

# TO WHAT EXTENT DOES THE *ICCPR* SUPPORT PROCREATION AND PARENTING BY LESBIANS AND GAY MEN?

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*[Throughout the world, domestic legal systems fail to secure adequate procreative and parenting opportunities for lesbians and gay men. This article looks at the possibilities offered by United Nations human rights law as a source of the obligation to provide lesbians and gay men interested in procreation and parenting with adequate legal protections. It argues that the International Covenant on Civil and Political Rights ('ICCPR') has the potential for promoting the full recognition of lesbians' and gay men's procreative and parental rights (such as the right to use medically unassisted alternative insemination and the right to have one's relationship with one's child — for example, the child born to one's same-sex partner — legally recognised). It also argues that the ICCPR has the potential to allow lesbians and gay men to obtain any additional level of protection for their procreative or parenting interests which a given state may accord to heterosexual people (such as where it provides them with access to assisted reproductive technology services). While arguing that the Human Rights Committee's case law has so far largely contained this potential, the article draws attention to the implications of more recent decisions (Young v Australia and X v Colombia) and argues that they appear to have paved the way for realising that potential in the near future. The discussion draws extensively on the case law of the Human Rights Committee, but is largely jurisprudential in its analytical approach.]*

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## I INTRODUCTION

A wealth of studies have shown that lesbian and gay parenting does not harm children, and that lesbian and gay-parented children do not significantly differ from those raised by heterosexuals.<sup>1</sup> Nevertheless, legal systems around the world are still far from securing adequate procreative and parenting opportunities for lesbians and gay men. Australia is an example: some of its jurisdictions criminalise insemination at home (whether across the blanket<sup>2</sup> or when the sperm used is not the woman's husband's<sup>3</sup>); some restrict access to reproductive technology services to infertile women or infertile heterosexual couples;<sup>4</sup> and some fail adequately to recognise parent-child relationships in lesbian and gay families.<sup>5</sup> The goal of this article is to establish whether international human rights law supports, and what its potential is for supporting, the legal recognition of lesbians' and gay men's procreative and parental rights, as well as, more broadly, the recognition of their interest in parenting on a par with that of heterosexuals. The *International Covenant on Civil and Political Rights* ('*ICCPR*')<sup>6</sup> will be the focus of the analysis, specifically the rights to found a family (art 23(2)), to protection given to the family and to family life (arts 23(1) and 17), as well as the rights to nondiscrimination and equality (arts 2(1) and 26).

<sup>1</sup> See Cheryl A Parks, 'Lesbian Parenthood: A Review of the Literature' (1998) 68 *American Journal of Orthopsychiatry* 376; Susan Golombok and Julie Mooney-Somers 'Children of Lesbian Mothers: From the 1970s to the New Millennium' (2000) 15 *Sexual and Relationship Therapy* 121; Carlos A Ball, 'Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference' (2003) 31 *Capital University Law Review* 691, 695–697 (summarising the overview provided by Ellen C Perrin, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents* (American Academy of Pediatrics Report, 2002)); Clare Murray, 'Same-Sex Families: Outcomes for Children and Parents' (2004) 34 *Family Law* 136; Jenni Millbank, 'From Here to Maternity: A Review of the Research on Lesbian and Gay Families' (2003) 38 *Australian Journal of Social Issues* 541. While some of these studies have been criticised as methodologically flawed by conservative scholars, they do represent by far the most 'objective' knowledge we have to date on lesbian and gay parenting. See generally Alcardo Zanghellini, 'Scientific Positivism and the Controversy over Research into Lesbian and Gay Parenting' (2007) 4(3) *Sexuality Research and Social Policy* 100.

<sup>2</sup> *Human Reproductive Technology Act 1991* (WA) ss 6, 28.

<sup>3</sup> *Infertility Treatment Act 1995* (Vic) s 7.

<sup>4</sup> *Infertility Treatment Act 1995* (Vic) s 8; *Reproductive Technology (Clinical Practices) Act 1988* (SA) s 13 (as affected, respectively, by *McBain v Victoria* (2000) 99 FCR 116 and *Pearce v South Australian Health Commission* (1996) 66 SASR 486).

<sup>5</sup> See, eg, *Family Law Act 1975* (Cth) s 60H, purporting, but effectively failing (given the provision's complexity and the controversy on its interpretation: *Re Mark* (2004) 31 Fam LR 162, 166–9), to identify the parents of (and hence, under s 61C, the holders of parental responsibility for) children born following fertilisation procedures. See generally Jenni Millbank, 'The Recognition of Lesbian and Gay Families in Australian Law — Part 2: Children' (2006) 34 *Federal Law Review* 205.

<sup>6</sup> Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

The discussion will draw extensively on the case law of the United Nations Human Rights Committee, but will be largely jurisprudential in its analytical approach.

## II PROCREATION AND ART 23(2) OF THE *ICCPR*

### A *The Relevance of Art 23(2) to the Issue of Procreative Rights*

Article 23(2) of the *ICCPR* protects the right to found a family in these terms: ‘The right of men and women of marriageable age to marry and to found a family shall be recognized’.

The right to found a family provides a conceptually attractive means for the promotion of lesbians’ and gay men’s procreative opportunities. As the legal literature on China’s one child policy makes clear, it is uncontroversial that the core of the right to found a family is procreation.<sup>7</sup> The Human Rights Committee itself, in its General Comment on art 23, stated that ‘the right to found a family implies, in principle, the possibility to procreate’.<sup>8</sup> Some commentators have argued that this includes, at least for different-sex couples, the right to use reproductive technologies, subject to those prohibitions necessary to protect the rights of others.<sup>9</sup>

Additionally, as far as the complaints and monitoring mechanisms offered by international human rights law are concerned, the right to found a family provides optimal opportunities to address gay and lesbian procreation as an issue of human rights, at least in countries that are a party to the Optional Protocol on individual complaints.<sup>10</sup>

### B *Is the Right to Found a Family Conditional on Marriage?*

Problems arise, however, when one examines the Committee’s jurisprudence on art 23(2). Indeed, the Human Rights Committee’s jurisprudence specifically on the right to found a family is practically nonexistent. The Committee, to the extent that it has considered the right to found a family at all, has done so in a context where this right figured essentially as an appendage to the right to marry.<sup>11</sup>

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<sup>7</sup> See, eg, Hannah A Saona, ‘The Protection of Reproductive Rights under International Law: The Bush Administration’s Policy Shift and China’s Family Planning Practices’ (2004) 13 *Pacific Rim Law and Policy Journal* 229, 253–4; Barbara Stark, ‘Crazy Jane Talks With the Bishop: Abortion in China, Germany, South Africa and International Human Rights Law’ (2003) 12 *Texas Journal of Women and the Law* 287, 310–11.

<sup>8</sup> UN Human Rights Committee, *General Comment No 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (Art 23)*, as contained in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/Gen/1/Rev.8 (8 May 2006) 188.

