

Application No. No. 19010/07, X & Others v. Austria
European Court of Human Rights, Grand Chamber

**WRITTEN COMMENTS OF FIDH, ICJ, ILGA-EUROPE, BAAF,
NELFA AND ECSOL, submitted on 1 August 2012**

1. Prof. Robert Wintemute, School of Law, King's College London, respectfully submits these Written Comments on behalf of FIDH (*Fédération Internationale des ligues des Droits de l'Homme*), ICJ (International Commission of Jurists), ILGA-Europe (the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association), BAAF (British Association for Adoption and Fostering), NELFA (Network of European LGBT Families Associations), and ECSOL (European Commission on Sexual Orientation Law). Their interest and expertise are set out in their "Application for leave" of 24 June 2012, granted by the President of the Court on 28 June 2012, under Rule 44(3) of the Rules of Court.

Introduction

2. There are three situations in which a lesbian or gay individual might seek to adopt a child: (i) a lesbian or gay individual seeks to adopt as an unmarried individual, in a member state where adoptions by unmarried individuals are permitted (even if only in exceptional cases), and any partner the individual might have acquires no parental rights as a result of the adoption ("individual adoption"); (ii) one member of a same-sex couple, consisting of two women or two men living together as partners, seeks to adopt the child of the other partner, so that both partners have parental rights vis-à-vis the child ("second-parent adoption", if the child has only one legal parent, or "step-parent adoption", if the child has two legal parents, and the court must decide whether the partner of one parent should replace the other parent, with the other parent's consent or because it would be in the child's best interest); and (iii) both members of a same-sex couple seek to jointly adopt a child with no prior genetic or legal connection with either partner, so that both partners simultaneously acquire parental rights vis-à-vis the child ("joint adoption"). This application concerns second-parent and step-parent adoption, because Austrian legislation makes both forms of adoption legally impossible in the case of a same-sex couple.

3. The question of equal access by lesbian and gay individuals to individual adoption, in member states in which this possibility exists for unmarried heterosexual individuals, was settled by the Grand Chamber in *E.B. v. France* (22 Jan. 2008). By 14 votes to 3, the Court adopted the following principle, stated succinctly in para. 3 of the dissenting judgment of Judge Costa (who dissented only on the application of the principle to the facts of the case): "the message sent by our Court to the States Parties is clear: a person seeking to adopt cannot be prevented from doing so merely on the ground of his or her homosexuality ... our Court ... considers that a person can no more be refused authorisation to adopt on grounds of their homosexuality than have their parental responsibility withdrawn on those grounds ... I agree." Excluding a lesbian or gay individual from the possibility of adopting a child as an unmarried individual, solely because of their sexual orientation, is discrimination violating Art. 14 combined with Art. 8 (respect for private or family life).

4. The Court has yet to consider a case in which a same-sex couple has challenged their exclusion from the possibility of joint adoption.

5. With regard to second-parent or step-parent adoption within a same-sex couple, the Court's only judgment to date is *Gas & Dubois v. France* (15 March 2012). The Court found no difference in treatment, and therefore no discrimination, because: "69. ... la Cour doit examiner [la] situation [des requérantes] par rapport à celles des couples hétérosexuels non mariés. ... [D]es couples [hétérosexuels non mariés] placés dans des situations juridiques comparables, la conclusion d'un PACS, se voient opposer ... le [même] refus de l'adoption simple ... [La Cour] ne relève donc pas de différence de traitement fondée sur l'orientation sexuelle des requérantes."

6. Unlike *Gas & Dubois*, which concerned legislation restricting second-parent adoption to married different-sex couples, *X & Others v. Austria* raises the question of whether there is discrimination based on sexual orientation, violating Art. 14 combined with Art. 8 (respect for family life) of the European Convention on Human Rights, if the legislation of a Council of Europe member state permits unmarried different-sex couples to apply to adopt each other's children, but makes it legally impossible for unmarried same-sex couples to do so.

7. The Court has made it clear that differences in treatment based on sexual orientation are analogous to differences in treatment based on race (*Smith & Grady v. UK*, 1999, para. 97), religion (*Mouta v. Portugal*, 1999, para. 36), and sex (*L. & V. v. Austria*, 2003, para. 45), and can only be justified by "particularly serious reasons". When justifying differences in treatment based on sexual orientation, "the margin of appreciation afforded to States is narrow ... It must ... be shown that it was necessary in order to achieve [the State's] aim to exclude certain categories of people ..." (*Karner v. Austria*, 2003, para. 41). In *Karner* and three subsequent cases, *Kozak v. Poland* (2 March 2010), *P.B. & J.S. v. Austria* (22 July 2010), and *J.M. v. United Kingdom* (28 Sept. 2010), the Court has found discrimination where an unmarried same-sex couple was denied a right granted to unmarried different-sex couples. These Written Comments will demonstrate that there is no reason for the Grand Chamber not to apply *Karner* to a difference in treatment based on sexual orientation that relates to the possibility of applying for second-parent or step-parent adoption.

I. There is no justification for discrimination against families composed of a same-sex couple and the children they are raising together.

8. The strongest and most persistent prejudice against the lesbian and gay minority in Europe is that they represent a threat to the well-being of children. This prejudice, held by many members of the heterosexual majority, is reflected in decisions of national courts denying lesbian women and gay men custody of their own children, or the possibility of adopting a child as an unmarried individual. It also appears in national legislation that fails to provide for the reality that, despite the legal obstacles and social prejudice they face, same-sex couples are raising children. Families composed of a same-sex couple and their children exist across Europe, but often face unnecessary problems in their daily lives, or anxieties about their futures, because their children are denied the same possibilities as the children of different-sex couples to establish a legal relationship with the two adults who are raising them.

