> (1993), paras. 15 and 33	"the girls could become the object of <u>social discrimination</u> "; "exposing them to becoming the object of <u>isolation and discrimination</u> " - <i>Fallo</i> , paras. 15 and 18

### 3. Access to donor insemination

- *E.B. v. France* applies?

#### C. Access to parenting (different-sex couple; one partner is transsexual)

- *X, Y & Z v. United Kingdom* (22 April 1997) (ECtHR judgment)

#### D. Access to parenting (same-sex couple; neither partner is transsexual)

##### 1. Access to joint or second-parent adoption

- *Karner v. Austria* applies if unmarried different-sex couples already have access (**for example, in Portugal**); compare *Kerkhoven v. Netherlands* (No. 15666/89) (19 May 1992) (admissibility decision of the former European Commission of Human Rights)

- *X, Y & Z v. Austria* (No. 19010/07) (ECtHR, pending) (*Karner* combined with *Emonet c. Switzerland*, 13 December 2007, ECtHR judgment)

- if only married different-sex couples have access, then see I.A.2

- *Valérie GAS & Natalie DUBOIS v. France* (No. 25951/07) (ECtHR, hearing of 12 April 2011)

##### 2. Access to donor insemination (or surrogate motherhood)

- *Karner v. Austria* applies if unmarried different-sex couples have access (eg France)

- if only married different-sex couples have access, then see I.A.2

## II. National Law (examples)

### A. Summary of the legal situation (examples)

	legal marriage	joint adoption	donor insemination	presumption of parenthood	access to surrogate motherhood
Canada	YES	YES	YES	YES	?
USA: Verm't	YES	YES	YES	YES	?
USA: Mass.	YES	YES	YES	?	?
USA: Conn.	YES	YES	YES	?	?
USA: Calif.	"domestic partnership"	YES	YES	YES	YES
South Africa	YES	YES	YES	YES	?
Netherlands	YES	YES	YES	NO	?
United Kingdom	"civil partnership"	YES	YES	YES	YES (foreign surrogacy recognised)
Spain	YES	YES (NO - unmarried same-sex)	YES	YES	NO (foreign surrogacy recognised)
<b><u>Portugal</u></b>	<b><u>YES!</u></b>	<b><u>NO</u></b>	<b><u>NO</u></b>	<b><u>NO</u></b>	<b><u>NO</u></b>
France	NO	NO	NO	NO	NO

### B. National legislation (examples)

#### 1. Access to joint adoption

United Kingdom - Adoption and Children Act 2002 (in force 30 December 2005), <http://www.legislation.gov.uk/ukpga/2002/38/contents>, sections 49-51, 144(4)

#### 2. Access to donor insemination and surrogate motherhood

United Kingdom - Human Fertilisation and Embryology Act 2008, <http://www.legislation.gov.uk/ukpga/2008/22/contents>, sections 42-47, 53-54 (all in force by 6 April 2010)

## C. National case law (examples)

### 1. Access to joint or second-parent adoption

- *In re Dana*, 660 N.E.2d 397 (New York Court of Appeals 1995) (second-parent)
- *Du Toit v. Minister for Welfare and Population Development* (10 September 2002), Case no. CCT40/01 (Constitutional Court of South Africa) (joint)
- *P & Others* (18 June 2008), [2008] UKHL 38, <http://www.bailii.org/uk/cases/UKHL/2008/38.html> (UK House of Lords) (joint, unmarried different-sex couple)
- *LRM & LMBG, Recurso Especial* No. 889.852 (*Superior Tribunal de Justiça* or "STJ", Brasilia, 27 April 2010)

On 27 April 2010, the STJ, Brazil's highest appellate court for non-constitutional matters, decided a case very similar to *Gas & Dubois v. France*, except that Brazilian legislation permitted unmarried different-sex couples to adopt each other's children. The case involved two women who had been living together as partners for 12 years. One of them (LRM) had adopted two children (siblings) from birth, and was their sole legal parent. Her partner (LMBG) applied to adopt the two children and become their second legal parent. In its *Ementa*, the STJ reasoned as follows:

"5. A matéria relativa à possibilidade de adoção de menores por casais homossexuais vincula-se obrigatoriamente à necessidade de verificar qual é a melhor solução a ser dada para a proteção dos direitos das crianças, pois são questões indissociáveis entre si.