<sup>9</sup> Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993) 413–14. See also Stephen P Marks, ‘Tying Prometheus Down: The International Law of Human Genetic Manipulation’ (2002) 3 *Chicago Journal of International Law* 115, 133. Cf Katarina Tomasevsky, ‘European Approaches to Enhancing Reproductive Freedom’ (1995) 44 *American University Law Review* 1037, 1040–1.

<sup>10</sup> *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 302 (entered into force 23 March 1976).

<sup>11</sup> *Aumeeruddy-Cziffra v Mauritius*, UN Human Rights Committee, Communication No 35/1978, supp 40, UN Doc A/36/40 (2 May 1978) [6.2(e)], [9.2(a)].

This poses a first problem. Given that the right to marry and the right to found a family are found in the same *ICCPR* provision, and given that the Committee has not yet considered and found a violation of the right to found a family apart from the right to marry, could the right to found a family be dependent on marriage? If art 23(2) protects only the right to found marriage-based families, then it is of little use for the purposes of the present discussion, as we are not concerned with establishing procreative rights for lesbians and gay men which are conditional upon their entering into (same- or different-sex) marriage.

Fortunately, the view that the right to found a family also covers non-marital families seems more plausible. The Human Rights Committee has not expressed any opinion on the subject of whether the right to found a family is held only by married couples (or individuals who intend to marry). However, it has been convincingly argued that neither a textual nor a contextual interpretation of art 23(2) supports the view that only married couples have the right to found a family. In particular, Nowak has compared the text of the *ICCPR* right to found a family with its regional equivalent in the European context — art 12 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ('*ECHR*').<sup>12</sup> He found it significant that the former is less supportive than the latter of the proposition that marriage and the right to found a family are inseparable.<sup>13</sup> Furthermore, he has noted that the *ICCPR* right to found a family must be understood 'in the overall context of a provision guaranteeing comprehensive, institutional protection to the family in all of its various cultural forms'.<sup>14</sup>

It is also noteworthy that in examining art 12 of the *ECHR*, the European Court of Human Rights denied that there is such a connection between the right to marry and the right to found a family as to make procreation a condition of the former right.<sup>15</sup> Admittedly, saying that the wish or physical capacity to procreate (without third party assistance) is not a prerequisite to the right to marry is different from saying that marriage is not a prerequisite to the right to found a family (and it is the latter proposition that is relevant to our discussion). However, the Court's willingness to read the right to marry and to found a family disjunctively opens up the opportunity to argue that the right to found a family, as protected by international human rights documents, is not held exclusively by people who marry or intend to marry. As applied to the *ICCPR*, this argument is strengthened by the observation that, as just noted, art 12 of the *ECHR* could support more easily than art 23(2) of the *ICCPR* the view that marriage and the right to found a family are indeed inseparable.

While some have argued that the *travaux préparatoires* of the *ICCPR* may indicate that the right to found a family protected by art 23 is held only by married people,<sup>16</sup> preparatory work has been used by others to argue exactly the

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<sup>12</sup> Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 2 June 1952). Article 12 states that '[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right'.

<sup>13</sup> Nowak, above n 9, 413 arguing that in the *ECHR* 'the connection between the two rights stems from a common phrase ("this right", "ce droit") that is missing in the Covenant'.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Goodwin v United Kingdom* (2002) VI Eur Court HR 1, [98].

<sup>16</sup> Maja Kirilova Eriksson, *The Right to Marry and to Found a Family: A World-Wide Human Right* (1990) 139.

opposite.<sup>17</sup> Further, '[p]reparatory work is notoriously unreliable as a general guide to treaty interpretation'.<sup>18</sup> In fact, one need not even proclaim oneself a non-originalist in order to argue that the right to found a family contained in art 23 is not held exclusively by married people. Rebecca Cook has noted that 'the recognition of the right to marry and to found a family is a reaction against Nazi racial and reproductive policies'.<sup>19</sup> These policies prevented people not only from forming interracial marital relationships, but also interracial relationships established outside marriage.<sup>20</sup> Thus, the best view seems to be that the inclusion of art 23(2) in the *ICCPR* was also intended to afford protection to non-marital familial relationships.

### C *Do Lesbians and Gay Men Hold the Right to Found a Family?*

In the previous section I argued that the right to found a family should not be read as being conditional on marriage or on the intention to marry. If it were, the usefulness of the right would be severely restricted for my purposes, which are to construct an art 23(2)-based argument to support the procreative rights of lesbians and gay men regardless of their ability or desire to marry. The fact that the right to marry and the right to found a family are contained in the same provision of the *ICCPR*, however, is the source of another problem. This stems from the Committee's views in the decision *Joslin v New Zealand*.<sup>21</sup> In discussing whether art 23(2) accords a right to access same-sex marriage, the Committee noted:

Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term 'men and women', rather than 'every human being', 'everyone' and 'all persons'. Use of the term 'men and women', rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.<sup>22</sup>

For our present purposes, the problem is not that the Human Rights Committee has denied that people have a human right to marry people of their own sex. Rather, it is that in doing so the Committee indirectly confirmed also that, under the *ICCPR*, lesbians and gay men (as well as heterosexuals wishing to be single parents) have no right to found a family. This is because it is very improbable that one understanding of 'men and women of marriageable age' applies with regard to the right to marry and another to the right to found a family. Indeed,

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<sup>17</sup> Nowak, above n 9, 413 (including fn 26).

<sup>18</sup> Francis Jacobs and Robin White, *The European Covenant on Human Rights* (2<sup>nd</sup> ed, 1996) 33.

<sup>19</sup> Rebecca J Cook, 'International Protection of Women's Reproductive Rights' (1992) 24 *New York University Journal of International Law and Politics* 645, 700.

<sup>20</sup> *Gesetz zum Schutze des Deutschen Blutes und der Deutschen Ehre 1935* (Ger); *Reichsbürgergesetz 1935* (Ger) (collectively, 'Nuremberg Laws 1935').

<sup>21</sup> UN Human Rights Committee, Communication No 902/1999, UN Doc CCPR/C/75/D/902/1999 (30 July 2002) ('*Joslin*').

<sup>22</sup> *Ibid* [8.2].

even before *Joslin*, Nowak had argued that only heterosexual couples have the art 23(2) right to found a family precisely on the basis of the textual circumstances used by the Committee in *Joslin* to deny that art 23(2) accords a right to access same-sex marriage.<sup>23</sup>

Thus the implication of *Joslin* seems to be that lesbians and gay men do not enjoy the protection of the right to found a family *qua* lesbians and gay men.<sup>24</sup> By this I mean that *Joslin* implies that the art 23(2) rights are enjoyed by lesbians and gay men only in the form that least matters to them. They have the right to marry heterosexually. They have the right to found a family through heterosexual intercourse. And if alternative insemination is covered by art 23(2) (I think it should be, at least if medically unassisted, but this remains unclear) they have an *ICCPR* right to use it only if they enter, and only as the members of, a heterosexual relationship. Similarly, lesbians and gay men could, presumably, successfully invoke art 23(2) against, say, compulsory sterilisation, but *Joslin* implies that they could do so in their capacity as potential future procreators in heterosexual relationships rather than as potential lesbian and gay procreators.