9. The Court has twice confronted the social prejudice against lesbian women and gay men raising children, and responded with clear legal principles rejecting this prejudice. In *Mouta v. Portugal* (21 Dec. 1999), the Court considered a national court's decision to transfer custody of a girl from her gay father to her heterosexual

mother. The national court found it unnecessary "to determine whether homosexuality is ... an illness" because, in any case, "it is an abnormality" (para. 34). The Court unanimously found a violation of Art. 14 combined with Art. 8, because the national court "36. ... made a distinction based on considerations regarding the applicant's sexual orientation, ... which is not acceptable under the Convention". In *E.B. v. France* (para. 3, above), the Court extended *Mouta* to the blanket exclusion of lesbian women and gay men from the possibility of adopting a child as an unmarried individual (in countries where it exists for unmarried heterosexual individuals).

10. It is implicit in *Mouta* and *E.B.* that the Court saw no reason why a child should not be raised by a lesbian or gay individual living with their same-sex partner (as Mr. Mouta and Ms. E.B. were doing), because lesbian and gay individuals and same-sex couples are just as capable as heterosexual individuals and different-sex couples of providing the care and upbringing a child needs.¹ It is also implicit that the Court rejected the concerns that are most often raised regarding the well-being of the children of lesbian and gay parents. But, unlike the Inter-American Court of Human Rights, the Court did not expressly reject these concerns.

11. On 20 March 2012, five days after *Gas & Dubois*, the Inter-American Court of Human Rights made public its judgment of 24 Feb. 2012 in *Atala v. Chile*.² The Inter-American Court (by 6 votes to 0) found multiple violations of the American Convention on Human Rights in a case very similar to *Mouta*: the Supreme Court of Chile had transferred custody of three girls from their lesbian mother to their heterosexual father, because she and her daughters were living with her female partner. Most importantly, the Inter-American Court provided an express and detailed rejection of common concerns regarding the well-being of the children of lesbian and gay parents: (a) "alleged social discrimination" against them; (b) "alleged confusion of sexual roles"; and (c) a "right to a 'normal and traditional' family".

12. With regard to "alleged social discrimination" by third parties against the children (eg, at school or in the neighbourhood), the Inter-American Court ruled that: "119. ... to justify a distinction in treatment ..., based on the alleged possibility of social discrimination ... that the minors might face due to their parents' situation cannot be used as legal grounds for a decision. While it is true that certain societies can be intolerant toward a person because of their race, gender, nationality, or sexual orientation, States cannot use this as justification to perpetuate discriminatory treatments. ... 121. ... [W]ith regard to the argument that the child's best interest might be affected by the risk of rejection by society, ... potential social stigma due to the mother or father's sexual orientation cannot be considered as a valid 'harm' for the purposes of determining the child's best interest."

13. At para. 120, the Inter-American Court cited *Palmore v. Sidoti*, 466 U.S. 429 at 433 (1984), in which the U.S. Supreme Court found unconstitutional racial discrimination where a court had transferred custody of a child to her white father,

¹ For the scientific studies, and statements by professional bodies and child welfare organisations, cited to the Court in *E.B.*, see the third-party interveners' Written Comments, submitted on 3 June 2005, http://www.ilga-europe.org/home/how_we_work/litigation/ecthr_litigation/interventions. See also "Die Lebenssituation von Kindern in gleichgeschlechtlichen Lebenspartnerschaften" (2009), http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/Forschungsbericht_Die_Lebenssituation_von_Kindern_in_gleichgeschlechtlichen_Lebenspartnerschaften.pdf?__blob=publicationFile; "Expert Testimony of Allison Jernow, Senior Legal Advisor, International Commission of Jurists" in *Atala v. Chile* (Inter-American Court of Human Rights, hearing of 23-24 August 2011), footnotes 30-35 and accompanying text, http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=23956.

² See http://www.corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf (paras. 115-146).

because her white mother had remarried a black man rather than a white man: "There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin. The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."

14. With regard to "alleged confusion of sexual roles", the Inter-American Court found that: "124. ... the determination of harm must be supported by ... reports from experts and researchers in order to reach conclusions that do not result in discriminatory decisions. 125. Indeed, the burden of proof here falls on the State, which must demonstrate that the judicial decision ... has been based on the existence of clear, specific and real harm to the children's development. ... Otherwise, there is a risk of basing the decision on stereotypes ... exclusively associated with the unfounded preconception that children raised by homosexual couples would necessarily have difficulties in defining gender or sexual roles. ... 128. ... [A] number of scientific reports considered representative and authoritative in the field of social sciences ... conclude that living with homosexual parents *per se* does not affect a child's emotional and psychological development. These studies agree that: ... ii) the psychological development and emotional well-being of girls or boys raised by gay fathers or lesbian mothers are comparable to those of girls or boys raised by heterosexual parents; ... iv) the sexual orientation of the mother or father does not affect children's development in terms of ... their sense of themselves as male or female, their gender role, behavior and/or sexual orientation ... 129. The Court notes that the American Psychological Association ... has stated that existing studies on this matter are 'impressively consistent in their failure to identify any deficits in the development of children raised in a lesbian or gay household ... [T]he abilities of gay and lesbian persons as parents and the positive outcome for their children are not areas where credible scientific researchers disagree'."