6. Os diversos e respeitadas estudos especializados sobre o tema, fundados em fortes bases científicas (realizados na Universidade de Virgínia, na Universidade de Valência, na Academia Americana de Pediatria), "não indicam qualquer inconveniente em que crianças sejam adotadas por casais homossexuais, mais importando a qualidade do vínculo e do afeto que permeia o meio familiar em que serão inseridas e que as liga a seus cuidadores". ...

8. É incontroverso que existem fortes vínculos afetivos entre a recorrida e os menores – sendo a afetividade o aspecto preponderante a ser sopesado numa situação como a que ora se coloca em julgamento.

9. Se os estudos científicos não sinalizam qualquer prejuízo de qualquer natureza para as crianças, se elas vêm sendo criadas com amor e se cabe ao Estado, ao mesmo tempo, assegurar seus direitos, o deferimento da adoção é medida que se impõe.

10. O Judiciário não pode fechar os olhos para a realidade fenomênica. Vale dizer, no plano da "realidade", são ambas, a requerente e sua companheira, responsáveis pela criação e educação dos dois infantes, de modo que a elas, solidariamente, compete a responsabilidade.

11. Não se pode olvidar que se trata de situação fática consolidada, pois as crianças já chamam as duas mulheres de mães e são cuidadas

por ambas como filhos. Existe dupla maternidade desde o nascimento das crianças, e não houve qualquer prejuízo em suas criações.

12. Com o deferimento da adoção, fica preservado o direito de convívio dos filhos com a requerente no caso de separação ou falecimento de sua companheira. Asseguram-se os direitos relativos a alimentos e sucessão, viabilizando-se, ainda, a inclusão dos adotandos em convênios de saúde da requerente e no ensino básico e superior, por ela ser professora universitária.

13. A adoção, antes de mais nada, representa um ato de amor, desprendimento. Quando efetivada com o objetivo de atender aos interesses do menor, é um gesto de humanidade. ...

14. Por qualquer ângulo que se analise a questão, seja em relação à situação fática consolidada, seja no tocante à expressa previsão legal de primazia à proteção integral das crianças, chega-se à conclusão de que, no caso dos autos, há mais do que reais vantagens para os adotandos, conforme preceitua o art. 43 do ECA. Na verdade, ocorrerá verdadeiro prejuízo aos menores caso não deferida a medida. ..."

## 2. Access to donor insemination (and automatic parenthood for the mother's partner)

- *North Coast Women's Care v. San Diego County Superior Court* (18 August 2008) (Supreme Court of California) (donor insemination)
- *J. & B. v. Director General, Department of Home Affairs* (28 March 2003), Case no. CCT46/02 (Constitutional Court of South Africa) (automatic parenthood)

## III. NGO Interventions in European Court of Human Rights

[http://www.ilga-europe.org/home/how\\_we\\_work/litigation/ecthr\\_litigation/interventions](http://www.ilga-europe.org/home/how_we_work/litigation/ecthr_litigation/interventions)

***Written comments and oral submissions [of FIDH, ICJ, ILGA-Europe, BAAF and NELFA] Gas & Dubois v France [2009 and 2011]***

***E.B. v. France, Written Comments of FIDH, ILGA-Europe, BAAF and APGL, 3 June 2005 (adoption by lesbian woman as an individual)***

## IV. Conclusions

A. *Mouta v. Portugal* and *E.B. v. France* make it clear that a government may not argue that children should not be raised by a lesbian mother or a gay father in a family with one legal mother or one legal father. These judgments implicitly reject the argument that children are harmed by being raised by a lesbian mother or a gay father.

B. If children may live in a family with one legal lesbian mother or one legal gay father, why is it not better for them to live in a family with two legal lesbian mothers, or two legal gay fathers? Question to be considered in *Gas & Dubois v. France*.