The ratio decidendi of *Joslin* is open to challenge. As Wintemute noted in the context of art 12 of the *ECHR*, art 23(2) of the *ICCPR* does not say that men and women have to marry each other.<sup>25</sup> Furthermore, the uniformity and consistency in the interpretation of the gender requirements of the right to marry had already begun to break down at the time the Committee's views were being formulated. On the one hand, the Netherlands had by that time fully recognised same-sex marriage.<sup>26</sup> On the other hand, the European Court of Human Rights had modified, in *Goodwin v United Kingdom*,<sup>27</sup> its long-standing approach whereby only people of opposite biological birth-sex have the right to marry under art 12 of the *ECHR*.<sup>28</sup> Here I assume that the unspecified authorities which, according to *Joslin*, had 'consistently and uniformly'<sup>29</sup> understood the expression 'men and women' as limiting the right to marry to heterosexual marriage, were those referred to by the respondent member state — namely, member states, the European Court of Human Rights and academic commentary.<sup>30</sup> However, for as long as the Committee holds on to its views in *Joslin*, the implication seems to

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<sup>23</sup> Nowak, above n 9, 413.

<sup>24</sup> Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2<sup>nd</sup> ed, 2004) 609–10.

<sup>25</sup> Robert Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (1995) 129.

<sup>26</sup> *Wet van 21 december 2000 tot wijziging van Boek I van het Burgerlijk Wetboek in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht* (Ned).

<sup>27</sup> (2002) VI Eur Court HR 1 (post-operative transsexuals have the right to marry a person of their opposite post-operative sex under the *ECHR*: [100]–[101]).

<sup>28</sup> *Rees v United Kingdom* (1986) 106 Eur Court HR (ser A) 1; *Cossey v United Kingdom* (1990) 184 Eur Court HR (ser A) 1; *Sheffield and Horsham v United Kingdom* (1998) V Eur Court HR 2011.

<sup>29</sup> *Joslin*, UN Human Rights Committee, Communication No 902/1999, UN Doc CCPR/C/75/D/902/1999 (30 July 2002) [8.2].

<sup>30</sup> *Ibid* [4.3]–[4.4].

be that the right to found a family is not held by anybody other than heterosexual couples, whether married or not.<sup>31</sup>

D *Does it Make a Difference if Art 23(2) is Read in Conjunction with Art 2(1) of the ICCPR?*

Can one reach a different conclusion by reading art 23(2) in conjunction with the non-discrimination guarantee in art 2(1) of the *ICCPR*? Article 2(1) provides that states parties shall ‘respect and ... ensure ... the rights recognized in the present Covenant, without distinction of any kind, such as ... sex’. The Human Rights Committee has clarified that ‘sex’ for the purposes of art 2(1) (as well as art 26) includes ‘sexual orientation’.<sup>32</sup> Thus, art 2(1) ensures the entitlement to *ICCPR* human rights without unjustifiable distinctions based on sexual orientation.

Unfortunately, if certain arguments can be successfully used to rationalise a certain conclusion when a claim is considered exclusively under art 23(2), they can be used in the same way when a claim is considered under art 2(1) in conjunction with art 23(2). Invoking the anti-discrimination principle contained in art 2(1) does not allow us to introduce any moral argument to make the case in support of the right of lesbians and gay men to found a family which would not have already been relevant under art 23(2) taken alone.<sup>33</sup> If, as *Joslin* implies, the families whose foundation art 23(2) protects are families in a heteronormative sense (art 23(2) analysis), then it cannot be unreasonable under the *ICCPR* to distinguish between lesbian or gay families and heterosexual families in the context of the right to found a family (art 2(1) *juncto* art 23(2) analysis).

E *If Art 23(2) juncto Art 2(1) Covers Procreative Opportunities Not Covered by Art 23(2) Taken Alone, Can They Be Denied to Lesbians and Gay Men Even If They Are Provided to Heterosexuals?*

Article 2(1) ‘can be violated only in conjunction with some other (substantive) provision of the Covenant’, this being its so-called ‘accessory’

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<sup>31</sup> If it is not first established that the interest in parenting is important enough to ground procreative rights for lesbians and gay men under art 23(2), it may be difficult to secure protection for such moral rights in the context of other potentially relevant international human rights law provisions. For example, to the extent that alternative insemination can be characterised as a result of scientific progress, art 15 of the *International Covenant on Economic, Social and Cultural Rights* (‘*ICESCR*’), which protects the right to enjoy the benefits of scientific progress, may be relevant to lesbians’ and gay men’s moral right to use this procedure: *ICESCR*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976). However, because scientific progress is not beneficial in itself, the right to benefit from the applications of scientific progress is probably not justified by an interest in using technology per se (which would make the right altogether indiscriminate). Rather, it is presumably justified severally by a variety of sufficiently important interests which the use of technology is apt to satisfy, such as the interest in being healthy or the interest in parenting. But if the latter interest is not considered important enough, in the context of international human rights law, to establish a right to use alternative insemination under art 23(2) of the *ICCPR*, it would be hard to justify the proposition that it can establish such a right under the more generic rubric of art 15 of the *ICESCR*.

<sup>32</sup> *Toonen v Australia*, UN Human Rights Committee, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (4 April 1994) [8.7].

<sup>33</sup> See Peter Westen, *Speaking of Equality: An Analysis of the Rhetorical Force of ‘Equality’ in Moral and Legal Discourse* (1990) 69–72.

character.<sup>34</sup> However, it has been argued that '[a]ccessoriness does not ... mean that art 2 can be violated only when some other provision of the Covenant has been violated independently'.<sup>35</sup> On this view, the non-discrimination principle of art 2(1) applies to the measures that states may decide to take when they act in supererogatory ways, that is, when they act in order to provide greater protection for a Covenant right than the *ICCPR* strictly mandates. For the purposes of this discussion I shall assume that this view is correct, although the Human Rights Committee, unlike the European Court of Human Rights,<sup>36</sup> has adopted it neither explicitly nor implicitly.<sup>37</sup> Does it follow that art 23(2) *juncto* art 2(1) requires states to provide lesbians and gay men at least with those procreative opportunities (such as access to assisted reproductive technology services, as distinct from medically unassisted alternative insemination) which states accord to heterosexuals probably not as a matter of art 23(2) obligations, but rather as a matter of supererogation?