15. With regard to a "right to a 'normal and traditional' family", the Inter-American Court observed, citing *Mouta* and *Karner*: "142. ... the American Convention does not define a limited concept of family, nor does it only protect a 'traditional' model of the family. 145. ... the [Chilean court's] language ... regarding the girls' alleged need to grow up in a 'normally structured family ... appreciated within its social environment', ... not in an 'exceptional family', reflects a limited, stereotyped perception of the concept of family, [with] no basis in the Convention ..." The Inter-American Court therefore concluded: "146. ... although [the Chilean courts] sought to protect the best interests of the girls ... , it was not demonstrated that the grounds stated in the decisions were appropriate to achieve said purpose, since the [Chilean courts] did not prove ... that Ms. Atala's cohabitation with her partner had a negative effect on the girls' best interest ... On the contrary they used abstract, stereotyped, and/or discriminating arguments to justify their decisions ... , for which reason said decisions constitute discriminatory treatment against Ms. Atala. ..." There was also a violation of the rights of Ms. Atala's daughters: "154. By having used the mother's sexual orientation as grounds for its decision, the Supreme Court, in turn, discriminated against the three girls, since it took into account considerations it would not have used if the custody proceedings had been between two heterosexual parents."

II. When Council of Europe member states have chosen voluntarily to end the restriction of second-parent or step-parent adoption to married different-sex couples, the great majority have decided to include (at least) same-sex couples (if not also unmarried different-sex couples).

16. Of the 47 Council of Europe member states, it would appear that 27.37³ restrict second-parent or step-parent adoption to married different-sex couples, and have no plans to amend their legislation. The decisions of these member states fall within their margin of appreciation under *Gas & Dubois* (paras. 66-68), and would not be affected if the Court were to find a violation in *X & Others*.

17. It is respectfully submitted that, when assessing the state of "European consensus", the relevant member states are the 19.63⁴ states that have ended the restriction of second-parent or step-parent adoption to married different-sex couples, or are planning to do so. Among these 19.63, the great majority (14 of 19.63 or 71%) have decided to extend the possibility of second-parent or step-parent adoption (at least) to same-sex couples (cohabiting, in a registered partnership, or married), if not also to unmarried different-sex couples. For example, the legislation in England and Wales defines a couple who may apply for second-parent adoption as: "(a) a married couple, or (b) two people (whether of different sexes or the same sex) living as partners in an enduring family relationship".⁵

18. Only a minority of member states (5.63 of 19.63 or 29%) have voluntarily extended this possibility beyond married different-sex couples, yet have chosen to limit it to unmarried different-sex couples, thereby excluding same-sex couples. Thus, the only member states that would be affected, if a violation were found in *X & Others*, are believed to be Andorra, Austria, Liechtenstein, Portugal, and Romania, as well as parts of Bosnia and Herzegovina. Appendix I lists citations for existing or planned legislation in the 19.63 member states. If only existing legislation is considered (if France, Luxembourg and Switzerland are deleted), the total remains 11 out of 16.63 member states or 66%. If only legislation as of 27 Sept. 2006 (decision of Austrian Supreme Court) is considered (if Finland and Slovenia are deleted from the 11, and those two states plus Romania are deleted from the 16.63), the total remains 9 out of 13.63 member states or 66%.

19. Turning to other democratic societies, in the United States, Canada, South Africa, Australia and New Zealand, second-parent adoption is generally restricted to married different-sex couples, or is also available to same-sex couples. In fact, a growing number of countries, states and provinces outside Europe have extended second-parent adoption, through legislation or appellate case-law, to married, registered or cohabiting same-sex couples. This is the case in all 13 parts of Canada, in at least 19 of the 50 United States (plus the District of Columbia), in the Federal District of Mexico, and in Brazil, Uruguay, Argentina and South Africa. In all 8 parts of Australia, and in New Zealand, the child of a lesbian couple may have two legal parents, either through automatic parenthood for the mother's female partner (if the child is born after donor insemination), or through second-parent adoption. For citations, see Appendix II.

³ The 0.37 represents the Republika Srpska, which has 37% of Bosnia and Herzegovina's population.

⁴ The 0.63 represents the remaining 63% of Bosnia and Herzegovina's population.

⁵ Adoption and Children Act 2002, s. 144(4), read with s. 51(2) and s. 144(7).

III. Judicial reasoning in European and other democratic societies supports an obligation not to discriminate against families composed of a same-sex couple and the children they are raising together.

20. Courts in South Africa, the US, Germany, the UK, Brazil and Belgium, like the legislatures mentioned in part II, have concluded that the best interests of children being raised by same-sex couples are served by permitting second-parent or step-parent adoption. The leading decision is *Du Toit v. Minister for Welfare and Population Development*, Case no. CCT40/01, Constitutional Court of South Africa, 10 Sept. 2002, which held (11-0) that the South African Constitution requires that an unmarried same-sex couple be allowed to adopt children jointly in the same way as a married different-sex couple. The Court's reasoning applies with equal force to exclusion from second-parent or step-parent adoption.

21. The applicants, two women who had lived as partners for 5 years, went through a standard process of screening by social workers, including psychological testing and home visits. "It was at all times made clear ... that the adopted children would be moving into a family structured around a permanent lesbian life partnership." Within two months, both applicants were accepted as adoptive parents, and a sister and brother aged 6 and 2 were placed with them. The two women challenged South African legislation permitting only one of them to adopt the children, because they were not a married different-sex couple.⁶

22. Acting Justice Skweyiya found that the legislation conflicted with s. 28(2) of the Constitution ("A child's best interests are of paramount importance in every matter concerning the child."): "21. ... [T]he impugned provisions exclude from their ambit potential joint adoptive parents who are unmarried, but who are partners in permanent same-sex life partnerships ... Their exclusion surely defeats the very essence and social purpose of adoption which is to provide the stability, commitment, affection and support important to a child's development ... 22. Excluding [them] from adopting children jointly where they would otherwise be suitable to do so is in conflict with the principle enshrined in s. 28(2) ... The impugned provisions ... deprive children of the possibility of a loving and stable family life ... "

23. Skweyiya J. also found that the legislation conflicted with the right to be free from discrimination based on sexual orientation (Constitution, s. 9(3)): "26. ... But for their sexual orientation which precludes them from entering into a marriage, they fulfil the criteria that would otherwise make them eligible jointly to adopt children ..." He found (at para. 37) no justification for the interference with the principle that the best interests of children are paramount, or with the right to equality.

