Human Rights Watch
350 Fifth Avenue, 34th Floor
New York, NY 10118
Phone: 212-290-4700
Fax: 212-736-1300
E-mail: hrwnyc@hrw.org
Website:http://www.hrw.org/lgbt/

Non-Discrimination in Civil Marriage: Perspectives from International Human Rights Law and Practice

A Human Rights Watch Briefing Paper

Many people take for granted that their government will acknowledge their relationships of love and care. Yet some relationships are arbitrarily denied that recognition. The results may be devastating. A partner may be denied the rights to

- *make medical decisions on a partner's behalf when she is sick, or even visit the partner or the partner's child in hospital;*
- *take bereavement or sick leave to care or mourn for a partner, or a partner's child;*
- *share equal rights and equal responsibilities for children in their care;*
- *have their partner covered under their health or employment benefits;*
- *apply for immigration and residency if their partner is from another country;*
- *file joint tax returns and enjoy tax benefits for couples, obtain joint insurance policies, or even rent or own property together;*
- *obtain a protection order against domestic violence;*
- *get a fair settlement of property when the relationship ends;*
- *inherit from a deceased partner if he lacked a valid will;*
- *choose a partner's final resting place;*
- *obtain pension benefits if the partner dies.*

In countries that deny same-sex partners access to marriage, such systemic inequalities are still routinely tolerated. In this briefing paper, Human Rights Watch looks at this inequality through the lens of international human rights law and practice.

The right to marry is a basic human right. Straightforward application of international protections against unequal treatment dictate that gay and lesbian couples, no less than heterosexual couples, should enjoy the right: there is no civil marriage "exception" to the reach of international anti-discrimination law. As the international examples summarized in this briefing show, moreover, the trend among nations is toward recognizing this right.

Many jurisdictions have responded to the call for equality in recognition of relationships by creating a parallel regime for regulating same-sex relationships. Laws on so-called "civil unions" or "domestic partnerships" have been adopted by many countries, and innumerable localities. Such steps have represented progress--but insufficient progress. Most such attempts

to create a status resembling marriage retain significant differences. These may reflect residual prejudices regarding same-sex couples, or inherently unequal conceptions of what constitutes a "committed relationship."

Governments committed to equality cannot legitimately reserve certain areas of civil life as exempt zones where inequality is permitted. Human rights principles demand that governments end discrimination based on sexual orientation in civil marriage, and open the status of marriage to all.

I. Recognizing Relationships: International Law and Practice

In deciding who should enjoy the right to marry, and how, the strength of international protections against discrimination—including protections based on both sex and sexual orientation--clearly are relevant.

The International Covenant on Civil and Political Rights (ICCPR)—to which the United States is a party--bans discrimination based on sex.[1] In the 1994 case of *Nicholas Toonen v Australia*, the U.N. Human Rights Committee, which monitors compliance with and adjudicates violations under the ICCPR, found that laws punishing consensual, adult homosexual conduct violate protections against discrimination in the ICCPR.[2] Specifically, the Human Rights Committee held that "sexual orientation" was a status protected under the ICCPR from discrimination, finding that the reference to "sex" in articles 2 and 26 was to be taken to include sexual orientation.[3] The same reasoning applies to civil marriage: excluding gay and lesbian people from the status of civil marriage is a form of discrimination based on sexual orientation.[4]

Ending discrimination in access to civil marriage has become an urgent issue in many countries. The legislatures of the Netherlands, in 2001, and Belgium, in 2003, extended full civil marriage to same-sex couples. Courts in the Canadian provinces of Ontario and British Columbia opened marriage to same-sex couples in 2003; the Canadian parliament is likely to extend the possibility of same-sex marriage throughout the country within a year.

---

[1] International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. Article 26 of the ICCPR states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[2] It also held that they violate protections for privacy in Article 17 of the ICCPR, which reads: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

[3] *Nicholas Toonen v Australia*, Human Rights Committee, Case no. 488/1992, UN Doc. CCPR/c/50/D/488/1992, at 8.7.

[4] Prohibitions on same-sex marriage can also be understood as discrimination based on sex, since marriage would be open to those persons but for the sex of their chosen partner.

However, these are only the latest and most sweeping developments in a broad international movement to recognize same-sex relationships. In 1989, Denmark became the first country to offer registered partnerships to couples of the same sex. In the ensuing years, Norway, Sweden, Iceland, and Finland all followed suit, and in 1995, the Scandinavian countries signed a treaty to recognize each other's registered partnerships.

In 1995, Hungary extended the recognition of "common-law" marriages to partners of the same sex. Since then, on the European continent, Croatia, France, Germany, and Portugal have created forms of registration for same-sex relationships.

Nor is such recognition limited to Europe. South Africa's 1996 constitution explicitly bars discrimination based on sexual orientation. A number of important court decisions based on this provision have affirmed the rights of gay and lesbian couples to equality in spousal benefits, adoption and childcare, and immigration rights for foreign partners. The Constitutional Court of South Africa has held that "the family and family life with gays and lesbians are capable of establishing … are in all significant respects indistinguishable from those of spouses, and in human terms as important to gay and lesbian same-sex partners as they are to spouses."[5] On September 1, 2003, the Law Reform Commission of South Africa released a report condemning the absence of formal legal recognition for same-sex marriage as unconstitutional.