The performance of supererogatory activities can logically be discriminatory within the meaning of art 2(1) *juncto* the substantive right only with respect to those categories of people who are entitled to the substantive right in the first place — that is, to benefit from the obligations which the article containing the substantive right, taken alone, requires states to perform. If the art 23(2) rights are not enjoyed by lesbians and gay men in the first place (as *Joslin* implies), denying lesbians and gay men procreative opportunities which states make available only as a matter of supererogation cannot logically amount to prohibited discrimination within the meaning of art 2(1) *juncto* art 23(2).

### III PARENTING AND ARTS 23(1) AND 17 OF THE *ICCPR*

#### A *The Relevance of Arts 23(1) and 17 to the Issue of Parental Rights*

Lesbians and gay men interested in parenting need not only the procreative opportunities to do so, but also the law's support when it comes to recognising their relationship with the children they raise. In other words, parental rights are the necessary complement of procreative rights: protection for both is required in order to genuinely make parenting a viable option. Just as art 23(2) of the *ICCPR* (the right to found a family) is relevant to the issue of procreative rights, arts 23(1) and 17 are relevant to the issue of parental rights. The relationship between arts 23(1) and 17 has been described as one of 'close interaction',<sup>38</sup> and it has been noted that 'most cases regarding family rights have concerned violations, or

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<sup>34</sup> Nowak, above n 9, 34.

<sup>35</sup> *Ibid* 35.

<sup>36</sup> See generally Robert Wintemute, "'Within the Ambit': How Big Is the 'Gap' in Article 14 European Convention on Human Rights?" [2004] *European Human Rights Law Review* 367.

<sup>37</sup> See UN Human Rights Committee, *General Comment No 18: Non-Discrimination*, as contained in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (8 May 2006) 185.

<sup>38</sup> Raija Hanski and Martin Scheinin, *Leading Cases of the Human Rights Committee* (2003) 226.

exonerations, of States under both articles'.<sup>39</sup> These articles read:

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his ... family ...
2. Everyone has the right to the protection of the law against such interference or attacks. ...

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

That 'family', for the purposes of art 17 and art 23(1), includes parent–child relationships is routinely recognised by the Committee jurisprudence on heterosexual nuclear families (whether based on marriage or cohabitation, and whether intact or not), regardless of whether the Committee ends up finding that a violation of family rights occurred in the circumstances of the specific case.<sup>40</sup> Further, just as the domestic laws of member states tend to recognise an unwed biological mother as her child's legal parent, so does the relationship between unmarried mothers and their biological children qualify self-evidently as 'family' for the purposes of the *ICCPR*.<sup>41</sup>

The connection between protecting parent–child relationships and providing legal recognition for such relationships is clear, so that the relevance of art 23(1) to the issue of attributing parental rights requires no elaboration. The relevance of art 17 to the same issue may be less immediately clear. In particular, lack of legal recognition for parent–child relationships is an omission, and we do not tend to think of omissions as forms of 'interference'.

However, the characterisation of an absence of legal recognition for particular family forms as interference is not as far-fetched as it may appear at first blush. The law's failure to attribute parental authority (or responsibility, as Australian law terms it)<sup>42</sup> to people who are morally entitled to parental rights imposes on them a number of burdens and disadvantages. These can certainly be said to 'interfere' with their family life. Indeed, the Human Rights Committee has established that if a family is left in a state of uncertainty with respect to its

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<sup>39</sup> Joseph, Schulz and Castan, above n 24, 586.

<sup>40</sup> See, eg, *Aumeeruddy-Cziffra v Mauritius*, UN Human Rights Committee, Communication No 35/1978, UN Doc CCPR/C/12/D/35/1978 (9 April 1981) [9.2(b)(2)(ii)]; *Hendriks v The Netherlands*, UN Human Rights Committee, Communication No 201/1985, UN Doc CCPR/C/33/D/201/1985 (12 August 1988) [10.3]; *Balaguer Santacana v Spain*, UN Human Rights Committee, Communication No 417/1990, UN Doc CCPR/C/51/D/417/1990 (29 July 1994) [10.2]; *Fei v Colombia*, UN Human Rights Committee, Communication No 514/1992, UN Doc CCPR/C/53/D/514/1992 (26 April 1995) [8.10]; *Canepa v Canada*, UN Human Rights Committee, Communication No 558/1993, UN Doc CCPR/C/59/D/558/1993 (20 June 1997) [11.5]; *Winata v Australia*, UN Human Rights Committee, Communication No 930/2000, UN Doc CCPR/C/72/D/930/2000 (16 August 2001) [7.2]; *L P v Czech Republic*, UN Human Rights Committee, Communication No 946/2000, UN Doc CCPR/C/75/D/946/2000 (19 August 2002) [7.3]; *Bakhtiyari v Australia*, UN Human Rights Committee, Communication No 1069/2002, UN Doc CCPR/C/79/D/1069/2002 (6 November 2003) [9.6].

<sup>41</sup> *Buckle v New Zealand*, UN Human Rights Committee, Communication No 858/1999, UN Doc CCPR/C/70/D/858/1999 (16 November 2000) [9.1]–[9.2].

<sup>42</sup> See *Family Law Act 1975* (Cth) div 2.

ability to pursue ‘the normal behaviour of a family’ an interference with family life occurs.<sup>43</sup> The Committee has clarified that ‘it is ... in State legislation above all that provision must be made for the protection of the [art 17] right’.<sup>44</sup> Furthermore, the interference may well be said to display the required arbitrary character<sup>45</sup> due to the absence of a rational connection between the child’s best interest and the lack of legal recognition of their relationship with relevant adults.

### B *Are Lesbian and Gay Families Covered by Arts 23(1) and 17?*

If arts 23(1) and 17 apply to the problem of the attribution of parental rights, can they be used to redress this problem specifically in the context of lesbian and gay families?

The provisions which international human rights documents devote to the family have been said to make use of ‘broad abstractions in recognition of the fact that the laws of different nations reflect a wide range of approaches to the family’.<sup>46</sup> Indeed, one of the Committee’s General Comments points out that the concept of ‘family’, in the context of art 23(1), is culturally relative, going on to argue as follows:

In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, States parties should also indicate whether and to what extent such types of family and their members are recognized and protected by domestic law and practice.<sup>47</sup>

This statement provides some support for the claim that the *ICCPR* family provisions require legal recognition for parent–child relationships in lesbian and gay families. However, other points made by the Committee are more ambiguous in their support for this claim. In particular, consider the following statement:

when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in art 23. Consequently, States parties should report on how the concept and scope of the family is construed or defined in their own society and legal system.<sup>48</sup>

The first problem with this statement is that it suggests that the families entitled to the protection of art 23(1) are not all the formations that qualify as ‘family’ in society, but only those which both society and the state have already agreed should count as legally protected families. This has been called by two

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<sup>43</sup> *Aumeeruddy-Cziffra v Mauritius*, UN Human Rights Committee, Communication No 35/1978, supp 40, UN Doc CCPR/C/12/D/35/1978 (9 April 1981) [9.2(b)(2)(i)2]–[9.2(b)(2)(i)3].