24. Skweyiya J. made the following order in relation to second-parent adoption: "the omission from section 17(c) of the Child Care Act ... 1983 after the word[s] '[by a married person whose spouse is the parent of the] child' of the words 'or by a person whose permanent same-sex life partner is the parent of the child' is inconsistent with the Constitution and invalid; ... section 17(c) ... is to be read as though [those] words appear therein ..."

25. Courts in the US have taken a similar view of "the best interests of the child". A leading example is the New York Court of Appeals, the state's highest court. In 1989, it interpreted housing legislation as allowing a surviving same-sex partner to succeed to the tenancy of an apartment⁷ (a decision similar to *Karner v. Austria*). In *In re Jacob*, *In re Dana* (1995), the New York Court built on its 1989

⁶ *Ibid.*, paras. 4-7.

⁷ *Braschi v. Stahl Associates Co.*, 543 N.E. 2d 49 (1989)

decision by interpreting adoption legislation as permitting second-parent adoption by same-sex couples.⁸ Chief Judge Kaye, writing for the majority, began by observing that "[u]nder the New York adoption statute, a single [unmarried] person can adopt a child ... Equally clear is the right of a single homosexual to adopt [New York state regulations]⁹ provide that '[a]pplicants shall not be rejected solely on the basis of homosexuality'.¹⁰ ... [T]he ... legislative purpose -- the child's best interest -- ... would certainly be advanced ... by allowing the two adults who actually function as a child's parents to become the child's legal parents.¹¹ ... [An interpretation] ... that would deny children like ... Dana the opportunity of having [her] two [female] de facto parents become [her] legal parents, based solely on [her] biological mother's sexual orientation [lesbian] ..., would not only be unjust under the circumstances, but also might raise constitutional concerns in light of the ... statute's ... purpose ..."¹²

26. In Germany, the 2004 legislation allowing same-sex registered life partners to adopt each other's children was challenged as contrary to the German Constitution. On 10 August 2009, the German Federal Constitutional Court upheld the legislation, finding that, in its case-law, biological parenthood does not enjoy constitutional supremacy over legal and social-familial parenthood.¹³

27. On 18 June 2008, in *P & Others*,¹⁴ the UK's House of Lords decided, by 4 votes to 1, that Northern Ireland's blanket exclusion of unmarried couples from joint adoption of children was discrimination contrary to Arts. 14 and 8 of the Convention. The case involved an unmarried different-sex couple, raising the 10-year-old daughter of the female partner. Because they did not wish to marry, the male partner was ineligible to adopt the girl. Baroness Hale noted the effect of a similar rule in England and Wales, before its amendment in 2002: "Unmarried couples were already in practice allowed to adopt; but only one of them could do so legally, thus reducing the other to second class status ..."¹⁵ She concluded: "... [I]f one looks at this from the point of view of a child, whose best interests would be served by being adopted by this couple even if they remain unmarried, then the difference in treatment does indeed become disproportionate. At bottom the issue is whether the child should be deprived of the opportunity of having two legal parents."¹⁶ In light of *Karner v. Austria*, applied by the House of Lords in 2004 in *Ghaidan v. Godin-Mendoza*,¹⁷ it is virtually certain that the reasoning in *P & Others* will also require that second-parent adoption in Northern Ireland be extended to unmarried same-sex couples.

28. On 27 April 2010, the *Superior Tribunal de Justiça* (STJ), Brazil's highest appellate court for non-constitutional matters, decided a case very similar to *X & Others*, because Brazilian legislation also 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.

⁸ 660 N.E.2d 397 (1995).

⁹ New York Compilation of Codes, Rules and Regulations, Title 18, s. 421.16(h)(2).

¹⁰ 660 N.E.2d at 398.

¹¹ 660 N.E.2d at 399.

¹² 660 N.E.2d at 405.

¹³ BVerfG, 1 BvL 15/09 vom 10.8.2009, Absatz-Nr. (1 - 16), http://www.bverfg.de/entscheidungen/lk20090810_1bv1001509.html, para. 14

¹⁴ [2008] UKHL 38, <http://www.bailii.org/uk/cases/UKHL/2008/38.html>.

¹⁵ Paragraph 97.

¹⁶ Paragraph 112.

¹⁷ [2004] UKHL 30.

29. In its *Ementa*, the STJ reasoned as follows: "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'. ... 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. ... 14. Por qualquer ângulo que se analise a questão, ... chega-se à conclusão de que, no caso dos autos, há mais do que reais vantagens para os adotandos ... Na verdade, ocorrerá verdadeiro prejuízo aos menores caso não deferida a medida. ..."18

