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# Finding Family: Considering the Recognition of Same-Sex Families in International Human Rights Law and the European Court of Human Rights

by Elizabeth Kukura

IN DECEMBER 2005 SOUTH AFRICA became the fifth nation to legalize same-sex marriage.<sup>1</sup> In a landmark decision, the Constitutional Court ruled that the law limiting marriage to different-sex couples was unconstitutional and gave the parliament one year to amend the country's marriage laws accordingly. This decision came just months after both Spain and Canada joined Belgium and the Netherlands as the first nations in the world to extend marriage rights to same-sex couples. These five countries have contributed significantly to the acceptance of gays and lesbians worldwide by recognizing same-sex relationships as equal to those of different-sex couples. In doing so, they have reinforced their commitment to the principle of non-discrimination and to supporting and strengthening the family. Although the rights of sexual minorities continue to be controversial in many countries, these important advances in same-sex marriage rights should not be dismissed as radical, or Western, exceptions. A steadily growing number of states are introducing laws to recognize same-sex partnerships, either by granting full marriage rights, by creating new mechanisms such as registered partnerships or civil unions, or by including same-sex couples in unregistered cohabitation laws.

Although advances in rights regarding same-sex marriage or other forms of partnership recognition have occurred on national and sub-national levels, they have yet to be affirmed in the international context. This is not because the right to marry for same-sex couples is beyond the scope of international human rights law. On the contrary, there is growing recognition that discrimination on the basis of sexual orientation constitutes a human rights violation.<sup>2</sup> Further, all of the major human rights treaties contain commitments to protect the family, which is described as the "natural and fundamental group unit of society."<sup>3</sup> Some opponents of same-sex marriage invoke this privileged notion of family in a traditional sense when they attempt to deny rights to sexual minorities. To value certain families less by denying them equality, however, undermines any commitment to protect the family's central role in society, a commitment that human rights law purports to take seriously.

This article briefly reviews national legal developments in the recognition of same-sex partnerships and then considers same-sex partnership rights in the context of international human rights law, specifically examining developments within the European Court of Human Rights. Although many states have begun to sanction marital and family diversity through national laws, the European Court of Human Rights, as well as the international community as a whole, generally persists in defining family according to the narrow model of a heterosexual married couple. International law must shed its heteronormative view of family in favor of one that reflects societal conditions. If it fails to recognize the importance of protecting all families, it risks losing its normative power as a force for promoting equality.

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## RECOGNIZING SAME-SEX PARTNERSHIPS

DESPITE A LACK OF LEGAL RECOGNITION in many jurisdictions, gays and lesbians are forming families according to their personal needs and desires. Some states have responded with diverse legal reforms, ranging from the extension of full marriage rights, to the creation of quasi-marital statuses, to the inclusion of same-sex couples in laws on unregistered cohabitation.

## MARRIAGE RIGHTS

In the Netherlands this process began with two court challenges to the existing marriage law. Although the petitioners were unsuccessful, the Supreme Court recommended the formation of a commission to study the legal needs of same-sex couples, which ultimately led to the creation of a registered partnership that has been effective since 1998.<sup>4</sup> A second commission later concluded that same-sex couples should be allowed to marry, and Parliament subsequently passed legislation legalizing same-sex marriage starting in 2001.<sup>5</sup>



A happy couple at the Boston Pride Parade.

The liberalization of Belgium's marriage laws similarly began with the creation of a new civil status. Belgian lawmakers introduced the *cohabitation légale* status in 2000 to remedy the lack of rights for cohabiting couples — both different-sex and same-sex — in Belgium.<sup>6</sup> *Cohabitation légale* status involved fewer rights and responsibilities than registered partnerships elsewhere in Europe and did not address parental rights. After the conservative Social Christian party lost its first election in 40 years in 1999, there was an opening for the introduction of full marriage rights. Same-sex marriage became legal in 2003, although restrictions on adoption and parenting rights for same-sex couples remain intact.<sup>7</sup>

Unlike the Netherlands and Belgium, Spain did not begin with a quasi-marital status. The Socialist party platform included the legalization of same-sex marriage, and such reform became possible when the Socialists came to power in 2004. In June 2005 the Spanish Congress of Deputies passed a law providing full marriage rights, including those related to parenting, to same-sex couples.<sup>8</sup>