<sup>44</sup> UN Human Rights Committee, *General Comment No 16: Article 17 (Right to Privacy) (1988)*, as contained in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (8 May 2006) 181.

<sup>45</sup> The question of the ‘unlawful’ character of the interference would be logically irrelevant to a case such as this, in which the ‘interference’ were deemed to arise on the basis of a lack of legal recognition.

<sup>46</sup> Ann Laquer Estin, ‘Families and Children in International Law: An Introduction’ (2002) 12 *Transnational Law and Contemporary Problems* 271, 287.

<sup>47</sup> UN Human Rights Committee, *General Comment No 19*, above n 8.

<sup>48</sup> *Ibid.*

commentators the ‘symbiotic relationship between the international norm and the domestic law’:

the ambiguity of [art 23(1)] means that ... [its] operational context is crucial ... Thus, the meaning of ... “family” will only become apparent in accordance with the accepted definitions of the [concept] in any given jurisdiction.<sup>49</sup>

While this symbiotic relationship may well ‘accommodate differences as between States Parties in their respective conceptions of the family’,<sup>50</sup> it is less apt to accommodate the possible differences between a certain societal group and the state having jurisdiction over it in their respective conceptions of the family. In particular, this symbiotic relationship may have the effect of watering down the protection provided to lesbian and gay families by the *ICCPR*. If ‘family’ for the purpose of art 23(1) is a state-defined concept, we are left with two possibilities. Either art 23(1) is useless because it requires recognition of lesbian and gay families involving children only in those states where the law already fully recognises them, or it is of limited use because at best it requires full recognition of such families only in states that already partially recognise them.

Problems remain even if the view is taken that ‘a State cannot prescribe a narrower definition of “family” than that adopted within that State’s society’<sup>51</sup> — a view that accords with the Committee’s statement that ““family” ... must be understood broadly as to include all those comprising a family as understood in the society concerned’.<sup>52</sup> In particular, even if the arbiter in defining the concept of family for the purposes of art 23(1) is taken to be civil society rather than the state, it is unclear what ‘society’ is for the purposes of the Committee’s statement. If dominant societal perceptions and discursive practices are crucial and these tend to construct lesbians and gay men as anti-family and non-familial,<sup>53</sup> how useful is art 23(1) going to be as a tool for claiming recognition for lesbian and gay families?

Consider also the Committee’s jurisprudence on the same issue. On the one hand the Committee has reiterated the principle that ‘the term “family” be given a broad interpretation so as to include all those comprising the family as understood in the society in question’ and has consistently applied this principle when dealing with what counts as a family for the purposes of art 23(1) in a non-Western context.<sup>54</sup> On the other hand, in a case arising in the Western context, the Committee has stated, as late as the mid-1990s, that a relationship must display the ‘minimal requirements’ of ‘life together, economic ties, a

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<sup>49</sup> Juliet Behrens and Phillip Tahmindjis, ‘Family Law and Human Rights’ in David Kinley (ed), *Human Rights in Australian Law: Principles, Practice and Potential* (1998) 169, 172.

<sup>50</sup> Douglas Hodgson, ‘The International Legal Recognition and Protection of the Family’ (1994) 8 *Australian Journal of Family Law* 219, 224.

<sup>51</sup> Joseph, Schultz and Castan, above n 24, 587.

<sup>52</sup> *Ngambi v France*, UN Human Rights Committee, Communication No 1179/2003, UN Doc CCPR/C/81/D/1179/2003 (16 July 2004) [6.4].

<sup>53</sup> Aleardo Zanghellini, ‘Lesbian and Gay Identity, the Closet and Laws on Procreation and Parenting’ (2007) 16 *Griffith Law Review* 107.

<sup>54</sup> *Hopu v France*, UN Human Rights Committee, Communication No 549/1993, UN Doc CCPR/C/60/D/549/1993/Rev.1 (29 December 1997) [10.3].

regular and intense relationship, etc' in order for it to be protected as a family under art 23(1).<sup>55</sup>

The approach is not actually contradictory, if one considers what seems to be its likely premise. Consider the following statement by the Committee: 'The Committee notes 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 that it is therefore not possible to give the concept a standard definition'.<sup>56</sup>

On the one hand, this statement suggests that the Committee is prepared to recognise that there may be different notions of what counts as family in different states or regions. On the other hand, the statement indicates that the Committee assumes that there is relative agreement on the requirements that an entity/relationship must display in order for it to qualify as family within each of these discrete geographical areas. The problem with this fictitious assumption is that it tends to entail that what the majority or 'common sense' does not regard as familial in any given geographical area does not count as family for the purposes of the protection offered by art 23(1). This is particularly unfortunate, and it runs against the whole ethos of the human rights system, which developed partly as a means to protect unpopular minorities from the tyranny of majorities.

Consider the case of a gay man who acted as sperm donor to a lesbian couple and maintains contact with the child. What would be the consequences of applying, to his relationship with his biological child, the Committee's principle that a relationship must involve life together and economic ties, as well as be regular and intense, in order for it to qualify as family in a Western context? The child and its 'limited' parent in my example do not live together, there may be no economic ties between them, and their relationship may be regular but not intense, or intense but not regular. Such a relationship would fail to measure up under the Committee's standard. Accordingly, a state failing to legally recognise the contact rights of the limited parent might not be violating art 23(1).

Predictably, 'family' for the purposes of art 17 is defined by the Committee in terms analogous to those applicable to art 23(1): 'the objectives of the Covenant require that for purposes of art 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned'.<sup>57</sup> This gives rise, in the context of art 17, to the same uncertainties in the interpretation of art 23(1). Thus, establishing that the interferences with family life occasioned by lack of recognition for lesbian and gay families violate art 17 is no easier than establishing a violation of art 23(1) on the same basis.

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<sup>55</sup> *Santacana v Spain*, UN Human Rights Committee, Communication No 417/1990, UN Doc CCPR/C/51/D/417/1990 (29 July 1994) [10.2]. In an early case the absence of cohabitation (between a mother and daughter) was sufficient to deny that a family existed for the purposes of art 23(1): *AS v Canada*, UN Human Rights Committee, Communication No 68/1980, UN Doc CCPR/C/12/D/68/1980 (31 March 1981) [8.2(b)]. However, more recently the Committee noted that 'the right to protection of family life [is not] necessarily displaced by geographical separation, infidelity, or the absence of conjugal relations': *Ngambi v France*, UN Human Rights Committee, Communication No 1179/2003, UN Doc CCPR/C/81/D/1179/2003 (16 July 2004) [6.4].

<sup>56</sup> UN Human Rights Committee, *General Comment No 19*, above n 8, [2].

<sup>57</sup> UN Human Rights Committee, *General Comment No 16*, above n 44, [5].

In sum, what has so far been the Committee's approach to arts 17 and 23(1) poses some obstacles to, while not categorically ruling out, lesbians' and gay men's successful use of those provisions to support their parental rights.