At the national level, same-sex relationships are recognized for the purposes of at least some of the benefits of marriage in Brazil, Colombia, Costa Rica, the Czech Republic, Israel, and New Zealand, among others. At the local level, same-sex relationships are recognized in a number of jurisdictions within countries as diverse as Argentina, Australia, Brazil, Italy, Spain, and Switzerland--as well as the state of Vermont within the United States.

In all these countries, expanding access to the rights entailed in civil marriage has neither altered nor assaulted core moral and cultural values. Rather, it has asserted the importance of civic equality, while leaving undisturbed the freedom of individual opinion and belief. Most states, in past centuries, have created a realm of civil law governing both the entry into marriage and its dissolution. Lawmakers have sought to guarantee that marriage is entered only with free and full mutual consent; to assure that partners enjoy equal rights within marriage; and to protect the equitable distribution of property when a marriage ends. In so doing, state regulation of marriage has often diverged from religious precepts. Countries, for instance, have allowed both divorce and remarriage, although locally prevailing religions may condemn both. There is thus a clear precedent for civil marriage laws to recognize marriages that religious standards may not. Civil laws on marriage can be amended to end discrimination based on sexual orientation without violating the right of religions to retain their own laws and practices. However, so long as the state retains marriage as a marker of legal recognition of relationships, it should be governed by international protections for equality and against discrimination.

The United Nations has also shown latitude in endorsing evolving, rather than fixed, definitions of the family. The U.N. Human Rights Committee has noted that "the concept of the family may differ in some respects from state to state, and even from region to region within a state, and … it

[5] *National Coalition for Gay and Lesbian Equality et al. v Minister of Home Affairs e. al.*, Constitutional Court of South Africa, case no. 3988/98, at 53.

is therefore not possible to give the concept a standard definition."[6] The U.N. Committee on the Rights of the Child has stated that in "considering the family environment," it should reflects "different family structures arising from various cultural patterns and emerging family relationships."[7]

II. Civil Unions or Marriage?

Many jurisdictions have responded to the call for equality in recognition of relationships by creating a parallel regime for regulating same-sex relationships. Laws on so-called "civil unions" or "domestic partnerships" have been adopted by many countries, and innumerable localities. In some cases (as in France) these create a status accessible to both same-sex and heterosexual couples, while marriage remains exclusive to heterosexual couples. In other cases (as in Germany) the status is available only to same-sex couples, while marriage is the only option for official recognition of heterosexual relationships.

Such steps have represented progress--but insufficient progress. Most such attempts to create a status resembling marriage retain significant differences. These may reflect residual prejudices regarding same-sex couples, or inherently unequal conceptions of what constitutes a "committed relationship." In the U.S. state of New York, for example, domestic partners seeking official registration must prove that they have lived together for two consecutive years; however, a man and a woman seeking to marry can do so without intrusive questions concerning how long they have known each other or where they have resided. Same-sex couples face an unequal and discriminatory burden of proving that their relationship is "real." Similarly, some jurisdictions require that same-sex couples demonstrate that they share finances or represent themselves as a couple publicly. In situations where publicly affirming one's homosexuality can lead to discrimination or violence--where one may lose one's job or home without legal redress--the burden imposed is not only discriminatory, but dangerous.

Moreover, "civil unions" do not carry the same guarantee of recognition by other jurisdictions that marriage ordinarily implies. An international convention governs the recognition of marriages across international borders.[8] Even for countries not party to it, however, the doctrine of comity--which has been defined in U.S. law as the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to the international duty and convenience and to the rights of its own citizens who are under the protection of its laws"[9]--ordinarily leads countries to recognize marriages performed in other jurisdictions. The burden is on governments to justify the denial of recognition to foreign marriages. The burden is usually, and unfairly, on partners in "civil unions" to justify their recognition abroad. This can have serious, and painful, consequences when partners in a civil union travel to a jurisdiction that does not recognize them. Even a partner's right to custody over a child may be endangered.

---

[6] "General Comment 19: Protection of the family, the right to marriage and equality of the spouses," Human Rights Committee, UN Doc. HRI/GEN/1/Rev.2 (1990), at 2.

[7] "Report on the Fifth Session," Committee on the Rights of the Child, UN Doc. CREC/C/24, Annex V.

[8] Hague Convention No. 26 on the Celebration and Recognition of the Validity of Marriages (1978).

[9] *Clubb v Clubb*, 402 Ill. 390, 399-400, 84 N.E. 2d 366 (1949), citing *Hilton v Guyot*, 159 US 113, 164, 40 L. Ed. 95, 108, 16 S. Ct. 139, 143 (1895).

Finally, the segregation of same-sex unions into a special legal status is a form of "separate but equal" acknowledgement. Separate is never equal: the experience of racial segregation in the United States testifies eloquently to how preserving discreteness only perpetuates discrimination. Even if the rights promised by civil unions on paper correspond exactly to those entailed in civil marriage, the insistence on a distinct nomenclature means that the stigma of second-class status will still cling to those relationships.

Governments committed to equality cannot legitimately reserve certain areas of civil life as exempt zones where inequality is permitted. Human rights principles demand that states end discrimination based on sexual orientation in civil marriage, and open the status of marriage to all.