Canadian same-sex marriage rights began with court challenges at the provincial level, starting in Ontario, British

Columbia, and Quebec. From 2002 to 2004, courts in six Canadian provinces held that the different-sex definition of marriage was contrary to Canada's Charter of Rights. Although the federal government initially fought these lawsuits, in 2003 it began to explore the introduction of same-sex marriage legislation at the federal level, which finally passed in 2005.<sup>9</sup>

In the United States, the only jurisdiction where same-sex couples can marry is the Commonwealth of Massachusetts. This right was secured in 2003 by a decision of the Massachusetts Supreme Judicial Court, which held that denying same-sex couples the right to marry was unconstitutional under the state constitution.<sup>10</sup> Other states in the country and the federal government do not recognize such marriages, but activists are currently pursuing similar litigation strategies in other states.

#### OTHER FORMS OF STATE RECOGNITION OF SAME-SEX PARTNERSHIPS

Marriage alternatives for same-sex couples have taken many forms. In 1989 Denmark created the first registered partnership in the world. Similar measures followed in Norway (1993), Sweden

Other European states have recognized same-sex relationships by extending unregistered cohabitation laws to same-sex couples. In 1996 the Hungarian Parliament legalized common-law marriage for same-sex couples; Portugal's 2001 *de facto* union law granted same-sex couples property rights and other benefits; and a 2003 civil union law gave same-sex couples in Croatia who have lived together for at least three years the same rights as unmarried different-sex couples.<sup>16</sup> Although such laws represent lesser forms of protection than access to full marriage, they are nonetheless significant for their official recognition of same-sex partnerships.

In the United States, a few individual states have adopted laws to recognize same-sex partnerships. A court challenge in Vermont led to the creation in 2000 of a civil union status that confers on same-sex couples all of the marriage rights regulated by the state government.<sup>17</sup> Four other states — California (2003), New Jersey (2004), Maine (2004), and Connecticut (2005) — have followed with their own domestic partnership or civil union legislation, which provide some of the marriage rights regulated by the states.<sup>18</sup> Although a Hawaiian court was the first in the United States to rule that a ban on same-sex marriage might violate the state's constitution, voters subsequently amended the state constitution to ban same-sex marriage. The state then offered an alternative reciprocal beneficiaries status, which provides a minimal package of rights to any two people prohibited by law from marrying each other.<sup>19</sup>

Outside Europe and North America, countries have been slower to recognize same-sex partnerships, but there has been some progress. The New Zealand Parliament passed civil union legislation in 2004, which granted some of the rights of marriage to unmarried couples, including same-sex couples.<sup>20</sup> Israeli courts have recognized the right of same-sex couples to receive benefits granted to unmarried different-sex partners.<sup>21</sup> Additionally, a number of sub-national jurisdictions in Argentina, Australia, Brazil, and Italy recognize same-sex partnerships. Other efforts to secure legal recognition are underway around the world. The availability of same-sex marriage in some jurisdictions ensures that national governments will continue to face pressure, especially as same-sex couples marry abroad and return home seeking domestic recognition of their unions.

#### FINDING FAMILY IN INTERNATIONAL HUMAN RIGHTS LAW

PROTECTION OF THE FAMILY is enshrined as an important principle in all major human rights instruments. Despite this bedrock of commitment, there exists no "single, clear, exhaustive, and standard" definition of family or family life for the purposes of international law.<sup>22</sup> Given this lack of uniformity, one way to understand what human rights law considers family is to compare who is accepted within and who is excluded from the ambit of protection. Although many human rights bodies have the potential to address the meaning of family under the relevant articles of their governing treaties, the European Court of Human Rights (Court) has the most developed family law jurisprudence. This is in part because the Court, established in 1959, has been in existence longer than its American and African counterparts. Also relevant in considering the Court's more sophisticated jurisprudence are differences in structure and procedure adopted by the various human rights bodies, the degree of accessibility to individual petitioners, and the regional and domestic contexts from which complaints arise.