C *Does It Make a Difference if Arts 23(1) and 17 Are Read in conjunction with Art 2(1) of the ICCPR?*

The same observations made in the context of the interaction between art 2(1) (the accessory anti-discrimination guarantee) and art 23(2) also apply to its interaction with arts 17 and 23(1). Article 2(1) does not codify any distinct moral principle which is not already an integral part of each of the substantive *ICCPR* rights to which art 2(1) applies. As such, it does not allow us to introduce any moral argument to support the legal recognition of lesbians' and gay men's parental rights which would not already be relevant under arts 23(1) and 17 taken alone. The function of art 2(1) — aside from its applicability in cases of supererogation — is merely that of reminding us that all those who genuinely qualify as right-holders of a substantive *ICCPR* right (because they have the relevant interest, whose importance is not outweighed by relevant counter-considerations) are entitled to that right.

IV THE INTEREST IN PARENTING AND ART 26 OF THE *ICCPR*

A *The Relevance of Art 26 to Lesbians' and Gay Men's Procreative Rights, Parental Rights, and More Broadly to Their Interest in Parenting*

Article 26 of the *ICCPR* reads:

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.

As we already know, the meaning of 'sex', for the purposes of art 26, includes sexual orientation. The Committee has argued that art 26 'prohibits discrimination in law or in fact in any field regulated and protected by public authorities'.<sup>58</sup> The Committee has also clarified that the interpretation of the term 'discrimination' would include

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>59</sup>

The expression 'rights and freedoms', as the Committee uses it in its General Comment, is clearly apt to catch not only procreative and parental rights but also

<sup>58</sup> UN Human Rights Committee, *General Comment No 18*, above n 37, [12].

<sup>59</sup> *Ibid* 187. In order for a distinction not to run afoul of the prohibition against discrimination, there must be a 'reasonable and objective justification and a legitimate aim for distinctions that relate to an individual's characteristics enumerated in article 26': *Borzov v Estonia*, UN Human Rights Committee, Communication No 136/2002, UN Doc CCPR/C/81/D/1136/2002 (25 August 2004) [7.3].

those procreative activities or choices which states may tolerate or recognise even if, strictly speaking, they are not correctly conceptualised as rights.

Although adjudicative bodies applying anti-discrimination guarantees tend to be cautious when facing claims of indirect discrimination,<sup>60</sup> the Committee has confirmed that art 26 may also prohibit indirect discrimination.<sup>61</sup> This is significant because often laws on reproduction and parenting tend to result in instances of indirect, rather than direct, discrimination on the ground of sexual orientation.<sup>62</sup> For instance, in Victoria<sup>63</sup> and in South Australian licensed fertility clinics,<sup>64</sup> an infertility requirement must be met before one can access all reproductive technology services and, in Western Australia, before one can access in vitro fertilisation.<sup>65</sup> Although that requirement applies to everybody, it has a disparate impact on those who are not in heterosexual relationships, because only for heterosexual couples is infertility the standard circumstance determining them to seek the service.

However, note that instances of indirect discrimination on the ground of sexual orientation may also constitute direct discrimination on such grounds as sex or marital status. For example, failing to recognise automatically the parental responsibility of the same-sex partner of a biological mother who conceives through reproductive technology discriminates against the former on the ground of sex, if a similarly positioned married man enjoys parental responsibility — as he does in Australia by virtue of s 60H(1) of the *Family Law Act 1975* (Cth).

## B Conceptions of Equality and the Relationship between Art 26 and Arts 17 and 23

### 1 Premise

Article 26 is certainly capable of being interpreted to support the conclusion that differential treatment of lesbians and gay men in the spheres of procreation and parenting amounts to prohibited discrimination under that article. As we know, art 23(2) as well as arts 17 and 23(1) are likewise capable, in theory, of supporting the conclusion that the *ICCPR* protects lesbians' and gay men's procreative and parental rights. In practice, however, art 23(2) is encumbered by *Joslin*, which implies that this article does not protect lesbians' and gay men's procreative rights. Likewise, arts 17 and 23(1) are burdened with the ambiguous approach taken by the Committee with regard to the meaning of family, which makes it unclear if lesbians' and gay men's parental rights are protected under these articles. Can we then concede that arts 17 and 23 may not protect lesbians'

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<sup>60</sup> Robert Wintemute, 'Filling the Article 14 "Gap": Government Ratification and Judicial Control of Protocol No 12 ECHR' [2004] *European Human Rights Law Review* 484, 496–7.

<sup>61</sup> See, eg, *Simunek v Czech Republic*, UN Human Rights Committee, Communication No 516/1992, UN Doc CCPR/C/54/D/516/1992 (19 July 1995) [11.7]; *Althammer v Austria*, UN Human Rights Committee, Communication No 998/2001, UN Doc CCPR/C/78/D/998/2001 (22 September 2003) [10.2].

<sup>62</sup> On the concept of indirect discrimination see Sandra Fredman, 'Combating Racism with Human Rights: The Right to Equality' in Sandra Fredman (ed), *Discrimination and Human Rights: The Case of Racism* (2001) 9, 23–6; Westen, above n 33, 108–13.

<sup>63</sup> *Infertility Treatment Act 1995* (Vic) s 8.

<sup>64</sup> *Reproductive Technology (Clinical Practices) Act 1988* (SA) s 13.

<sup>65</sup> *Human Reproductive Technology Act 1991* (WA) s 23.

and gay men's procreative and parental rights, but argue that, at any rate, art 26 does require us to treat lesbian and gay procreation and parenting on a par with heterosexual procreation and parenting?

In particular, note that, unlike art 2(1), art 26 contains a freestanding, or autonomous, equality guarantee.<sup>66</sup> This means that the article can be violated independently of any violation of other substantive *ICCPR* rights.<sup>67</sup> From this, one could perhaps conclude that art 26 requires that procreative and parenting options for lesbians and gay men be secured on a basis of equality with heterosexuals regardless of whether it is determined that arts 23 and 17 protect lesbians' and gay men's procreative and parental rights. Although this would be a practically useful argument, I shall argue that logic, consistency and integrity forbid us from making such an argument under the conception of equality which is widely accepted as underlying the guarantee contained in art 26. But I shall also explain that, in light of the recent jurisprudence on art 26, this conclusion does not necessarily turn out to be bad news for lesbian and gay parents and prospective parents after all.

## 2 *Value-Driven Approaches to Art 26*

In this section I argue that if we take what Sandra Fredman has called a 'value-driven approach'<sup>68</sup> to the equality guarantee contained in art 26, we can perhaps turn a blind eye to whatever arts 23 and 17 may be deemed to tell us on the degree of respect owed to lesbians' and gay men's interest in parenting. This would allow us to argue that art 26 requires protection for lesbians' and gay men's procreation and parenting on a par with heterosexuals even if we were to conclude that arts 17 and 23 do not protect lesbians' and gay men's procreative and parental rights. However, it is not yet clear that the Human Rights Committee supports a value-driven approach to art 26.