30. On 16 August 2010, the amendments to the Civil Code of the Federal District in Mexico, allowing same-sex couples to marry and adopt children jointly, were upheld as constitutional by the *Suprema Corte de Justicia de la Nación*, Mexico's highest federal court (emphasis added):¹⁹ "324. ... esta Suprema Corte no puede suscribir, de ningún modo, que sea la preferencia u orientación sexual de un ser humano, el elemento utilizado o que sirva para, a priori, establecer que una persona o una pareja homosexual no debe tener la opción de adoptar un menor, una vez satisfechos los requisitos y el procedimiento que ... establezca la legislación aplicable, pues ello, sin duda alguna, se constituiría en una discriminación por orientación sexual, proscrita por el artículo 1º constitucional, al basarse esa restricción o limitación exclusivamente en la preferencia sexual de una persona que ... tampoco puede verse como un elemento o factor que, por sí mismo, pudiera afectar el desarrollo de un menor. ... 329. De igual manera, tampoco puede aceptarse la presunción del accionante, acerca de que este tipo de adopción afecta el interés superior de los niños y niñas, pues los colocará en una situación de 'desigualdad' frente a otros menores que sí estén en una familia heterosexual y, además, que serán objeto de discriminación social. ... 331. ... Si esta Suprema Corte estableciera que la reforma impugnada es inconstitucional, porque la sociedad va a discriminar a los niños que sean adoptados por parejas homosexuales, se discriminaría a estos niños desde esta sede constitucional, lo cual sería sumamente grave. ... 334. ... un niño o niña puede ya estar viviendo con su padre o madre biológico y su pareja homosexual. ¿Qué pasa si falta el padre biológico, si en algún momento no está físicamente o muere? ¿Quién se va a hacer cargo del niño? ¿Quién va a tomar las decisiones? Este tipo de adopción también se hace pensando en el interés superior del niño. 335. El cuestionamiento a priori de que las parejas homosexuales afectan el interés superior

¹⁸ See *Recurso Especial* No. 889.852 (Brasília, 27 April 2010), <http://www.stj.jus.br/SCON> (Pesquisa Livre: casais homossexuais).

¹⁹ *Asunto No. 2/2010, Acción de Inconstitucionalidad promovida por el Procurador General de la República contra actos de la Asamblea Legislativa y del Jefe de Gobierno del Distrito Federal, demandando la invalidez de los artículos 146 y 391 del Código Civil del Distrito Federal, publicados en la Gaceta Oficial del Distrito Federal de 29 de diciembre de 2009*, paras. 324-340.

del niño y, por tanto, no debe permitírseles adoptar, es, en sí mismo, discriminatorio y se apoya, más bien, en prejuicios que, lejos de convalidarse por esta Corte, deben, en todo caso, superarse. ... 340. De este modo, esta Suprema Corte concluye que ... [no] existen elementos que sustenten una duda razonable de que ... se ponga en riesgo el interés superior del niño, sino, por el contrario, todo apunta a que se protege, de mejor manera, este interés, razón por la cual debe reconocerse su constitucionalidad ..."

31. On 12 July 2012, the Belgian Constitutional Court decided a case in which a mother had withdrawn her consent to a second-parent adoption by her former female spouse.²⁰ The Court held that: "B.14. L'intérêt potentiel de l'enfant à bénéficier d'un double lien de filiation juridique l'emporte en principe sur le droit de la mère de refuser son consentement à l'adoption par la femme avec laquelle elle était mariée, qui avait engagé avec elle un projet de coparentalité avant la naissance de l'enfant et l'avait poursuivi après celle-ci, dans le cadre d'une procédure d'adoption."

32. Finally, in light of its reasoning in *Atala v. Chile* (part I), it seems likely that the Inter-American Court of Human Rights would find a violation of the American Convention on Human Rights, if a party to the Convention allowed unmarried different-sex couples to adopt each other's children, but excluded same-sex couples from that possibility, as in *X & Others*.

IV. The non-discrimination standard of the European Convention on Human Rights may require a form of adoption that is permitted but not required by the European Convention on the Adoption of Children (Revised).

33. The 1967 European Convention on the Adoption of Children provides, in Art. 6(1), that: "The law shall not permit a child to be adopted except by either two persons married to each other, whether they adopt simultaneously or successively, or by one person." As the result of social and legal changes in Europe, the 1967 Convention became out-of-date. Indeed, Sweden in 2002 and the UK in 2005 were forced to denounce it, after they allowed same-sex couples to adopt (Explanatory Report, para. 45). The European Convention on the Adoption of Children (Revised) (opened for signature 27 Nov. 2008, in force 1 Sept. 2011) eliminates this problem:

Art. 7(1): "The law shall permit a child to be adopted: (a) by two persons of different sex (i) who are married to each other, or (ii) ... have entered into a registered partnership together; (b) by one person."

Art. 7(2): "States are free to extend the scope of this Convention to same-sex couples who are married to each other or who have entered into a registered partnership together. They are also free to extend the scope of this Convention to different-sex couples and same-sex couples who are living together in a stable relationship."

34. Similarly, the 2008 Convention expressly permits second-parent adoption:

Art. 11(1) "The adoption shall terminate the legal relationship between the child and his or her father, mother and family of origin."

²⁰ Arrêt no. 93/2012, <http://www.const-court.be/public/f/2012/2012-093f.pdf>.

Art. 11(2) "Nevertheless, the spouse or partner, whether registered or not, of the adopter shall retain his or her rights and obligations in respect of the adopted child if the latter is his or her child, unless the law otherwise provides."

35. The purpose of Art. 7 of the 2008 Convention is to recognise the variety of adoption legislation in Council of Europe member states, without stating a new minimum standard for all member states, ie, which forms of adoption, other than by a married different-sex couple or by an individual, member states "shall" rather than "are free to" recognise. In particular, when the Explanatory Report states, at para. 45, that "the right of same-sex registered partners to adopt jointly [an unrelated] child was not a solution that a large number of states parties were willing to accept at the present time", it is not focussing on the case of second-parent or step-parent adoption of a child that is already being raised by a same-sex couple.

36. It is the role of the Court, interpreting the 1950 Convention as a "living instrument", to determine when a particular form of adoption "must" be permitted, because extending it to one group but not another would involve discrimination. In *Emonet v. Switzerland* (13 Dec. 2007, para. 84), the Court saw the draft version of the 2008 Convention "as a sign of growing recognition in the Council of Europe's member States for adoptions such as that at the origin of this case", ie, a second-parent adoption within an unmarried couple.