Family cases arise under several articles of the European Convention on Human Rights (ECHR). Article 8 establishes the "right to respect for ... private and family life," and Article 12 provides that "[m]en and women of marriageable age have the right to

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(1995), Iceland (1996), and Finland (2002).<sup>11</sup> In 1999 France introduced the *Pacte civil de solidarité* (civil pact of solidarity), a civil status through which same-sex couples gain access to certain limited rights.<sup>12</sup> Germany created the *Lebenspartnerschaft* (life partnership) in 2001; Luxembourg introduced civil unions in 2004; and Slovenia established a registered partnership that covers a limited set of financial matters in 2005.<sup>13</sup> Switzerland has created a registered partnership that Swiss voters affirmed in a 2005 referendum, which was the first-ever popular vote in favor of same-sex partnership rights.<sup>14</sup> The United Kingdom extended virtually all marriage rights to same-sex couples through the creation of a civil partnership, which entered into effect in December 2005.<sup>15</sup>

marry and to found a family.” Article 14 consists of a non-discrimination provision, which can be invoked only in conjunction with one or both of the other articles.<sup>24</sup> A brief look at a series of important family law cases under the ECHR illustrates how cautious the Court has been when it comes to protecting the rights of individuals in non-traditional families. Evidence of this first appears in cases regarding unmarried cohabitation and out-of-wedlock births among heterosexual couples, followed by cases where the Court considered the partnership and parental rights of homosexuals and transsexuals.

The Court dealt with the issue of unmarried cohabitation in a 1977 case called *X & Y v. Switzerland*,<sup>25</sup> when it found that a different-sex cohabiting couple fell within the scope of family life under the ECHR. In *Keegan v. Ireland*, the Court examined the relationship between two parents before their child’s birth and found that, although they had never married and had since separated, family life existed because they had lived together and had planned the pregnancy. The Court held that family “may encom-

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pass other *de facto* ‘family’ ties where the parties are living together outside of marriage,” but it has heretofore found that only heterosexual cohabiting couples with children qualify as *de facto* family.<sup>26</sup>

The first same-sex partnership case before the European Commission on Human Rights<sup>27</sup> was *X & Y v. United Kingdom* in 1983. In this unsuccessful challenge to a deportation order issued for the male Malaysian-national partner of a male UK national, the Commission adopted a line of reasoning it would follow for the next 13 years in a series of similar immigration and housing cases.<sup>28</sup> The Commission denied that family life existed between the two same-sex applicants, thereby avoiding the need to consider the issue of discrimination between unmarried same-sex couples and unmarried different-sex couples. “Despite the modern evolution of attitudes towards homosexuality,” which was acknowledged in the decision itself, the applicants did not reflect the Commission’s normative family model and thus were denied legal recognition.<sup>29</sup>

In *Kerkhoven v. Netherlands*, the Commission found no Article 8 violation when the Netherlands refused to grant joint parental authority for a child born by artificial insemination to one of two lesbian partners. With inconsistent and confusing reasoning, it noted that although the law did not prevent the three applicants from living together as a family, “a stable homosexual relationship between two women does not fall within the scope of the right to respect for family life.”<sup>30</sup> In *Salgueiro da Silva Mouta v. Portugal*, the Court held that although a homosexual parent enjoys family life with his or her child, a homosexual parent and his or her partner do not enjoy the existence of family life.<sup>31</sup> Another case, *Karner v. Austria*, involved a successful challenge to a law that denied successor tenancy rights to a surviving same-sex partner. The Court, however, chose to base its reasoning on the Article 8 right to respect for the home, and thus did “not find it necessary to determine the notions of ‘private life’ or ‘family life,’” thereby avoiding an opportunity to advance the rights of sexual minorities under the ECHR.<sup>32</sup>