A 'value-driven approach' to art 26 would try to give meaning to the vague notion of equality by identifying broad values which are understood as the aims of the equality guarantee. In her analysis of value-driven approaches to equality guarantees, Fredman notes that, from an examination of legislative and judicial practices in several jurisdictions, '[t]hree intertwined themes can be discerned': 'individual dignity and worth', 'participation in society' and 'redress[ing] historical disadvantage'.<sup>69</sup>

If art 26 is understood as a provision serving this kind of purpose, it could be used to make a number of different equality-based arguments aimed at securing procreative options and parental rights for lesbians and gay men. We could argue, for example, that one of the mandates of art 26 is that action be taken to remedy lesbian and gay inequality of power. According to Cooper, everybody has a moral entitlement to participate, on a basis of equality with other people, in shaping their environment and world.<sup>70</sup> This tenet, together with the idea that

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<sup>66</sup> *Danning v The Netherlands*, UN Human Rights Committee, Communication No 180/1984, UN Doc CCPR/C/29/D/180/1984 (9 April 1987) [12.1]–[12.4].

<sup>67</sup> UN Human Rights Committee, *General Comment No 18*, above n 37.

<sup>68</sup> Fredman, above n 62, 21.

<sup>69</sup> *Ibid* 21–2.

<sup>70</sup> Davina Cooper, *Challenging Diversity: Rethinking Equality and the Value of Difference* (2004) 77–83.

‘the good society is one not based on structures of domination and exploitation’,<sup>71</sup> constitutes the driving idea behind what she identifies as the immediate focus of political action — namely, undoing such categories as sexuality to the extent that they work as organising principles of inequality, that is, to the extent that they make ‘people’s capacity to exercise power unequal’.<sup>72</sup> Sexual identity categories (for example, homosexual or heterosexual) work precisely as such a principle,<sup>73</sup> so that their destabilisation is crucial to lesbian and gay empowerment; and a way of achieving that destabilisation is precisely by making laws and policies on reproduction and parenting more lesbian and gay-affirmative. On this basis, it could be argued that — regardless of whether or not procreative and parental rights for lesbians and gay men can be established as fundamental rights under arts 17 and 23 — art 26 requires that lesbians and gay men have an opportunity to procreate and parent which is genuinely equal to that of heterosexuals. This is because of the importance of the aim of undoing sexual identity categories, which is in turn justified by the principle of equality of power.

Another possible argument in support of lesbian and gay procreation and parenting that could be made by taking a value-driven approach to art 26 would be along the following lines: rather than Cooper’s ‘equality of power’, the equality principle contained in art 26 reflects the principle of ‘equal concern’ in a Dworkinian sense. Dworkin has argued that the best interpretation of the principle that governments should show equal concern for their citizens requires them to make people equal in the resources they own.<sup>74</sup> Equality of resources means, in this sense, providing each person with a bundle of resources such that nobody envies anybody else’s bundle. This involves setting up an economic market (intended ‘mainly as an analytical device but also, to a certain extent, as an actual political institution’<sup>75</sup>) allowing ‘that the true measure of the social resources devoted to the life of one person ... [be] fixed by asking how important, in fact, that resource is for others’.<sup>76</sup> Since the value of resources is a function of people’s plans and projects, which in turn depend on what people are free to do with resources, the freer people are, the fairer the distribution of resources will be.<sup>77</sup> In particular, strong protection will have to be accorded to those freedoms, including family rights (along with rights to conscience, expression, etc), which allow people to form and review their projects and preferences.<sup>78</sup> It follows that — whether or not lesbians’ and gay men’s procreative and parenting aspirations deserve recognition for their intrinsic value under arts 17 and 23 — protection for lesbians’ and gay men’s procreation and parenting is required under art 26 because it is instrumental to realising the fairness of resource distribution. This is in turn necessary to give effect to

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<sup>71</sup> Ibid 88.

<sup>72</sup> Ibid.

<sup>73</sup> William B Turner, *A Genealogy of Queer Theory* (2000) 32–3.

<sup>74</sup> Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (2000) 3, 65–119.

<sup>75</sup> Ibid 66.

<sup>76</sup> Ibid 70.

<sup>77</sup> Ibid 147–52.

<sup>78</sup> Ibid 59–60.

equality of resources, which is the goal underlying the principle of equal concern contained in art 26.

Whatever the moral urgency of principles such as equality of power and equality of resources, art 26 can work as a framework for the articulation of arguments based on these or similar principles only if it is accepted that a value-driven approach should be taken to it. But it is not clear that the Committee is yet prepared to take an uncompromisingly value-driven approach to art 26. But for a single statement made in the context of art 3,<sup>79</sup> any indication that ‘equality’ in the *ICCPR* stands for ‘dignity’, ‘equal concern’ or similar values is vague at best. The vocabulary of ‘stigma’, ‘stereotype’, ‘subordination’, ‘dignity’, ‘equal concern’, ‘equal power’, etc, is all but absent from the Committee’s jurisprudence on art 26. Nor does the *General Comment on Non-Discrimination* expand on the aims of the equality guarantee in these or analogous terms.

The strongest indication that the Committee may in the future take a value-driven approach to art 26 is perhaps a recent decision in two cases in which the claimants argued that preference for males in succession to titles of nobility discriminated on the ground of sex.<sup>80</sup> A majority of the Committee declared the complaints inadmissible. It argued that:

article 26 cannot be invoked in support of claiming a hereditary title of nobility, an institution that, due to its indivisible and exclusive nature, lies outside the underlying values behind the principles of equality before the law and non-discrimination protected by article 26.<sup>81</sup>

### 3 *The Formal Principle of Equality*

#### (a) *Relationship Between Art 26 and Arts 17 and 23*

Rather than taking a value-driven approach, we can, less controversially, understand art 26 as enshrining what has been called the ‘formal principle of

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<sup>79</sup> ‘[E]quality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women’: UN Human Rights Committee, *General Comment No 12: Article 3 (The Equality of Rights between Men and Women)*, as contained in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (8 May 2006) 223.

<sup>80</sup> *de Irujo v Spain*, UN Human Rights Committee, Communication No 1008/2001, UN Doc CCPR/C/80/D/1008/2001 (15 June 2004) [6.5]; *Barcaiztegui v Spain*, UN Human Rights Committee, Communication No 1019/2001, UN Doc CCPR/C/80/D/1019/2001 (15 June 2004) [6.4].