Conclusion

37. All 47 Council of Europe member states are parties to the United Nations Convention on the Rights of the Child. Under its Art. 2, "States Parties shall ... ensure the [Convention's] rights ... to each child ... without discrimination of any kind, irrespective of the child's ... parent's ... sex ... or other status", and "shall ... ensure that the child is protected against all forms of discrimination or punishment on the basis of the status [or] activities ... of the child's parents". Under its Art. 3, "[i]n all actions concerning children, whether undertaken by ... courts of law ... , or legislative bodies, the best interests of the child shall be a primary consideration".

38. It is clearly in the best interests of children being raised by unmarried same-sex couples that they enjoy the same possibility, as children being raised by unmarried different-sex couples, of establishing a legal relationship with the two adults who are raising them. As long ago as 1993, the Supreme Court of Vermont (USA) said: "[O]ur paramount concern should be with the effect of our laws on the reality of children's lives. . . . To deny legal protection of [the] relationship [between a lesbian mother's female partner and her child], as a matter of law, is inconsistent with the children's best interests ..."²¹ Arts. 14 and 8 (respect for family life) of the Convention do not permit a Council of Europe member state to extend second-parent or step-parent adoption to unmarried different-sex couples and their children, but exclude unmarried same-sex couples and their children, solely because of the sexual orientation of the couple's relationship, or the sex of the proposed adoptive parent.

²¹ *In re Adoption of B.L.V.B.*, 628 A.2d 1271 (Vermont Supreme Ct. 1993).

**APPENDIX I: COUNCIL OF EUROPE:
LEGISLATION ENDING THE RESTRICTION OF
SECOND-PARENT OR STEP-PARENT ADOPTION
TO MARRIED DIFFERENT-SEX COUPLES**

Existing or planned legislation including (at least) same-sex couples (if not also unmarried different-sex couples, through the cited law or an earlier law)

1. Belgium - *Loi du 18 mai 2006 modifiant certaines dispositions du Code civil en vue de permettre l'adoption par des personnes de même sexe*, *Moniteur belge*, 20 June 2006, Edition 2, p. 31128
2. Denmark - Law No. 360 (2 June 1999), amending Law No. 372 (7 June 1989)
3. Finland - Act on Registered Partnerships (950/2001), as amended by Act 391/2009
4. France - <http://www.gouvernement.fr/presse/marche-des-fiertés> (29 June 2012): "le Premier ministre souhaite réaffirmer que le gouvernement a inscrit à son programme de travail des prochains mois la mise en œuvre des engagements pris pendant la campagne présidentielle, en matière de lutte contre les discriminations liées à l'orientation sexuelle ...Le droit au mariage et à l'adoption pour tous sera institué ..."
5. Germany - *Lebenspartnerschaftsgesetz*, para. 9(7) (amended by Law of 15 Dec. 2004)
6. Iceland - Law No. 52/2000, amending Law No. 87/1996
7. Luxembourg - "*Projet de loi portant réforme de l'adoption et modifiant: a) le Code civil ...*", no. 6172B (16 May 2012) (formerly part of no. 6172)
8. Netherlands - Act of 21 Dec. 2000 amending Book 1 of the Civil Code, *Staatsblad* 2001, nr. 10 (in force on 1 April 2001)
9. Norway - Law No. 36 (15 June 2001), amending Law No. 40 (30 April 1993)
10. Slovenia - *Zakon o zakonski zvezi in družinskih razmerjih*, Marriage and Family Relations Act, Article 135, as interpreted by Supreme Court of the Republic of Slovenia, Decision No. II Ips 462/2009-9 of 28 January 2010: "15 ... Article 135 provides that no one can be adopted by more than one person, save where the adoptive parents are married. Accordingly each of the partners in the same-sex union can subject to general conditions adopt the biological [or adopted] child of his/her partner, while same-sex partners cannot jointly adopt a child that is not a biological descendant [or adopted child] of one of them. ..." (unofficial translation from Slovenian)

11. Spain

Civil Code: *Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio*, *Boletín Oficial del Estado*, no. 157, 2 July 2005, pp. 23632-23634, <http://www.boe.es/boe/dias/2005-07-02/pdfs/A23632-23634.pdf>

Autonomous communities with own family law:

- Aragón - *Ley 2/2004* (3 May 2004)
- Basque Country - *Ley 2/2003* (7 May 2003)
- Catalonia - *Llei 3/2005* (8 April 2005)
- Navarra - *Ley Foral 6/2000* (3 July 2000)

12. Sweden - SFS 2002:603

13. Switzerland

- Assemblée fédérale (Parlement suisse), Conseil des États, Commission des affaires juridiques, Motion, "Droit de l'adoption. Mêmes chances pour toutes les familles." (15 Nov. 2011), http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch_id=20114046

- Réponse du Conseil fédéral (Gouvernement suisse) (22 Feb. 2012): <http://www.ejpd.admin.ch/content/dam/data/pressemitteilung/2012/2012-02-220/stgn-br-f.pdf> (emphasis added):

"Le Conseil fédéral considère en revanche qu'il est indiqué, dans l'intérêt de l'enfant, de permettre aux membres d'un couple homosexuel d'adopter l'enfant de leur partenaire (art. 264a, al. 3, CC): il faut que les enfants nés d'une relation antérieure ou adoptés par une personne seule (art. 264b CC) puissent ensuite être adoptés par le partenaire enregistré de leur mère ou de leur père. L'ouverture de ce type d'adoption aux partenaires enregistrés tiendrait compte du fait que beaucoup d'enfants grandissent déjà avec leurs parents homosexuels. Ils ne bénéficient pourtant pas de la même protection juridique que les enfants nés de couples mariés parce que la législation en vigueur ne permet pas qu'ils soient adoptés par le ou la partenaire de leur parent. Ouvrir cette adoption aux partenaires enregistrés [homosexuels] mettra tous les enfants sur un pied d'égalité juridique. Comme lors de toute adoption, il faudra vérifier dans le cas concret si toutes les circonstances permettent de prévoir que l'établissement d'un lien de filiation servira au bien de l'enfant (art. 264 CC)."