The Court’s reasoning in *X, Y and Z v. United Kingdom* illustrates how entrenched traditional assumptions about family are in the Court’s decision-making. Here the Court confirmed the *Keegan* principle that *de facto* family relationships could constitute family life by acknowledging that family life existed between a woman, her transsexual partner, and her child conceived through artificial insemination.<sup>33</sup> Yet the Court later failed to find an actual violation of the right to respect for family life. It instead expressed concern that a transsexual man could be recognized legally as a father while being treated as a female for other purposes under UK law, which at the time did not allow transsexuals to register and marry as a member of their reassigned sex. The Court’s reasoning implies that for transsexuals, the right to marry is a precursor to the right to enjoy family life, even though it had previously held that heterosexual couples need not be married to enjoy the family life protected under the ECHR. Given that the Court did not uphold the right to marry for transsexuals for another five years,<sup>34</sup> the applicants in *X, Y and Z* found themselves in the paradoxical position where the Court recognized their family life but refused to recognize a right to enjoy that family life. This particular decision appears to indicate that the existence of family life turns on the presence of two parents who appear physically to be of different sexes. This conclusion is reinforced by a comparison to *Kerkhoven*, where the two parents were both women and the Commission found no family life to exist. The twisted logic of *X, Y and Z* reflects the Court’s resistance to revising its normative conception of the family in light of changing social conditions.

## CONCLUSION

AT THE CORE OF THE ECHR is the idea of “the Convention [a]s a living instrument which ... must be interpreted in the light of present-day conditions.”<sup>35</sup> The Court has firmly established that human rights law should always take into account the “current circumstances” in which a particular question arises.<sup>36</sup> Indeed, in the landmark decision of *Goodwin v. United Kingdom*, which concerned a transsexual’s right to marry, the Court acknowledged its responsibility to “have regard to the changing conditions” within contracting states and to respond to “any evolving convergence as to the standards to be achieved.”<sup>37</sup>

It seems clear from a review of the family law jurisprudence discussed here, however, that this “dynamic and evolutive



approach” has not permeated the Court’s analysis of family life.<sup>38</sup> Although marriage is no longer necessarily at the root of family life, an unmarried couple must evince certain characteristics of a married couple for the Court to find that they enjoy family life together. The Court has articulated a notion of *de facto* family ties, potentially useful to same-sex families, but so far it has only applied this analysis to heterosexual cohabiting couples with children. Where two parents have sought human rights protection for their less “traditional” family forms, the Court has accepted — albeit partially — that family life exists in instances where the family outwardly resembles the heterosexual married model. But it has refused to find similarly for families with two same-sex parents. This rigid approach fails to consider the “current circumstances” of same-sex partnership recognition and remains impervious to the “changing conditions” the Convention is charged with respecting and to which it must adapt.

The failure of the European Court of Human Rights to heed its own dictates about adapting to evolving social conditions per-

petuates inequality and poses a threat to the Court’s continued relevance in the realm of family protection. As long as the Court continues to interpret the ECHR’s human rights protections for families within a heteronormative framework, there will be a disjunction between its reading of international human rights law and the lived realities of millions of people.

Such critiques are also important for human rights bodies that are in the earlier stages of articulating the scope of human rights protection for the family. The diversity of family forms, particularly those involving same-sex partnerships, will continue to grow as sexual minorities worldwide gain greater visibility. South Africa earned itself distinction as the first African nation to legalize same-sex marriage, while at the same time joining an ever-increasing number of countries that recognize same-sex partnerships in law. International bodies must adopt a conception of family that reflects this reality if they are to fulfill their obligations under international human rights law of ensuring respect for the dignity and worth of all people.

HRB

## ENDNOTES: Finding Family

<sup>1</sup> *Minister of Home Affairs and Another v. Fourie and Another*, Constitutional Court of South Africa, Case CCT 60/04 (Dec. 1, 2005).

<sup>2</sup> See International Commission of Jurists, 61st Session of the United Nations Commission on Human Rights, *International Human Rights References to Human Rights Violations on the Grounds of Sexual Orientation and Gender Identity*, [http://www.icj.org/IMG/pdf/Compilation\\_on\\_SO.pdf](http://www.icj.org/IMG/pdf/Compilation_on_SO.pdf) (Mar.-Apr. 2005); Douglas Sanders, *International Lesbian and Gay Association Files*, “Human Rights and Sexual Orientation in International Law,” [http://www.ilga.org/news\\_results.asp?LanguageID=1&FileCategory=44&ZoneID=7&FileID=577](http://www.ilga.org/news_results.asp?LanguageID=1&FileCategory=44&ZoneID=7&FileID=577) (July 17, 2005).

<sup>3</sup> Universal Declaration of Human Rights, art. 16(3) (Dec. 10, 1948); International Covenant on Civil and Political Rights, art. 23(1) (Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights, art. 10(1), (Dec. 16, 1966), available at <http://www.ohchr.org/english/law/index.htm> (accessed Jan. 27, 2005). American Convention on Human Rights, art. 17(1) (Nov. 22, 1969), available at <http://www.oas.org/juridico/english/Treaties/b-32.htm> (accessed Jan. 27, 2005). Article 8 of the European Convention on Human Rights (Nov. 4, 1950) includes “the right to respect for...family life,” while Article 12 contains the “right to marry and to found a family.” Available at <http://www.hri.org/docs/ECHR50.html> (accessed Jan. 27, 2005). Article 18(1) of the African Charter on Human and People’s Rights (June 27, 1981) refers to the family as “the natural unit and basis of society.” Available at <http://www1.umn.edu/humanrts/instree/z1afchar.htm> (accessed Jan. 27, 2005).

<sup>4</sup> Act amending Book 1 of the Civil Code and the Code of Civil Procedure, which concerns the introduction therein of provisions relating to registered partnership (*geregistreerd partnerschap*), *Staatsblad* 1997, nr. 324 (Jul. 5, 1997).

<sup>5</sup> Act amending Book 1 of the Civil Code, which concerns the opening up of marriage for persons of the same sex, *Staatsblad* 2001, nr. 9 (Dec. 21, 2000). Two differences remain between different-sex and same-sex marriage in the Netherlands: same-sex couples are not able to participate in international adoptions and the presumption of paternity does not apply to same-sex couples. See Dutch Justice Department, “Fact Sheet on Same-sex Marriage,” available in English at [http://www.justitie.nl/english/publications/factsheets/same-sex\\_marriages.asp](http://www.justitie.nl/english/publications/factsheets/same-sex_marriages.asp) (accessed Jan. 27, 2005).

<sup>6</sup> *Loi du 23 novembre 1998 instaurant la cohabitation légale* (Jan. 12, 1999).

<sup>7</sup> *Loi du 13 février 2003 ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil* (Feb. 28, 2003).

<sup>8</sup> *Proyecto de Ley: Por la que se modifica el Código Civil en materia de derecho a contraer matrimonio*, 121/000018 (June 30, 2005).

<sup>9</sup> Civil Marriage Act, Statutes of Canada 2005, ch. 33 (July 20, 2005).

<sup>10</sup> *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>11</sup> Danish Law on Registered Partnership (*Lov om registreret partnerskab*), nr. 372 (June 7, 1989); Norwegian Law on Registered Partnership (*Lov om registrert partnerskap*), nr. 40 (Apr. 30, 1993); Swedish Law on Registered Partnership (*Lag om registrerat partnerskap*), SFS 1994:1117 (June 23, 1994); Ice-

landic Recognized Partnership Law (*Lög um stadfesta samvist*), nr. 87 (June 12, 1996); Finnish Act on Registered Partnerships (*Oikeusministeriö*), Act 950/2001 (Sept. 28, 2001).

<sup>12</sup> *Loi no. 99-944 du 15 novembre 1999 relative au pacte civil de solidarité* (Nov. 16, 1999). The French PACS is also open to different-sex couples, which is true of some — but not all — alternative statuses.

<sup>13</sup> German Law on Ending Discrimination Against Same-Sex Communities: Life Partnerships (*Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften*), 9 *Bundesgesetzblatt* 266 (Feb. 16, 2001); Luxembourg, *Loi relative aux effets légaux de certains partenariats* (July 9, 2004); Slovenian Law on Registered Same-Sex Partnership (June 22, 2005).

<sup>14</sup> Swiss Registered Partnership Law (*Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare*), 02.090 (June 2004).

<sup>15</sup> United Kingdom Civil Partnership Act, ch. 33 (Nov. 18, 2004).

<sup>16</sup> Hungarian Civil Code, Article 685/A, as amended by Act No. 42 of 1996; *Lei No. 71/2001 de 11 de Maio, Adopção medidas de protecção das uniões de facto*, 109 (I-A) *Diário da República* 2797 (2001); Croatian Law on Same Sex Civil Unions, no. 01-081-03-2597/2 (Jul. 14, 2003).