14. United Kingdom:

- England and Wales, Adoption and Children Act 2002, ss. 50, 51(2), 144(4), 144(7) (in force 30 Dec. 2005)
- Scotland, Adoption and Children (Scotland) Act 2007, s. 29(3) (in force 29 Sept. 2009)
- Northern Ireland, likely impact of *P & Others*, [2008] UKHL 38, and *Ghaidan v. Godin-Mendoza*, [2004] UKHL 30

Legislation including only unmarried different-sex couples

1. Andorra - *Llei qualificada de l'adopció i de les altres formes de protecció del menor desemparat*, *Butlletí Oficial del Principat d'Andorra Núm. 29 - any 8 - 24.4.1996*, p. 712, Article 2: "*L'adopció pot ésser demanada després de cinc anys de matrimoni o de convivència, per parelles estables heterosexuales ...*"

2. Austria - Civil Code, Article 182(2):

"2. If the child is adopted by a married couple, the legal relationship under family law ... between the biological parents and their relatives, on the one hand, and the adopted child ..., on the other hand, shall cease at that time... If the child is adopted by just an adoptive father (an adoptive mother), the relationship shall cease only in respect of the biological father (the biological mother) and his (her) relatives; ..."

3. Bosnia and Herzegovina:

- Federation of Bosnia and Herzegovina, Family Law (20 June 2005) *Official Gazette of Federation of Bosnia and Herzegovina*, No 35/05, Arts 102(1)-(2), 104(1)-(2) (unmarried different-sex couples who have lived together for at least 5 years)

- Brčko, District of Bosnia and Herzegovina, Family Law, (14 June 2007) *Official Gazette of Brčko, District of Bosnia and Herzegovina*, No 3/07, Arts. 86 (2)-(3), 87(3)-(4) (unmarried different-sex couples who have lived together for at least 5 years)

- Republika Srpska, Family Law, (27 August 2002) *Official Gazette of Republika Srpska*, No 54/11, Art. 158(2) (married different-sex couples only)

4. Liechtenstein - Civil Code, Article 182(2), <http://www.gesetze.li/Seite1.jsp?LGBIm=1003001> (same as in Austria)

5. Portugal - *Lei No. 7/2001 de 11 de Maio, Adopção de medidas de protecção das uniões de facto*, [2001] 109 (I-A) *Diário da República* 2797, http://www.dgap.gov.pt/upload/Legis/2001_1_7_11_05.pdf:

Artigo 7.º - Adopção

Nos termos do actual regime de adopção, constante do livro IV, título IV, do Código Civil, é reconhecido às pessoas de sexo diferente que vivam em união de facto nos termos da presente lei o direito de adopção em condições análogas às previstas no artigo 1979.º do Código Civil, sem prejuízo das disposições legais respeitantes à adopção por pessoas não casadas.

6. Romania - Law no. 273/2004 concerning the legal regime of adoption (republished), published in the Official Gazette, Part I of 19 April 2012, Art. 6§2(c) (unofficial translation from Romanian):

“[An exception to the general rule that only married different sex couples can adopt is when] the adopted child has one parent, unmarried, who is in a stable cohabitating relationship with an unmarried, unrelated different-sex person, and who makes a special notarised statement to the effect that the new adopter had contributed directly to the upbringing and care of the child for an uninterrupted period of at least 5 years”.

**APPENDIX II: OTHER DEMOCRATIC SOCIETIES:
LEGISLATION AND CASE LAW EXTENDING SECOND-PARENT OR
STEP-PARENT ADOPTION TO SAME-SEX COUPLES**

Argentina

Civil Code, as amended by *Ley* 26.618, promulgated on 21 July 2010, published in *Boletín Oficial de la República Argentina* on 22 July 2010, No. 31.949, Arts. 172, 326

Australia

- Australian Capital Territory, Parentage Act 2004, s. 11 and Schedule 1 (amending Adoption Act 1993, s. 18)
- New South Wales, Adoption Amendment (Same Sex Couples) Act 2010, "Dictionary" (definition of "couple"); Miscellaneous Acts Amendment (Same-Sex Relationships) Act 2008 (amending Status of Children Act 1996, s 14(1A))
- Queensland, Status of Children Act 1978, s. 19B (inserted by Act No. 2 of 2010, s. 107)
- Northern Territory, Status of Children Act 1978, s. 5DA (inserted by Act No. 1 of 2004, s. 41)
- South Australia, Family Relationships (Parentage) Amendment Act 2011 (amending Family Relationships Act 1975, ss. 10A(1), 10C(3))
- Tasmania, Relationships (Consequential Amendments) Act 2003, Schedule 1 (amending Adoption Act 1988, s. 20)
- Victoria, Assisted Reproductive Treatment Act 2008, s. 147 (amending Status of Children Act 1974)
- Western Australia, Acts Amendment (Lesbian and Gay Law Reform) Act 2002, s. 16 (amending Adoption Act 1994, s. 67).