<sup>17</sup> *Baker v. State*, 744 A.2d 864 (Vt. 1999); Vermont Civil Union Act, Act No. 91 (Apr. 26, 2000).

<sup>18</sup> California Registered Domestic Partner Rights and Responsibilities Act of 2003, codified at California Family Code § 297 (2005); New Jersey Domestic Partnership Act, ch. 246, PL 2003 (approved Jan. 12, 2004); An Act to Promote the Financial Security of Maine’s Families and Children, LD 1579, 2004 Leg., 121st Leg., (Me. 2004); Connecticut Civil Union Act, Public Act No. 05-10 (approved Apr. 20, 2005).

<sup>19</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); Hawaii Reciprocal Beneficiaries Act, Laws of 1997, ch.383 (July 8, 1997).

<sup>20</sup> New Zealand Civil Union Act 2004 (Dec. 9, 2004).

<sup>21</sup> *El Al Israel Ltd. v. Danilowitz*, 48(5) P.D. 749 (Isr. 1994).

<sup>22</sup> Yuval Merin, *The Right to Family Life and Civil Marriage Under International Law and Its Implementation in the State of Israel*, 28 B.C. Int’l. & Comp. L. Rev. 79, 87 (2005).

<sup>23</sup> This is not to suggest, however, that same-sex family issues have been completely absent in other human rights systems. For example, the United Nations Human Rights Committee, which is charged with interpreting and applying the International Covenant on Civil and Political Rights, has considered same-sex partnership recognition in the context of both marriage and survivor benefits. See, e.g., *Joslin, et al. v. New Zealand*, Communication No. 902/1999, U.N. Doc. A/57/40, 214 (2002) (finding that the wording of ICCPR Article 23(2) limits the right to marry to different-sex couples) and *Young v. Australia*, Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (2003) (finding a violation of the ICCPR when

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### THE IRAQI HIGH CRIMINAL COURT (FORMERLY THE IRAQI SPECIAL TRIBUNAL)

On January 15, 2006, an official with the Iraqi tribunal trying Saddam Hussein confirmed that Chief Judge Rizgar Muhammad Amin had submitted his letter of resignation to the Iraqi High Criminal Court (Court). Judge Amin cited government interference as his main frustration, although some commentators speculate that recent criticism regarding his lack of control in the courtroom may have contributed to his decision to resign. It was initially expected that Amin's deputy, Saeed al-Hammash, would succeed him, but allegations that al-Hammash had once been a member of the Ba'ath party — which al-Hammash, as a Shiite, denies — resulted in his withdrawal from contention. Instead, Kurdish Justice Rouf Abdel-Rahman was appointed.

These events come after continued personnel upheavals in the trial of Hussein and his co-defendants, which began October 19, 2005. Just 36 hours after proceedings began, Sadoon Janabi, lawyer for co-defendant Awad Hamad Bandar, the former chief judge of Hussein's Revolutionary Court, was kidnapped and killed. On November 8, 2005, gunmen fired on Adel Muhammad al-Zubaidi and Thamer Mahmoud al-Khuzai, two attorneys for co-defendant and former Iraqi Vice President Taha Yassin Ramadan. Al-Zubaidi was killed instantly and Al-Khuzai was injured.

The Court has also faced disruptions by defense lawyers and defendants objecting to the Court's limitations on their defense strategies. When a new session began on November 28, 2005, at least four defense attorneys were absent. During the same session, prominent

civil rights lawyer and former U.S. Attorney General Ramsey Clark joined Hussein's defense team. On December 5, 2005, when the trial again resumed, defense lawyers briefly left the courtroom when Judge Amin refused to allow them to question the court's authority as part of their defense strategy. Defense lawyers staged another walkout on January 29, 2006, when Judge Abdel-Rahman accused them of encouraging defendants to publicly question the court's authority and ejected one lawyer from the courtroom. The judge stated that attorneys who walked out would be unable to return. When four new defense attorneys were appointed, defendants Taha Yassin Ramadan and Awad Hamed al-Bandar objected and exited the courtroom. Hussein was removed after he refused his court-appointed lawyers and shouted "down with traitors."

The proceedings themselves have also proved contentious. In their first court appearance, Hussein and seven co-defendants refused to recognize the Court's authority, although they subsequently pleaded not guilty to charges of killing 149 Shiites in Dujail in 1982 following a failed attempt on Hussein's life. Upon defense counsel's request for a continuance, proceedings were postponed until November 28, 2005. When the trial resumed, it quickly degenerated into a shouting match in which Hussein stood and yelled "long live Iraq" and boasted that he was not afraid of execution. During this session the Court heard its first witness testimony.

During a short session from December 5 - 7, 2005, the first prosecution witnesses to appear in person testified. Hussein disrupted the first two days of the session and boy-

cotted the third. He described his absence as a protest against "an unjust court." Hussein's defense lawyers claimed that he and the other defendants have not been allowed private meetings with their lawyers, and that they have otherwise been denied access to the necessary facilities and evidence to prepare their defense. Proceedings were adjourned until December 21, 2005, to avoid holding hearings immediately prior to and during the Iraqi parliamentary elections, which took place on December 15, 2005.

The Court was scheduled to resume with the trial on January 24, 2006. Just hours before it was set to begin, however, Chief Investigative Judge Raed Juhi announced that the Court would delay the proceedings for another five days because some of the witnesses scheduled to testify were on pilgrimage to Mecca. Despite the absence of many of the defendants and defense attorneys, the Court heard some witness testimony when the court resumed January 29, 2006. The trial was adjourned until February 1, 2006. *HRB*

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Australia refused to provide a pension to the surviving same-sex partner of a war veteran). Generally, the Committee's decisions support the view that the conception of family in international human rights law is narrow. For example, when the Committee decided in favor of Young, it did so without actually considering the existence of family life between the partners.

<sup>24</sup> ECHR Protocol No. 12, which went into force in April 2005, adds a general ban on discrimination, but only a minority of states has ratified the protocol to date.

<sup>25</sup> *X & Y v. Switzerland*, nos. 7289/75 and 734/76, 9 D&R 57 (1977).

<sup>26</sup> *Keegan v. Ireland*, 1994 Eur. Ct. H.R. 18, ¶ 44 (May 26, 1994).

<sup>27</sup> The Commission on Human Rights historically screened cases for admissibility before referring them to the Court until the two effectively merged in 1998 under Protocol No. 11 on the restructuring of the ECHR organs. This article distinguishes between the Commission and Court for the sake of accuracy, but the distinction is largely irrelevant for the present discussion.

<sup>28</sup> Within this time period, Denmark, Norway, and Sweden passed same-sex

partnership laws, but the Commission took no account of the evolving social conditions.

<sup>29</sup> *X & Y v. United Kingdom*, no. 9396/81, 32 D&R 220, at 221-22 (May 3, 1983).

<sup>30</sup> *Kerkhoven v. Netherlands*, no. 15666/89, at "The Law" ¶ 1 (May 19, 1992).

<sup>31</sup> *Salgueiro da Silva Mouta v. Portugal*, 1999 Eur. Ct. H.R. 176 (Dec. 21, 1999).

<sup>32</sup> *Karner v. Austria*, 2003 Eur. Ct. H.R. 395, ¶ 33 (July 24, 2003).

<sup>33</sup> *X, Y & Z v. United Kingdom*, 1997 Eur. Ct. H.R. 20, ¶ 35 (Apr. 22, 1997).

<sup>34</sup> *Goodwin v. United Kingdom*, 2002 Eur. Ct. H.R. 588 (July 11, 2002).

<sup>35</sup> *Tyrer v. United Kingdom*, 1978 Eur. Ct. H.R. 2, ¶ 31 (Apr. 25, 1978).

<sup>36</sup> See, e.g., *Rees v. United Kingdom*, 1986 Eur. Ct. H.R. 11, ¶ 49 (Oct. 17, 1986); *Marckx v. Belgium*, 1979 Eur. Ct. H.R. 2 (June 13, 1979).

<sup>37</sup> *Goodwin* at ¶ 74.

<sup>38</sup> *Id.*