Brazil

Superior Tribunal de Justiça, Recurso Especial No. 889.852 (Brasilia, 27 April 2010), <http://www.stj.jus.br/SCON> (Pesquisa Livre: casais homossexuais)

Canada

- Alberta, Child, Youth and Family Enhancement Act, R.S.A. 2000, c. C-12, s. 72(3)
- British Columbia, Adoption Act, R.S.B.C. 1996, c. 5, s. 29(1)-(2)
- Manitoba, Adoption Act, C.C.S.M. c. A2, ss. 36, 73(1), 88 (as amended by S.M. 2002, c. 24, s. 1)
- Newfoundland, Adoption Act, R.S.N. 1999, c. A-2.1, s. 20(1)-(2) (as amended by S.N. 2002, c. 13, s. 10)

New Brunswick, Family Services Act, S.N.B. 1980, c. F-2.2, s. 66(2) (as amended by S.N.B. 2007, c. 20, s. 5)
 Northwest Territories, Adoption Act, S.N.W.T. 1998, c. 9, ss. 1(1), 5(1)(b), 5(1)(c)
 Nova Scotia, Child and Family Services Act, S.N.S. 1990, c. 5, s. 72(2)
 Nunavut (same as Northwest Territories)
 Ontario, Child and Family Services Act, R.S.O. 1990, c. C.11, ss. 136(1), 146(2), 146(4) (as amended by S.O. 1999, c. 6, s. 6)
 Prince Edward Island, Adoption Act, R.S.P.E.I. 1988, c. A-4.1, s. 16(1) (last amended by S.P.E.I. 2008, c. 8, s. 1(3))
 Québec, Civil Code, arts. 546, 579
 Saskatchewan, Adoption Act, S.S. 1998, c. A-5.1, ss. 16(2), 23(1) (as amended by S.S. 2001, c. 51, s. 2)
 Yukon, Child and Family Services Act, S.Y. 2008, c. 1, s. 116(1)

Mexico

Federal District, *Código Civil para el Distrito Federal*, <http://www.aldf.gob.mx/codigos-107-4.html> (as amended by a law approved by the *Asamblea Legislativa* on 21 Dec. 2009 and published on 29 Dec. 2009), Arts. 146, 391, 392

New Zealand

Status of Children Act 1969, s. 18 (inserted by Act No. 91 of 2004, s. 14)

South Africa

Du Toit v. Minister for Welfare and Population Development, Case no. CCT40/01, Constitutional Court of South Africa, 10 Sept. 2002

United States²²

Legislation:

- California Statutes, Chapter 893 (14 Oct. 2001), amending Family Code, s. 9000
- Colorado Revised Statutes, s. 19-5-203(1), 208(5), 210(1.5), 211(1.5) (2007)
- Connecticut General Statutes Annotated, s. 45a-724 (2000)
- 13 Delaware Code ss. 204, 212(a), 903
- District of Columbia Code, s. 16-308
- Hawaii Revised Statutes ss. 572B-9, 578-16
- 750 Illinois Compiled Statutes ss. 50/2, 75/20 (2011)
- Iowa Code s. 600.4
- Massachusetts General Laws Annotated ch. 210, s. 1
- Nevada Revised Statutes, ss. 122A.200 (1)(a) and (d), 127.030, 127.160
- New Hampshire Revised Statutes, s. 170-B:4
- New Jersey Statutes ss. 9:3-50, 37:1-31
- New York Domestic Relations Law s. 110 ("any two unmarried adult intimate partners together may adopt")
- Oregon Revised Statutes, ss. 106.340, 109.041(2)

²² See National Center for Lesbian Rights, "Adoption by Lesbian, Gay, and Bisexual Parents: An Overview of Current Law" (March 2012), <http://www.nclrights.org/site/DocServer/adptn0204.pdf?docID=1221>.

- Rhode Island General Laws ss. 15-3.1-6, 15-7-17
- Vermont, 15A Vt. Stat. Ann. ss. 1-102(b), 4-101 (1995)
- Washington Revised Code, sections 26.33.260, 26.33.902

Case law:

- California - *Sharon S. v. Superior Court of San Diego County*, 73 P.3d 554 (California Supreme Ct. 2003)
- District of Columbia, *In re M.M.D.*, 662 A.2d 837 (DC Ct. of Appeals 1995)
- Illinois, *In re Petition of K.M. and D.M.*, 653 N.E.2d 888 (Illinois Appellate Ct. 1995)
- Indiana, *Adoption of M.M.G.C.*, 758 N.E.2d. 267 (Indiana Ct. of Appeals 2003); *Adoption of K.S.P.*, 804 N.E.2d 1253 (Indiana Ct. of Appeals 2004)
- Iowa, *Schott v. Schott*, 744 N.W.2d 85 (Iowa Supreme Ct. 2008)
- Maine, *Adoption of M.A.*, 930 A.2d 1088 (Maine Supreme Judicial Court 2007)
- Massachusetts, *In re Adoption of Tammy*, 619 N.E.2d 315 (Massachusetts Supreme Judicial Ct. 1993)
- New Jersey, *In re Adoption ... by H.N.R.*, 666 A.2d 535 (New Jersey Superior Ct. Appellate Division 1995)
- New York, *In re Jacob, In re Dana*, 660 N.E.2d 397 (New York Ct. of Appeals 1995)
- Pennsylvania, *In re Adoption of R.B.F.*, 803 A.2d 1195 (Penn. Sup. Ct. 2002)
- Vermont, *In re Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. Supreme Ct. 1993)

Uruguay

Ley N° 18.590, *Código de la Niñez y la Adolescencia*, *Se modifican disposiciones relativas a adopción*, promulgated on 18 Sept. 2009, <http://www.parlamento.gub.uy>, published in *Diario Oficial*, 16 October 2009, No. 27837: Art. 141: "Nadie puede ser adoptado por más de una persona a no ser [unless it is] por dos cónyuges o [dos] concubinos." See also *Ley No. 18.246 de Unión Concubinaria*, published in *Diario Oficial*, 10 Jan. 2008, No. 27402 (same-sex or different-sex "concubinos").