<sup>81</sup> *de Irujo v Spain*, UN Human Rights Committee, Communication No 1008/2001, UN Doc CCPR/C/80/D/1008/2001 (15 June 2004) [6.5]; *Barcaiztegui v Spain*, UN Human Rights Committee, Communication No 1019/2001, UN Doc CCPR/C/80/D/1019/2001 (15 June 2004) [6.4]. The Committee may perhaps be viewed as having taken some sort of value-driven approach to art 26 also on those occasions when it appears to have objected on equality grounds to practices or laws evidencing a persecutory animus, for that reason alone: *Pezoldova v Czech Republic*, Human Rights Committee, Communication No 757/1997, UN Doc CCPR/C/76/D/757/1997 (9 December 2002) (Partly Concurring Individual Opinion by Committee Member Justice Prafullachandra Natwarlal Bhagwati); *Diergaardt v Namibia*, UN Human Rights Committee, Communication No 760/1997, UN Doc CCPR/C/69/D/760/1997 (6 September 2000) [10.10].

equality'.<sup>82</sup> The formal principle of equality is the idea that equals should be treated equally, and it is certainly one of the purposes of art 26 to affirm this tenet. If we take this principle as our conception of equality for the purposes of art 26, the argument that homosexuals and heterosexuals should have an equal opportunity to procreate and parent can be restated as follows: the reason for recognising certain procreative and parenting options for heterosexuals also applies to lesbians and gay men, who should thereby enjoy equivalent options.

Obviously, that reason is essentially that human beings have an interest in parenting, which our cultures highly value. Indeed, the importance of the interest in parenting is such that it morally requires states to refrain from interfering not only with consensual heterosexual intercourse, but also, I would argue, alternative insemination at home. This does not necessarily mean that states are morally required to secure or tolerate all conceivable procreative means, such as the provision of assisted reproductive technology services. But to the extent that they decide to do so, the interest in parenting still features as the reason rationally justifying these decisions.

As far as heterosexuals are concerned (at a minimum those who are happy to procreate by having intercourse with their partner), the moral obligations which states have towards people engaging in procreation are legally codified by art 23(2) of the *ICCPR*. On the other hand, as we have seen, the same article, as interpreted in light of the Human Rights Committee's jurisprudence on the right to marry, appears to deny the proposition that the interest in parenting of lesbians and gay men should be similarly supported.<sup>83</sup> This creates a problem. Can one argue that art 26 requires that lesbians and gay men should have an opportunity to satisfy their interest in parenting which is genuinely equal to that of heterosexuals while accepting that art 23(2) may not require this, or remaining agnostic about that possibility?

In the *Joslin* case, with regard to the right to marry, the Committee argued:

The authors' essential claim is that the Covenant obligates States parties to confer upon homosexual couples the capacity to marry and that by denying the authors this capacity the State party violates their rights under articles ... 23 ... and 26 of the Covenant. The Committee notes that article 23, paragraph 2, of the Covenant expressly addresses the issue of the right to marry.

Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision ...

In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under article ... 26 of the Covenant.<sup>84</sup>

The logic of this passage cannot be faulted. If an individual interest (for example, the interest in parenting) is important enough to ground an independent substantive right in the *ICCPR* (for example, the right to found a family), the

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<sup>82</sup> See generally Westen, above n 33, 185–229.

<sup>83</sup> See above Part II(C).

<sup>84</sup> *Joslin*, UN Human Rights Committee, Communication No 902/1999, UN Doc CCPR/C/75/D/902/1999 (30 July 2002) [8.2]–[8.3].

degree of protection afforded by the Covenant to that interest through that right is the level of protection required by the *ICCPR* human rights principles. If certain hypothetical derivations of the substantive right (for example, the right to found a lesbian/gay family) are not covered by the substantive right (the right to found a family) as guaranteed by the *ICCPR*, it is presumably because the interest grounding the right (the interest in parenting) is, according to the Covenant, not important enough, in light of relevant counter-considerations, to justify that particular derivation. Thus, if one concludes that the foundation of lesbian and gay families is not protected under the right to found a family, this means that, under the Covenant, one can lawfully differentiate between homosexual families and heterosexual families. Accordingly, there seems to be little scope under art 26 for obliging states to give lesbians and gay men an opportunity to satisfy their interest in parenting which is genuinely equal to that of heterosexuals, unless we are prepared to argue simultaneously that the existence of such an obligation can be established also under art 23(2). In this sense, a procreative claim under art 26 cannot be construed as freestanding even if art 26 is a freestanding equality guarantee.<sup>85</sup>

Relevantly, art 26 does cover procreative matters which are probably outside the jurisdiction of art 23(2). In particular, if a state provides (or tolerates the provision of) assisted reproductive technology services, art 26 applies even if art 23(2) is deemed (as I think it should be) to guarantee the right to use such services neither to heterosexuals nor to lesbians or gay men. It does not follow, however, that denying or limiting lesbian or gay access to such services would violate art 26, if one is prepared to accept that art 23(2) may not protect lesbians' and gay men's procreative rights. This is because the case for providing equal access to reproductive technology services under the formal principle of equality contained in art 26 rests on the proposition that equal consideration must be afforded under the *ICCPR* to the interest in parenting of lesbians and gay men and that of heterosexuals. But this same proposition is denied by art 23(2) to the extent that it is interpreted to allow states to interfere with the procreative rights of lesbians and gay men, such as by prohibiting alternative insemination at home. In this sense, if art 23(2) is taken not to protect lesbian and gay procreative rights, it also indirectly suggests that art 26 does not protect their right to equal treatment with regard to those procreative opportunities incorrectly conceptualised as rights, and hence falling outside the jurisdiction of art 23(2) in the first place.

In short, the proposition that art 26 requires that lesbians and gay men be secured procreative options available to heterosexuals stands or falls together with the proposition that art 23(2) protects for lesbians and gay men the subset of those options that are correctly conceptualised as procreative rights. Similarly, we cannot logically argue that art 26 requires equal protection for lesbians' and gay men's parental authority regardless of whether or not arts 17 and 23(1) require this too.

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<sup>85</sup> Cf *Kollar v Austria*, UN Human Rights Committee, Communication No 989/2001, UN Doc CCPR/C/78/D/989/2001 (1 September 2003) [8.7]; *Diergaardt v Namibia*, UN Human Rights Committee, Communication No 760/1997, UN Doc CCPR/C/69/D/760/1997 (6 September 2000) (Individual Opinion of P N Bhagwati, Lord Colville and Maxwell Yalden (Dissenting)) [7].

In asking ourselves if the *ICCPR* protects procreative or parenting options for lesbians and gay men, we need to achieve consistent answers under art 26 and arts 23 and 17 — at least if we understand art 26 to be about the formal principle of equality. It is not so much that inconsistency would be aesthetically bothering. Rather, the point is that the authority we want to claim for human rights law in order to deploy it effectively as a tool for progressive social change is justified in part by its integrity,<sup>86</sup> such that we may have more to lose than to gain by compromising its internal coherence.<sup>87</sup>

I believe that arts 23 and 17 can and should be interpreted — in contrast to what has been implied or suggested by the Committee — so as to protect lesbians' and gay men's procreative and parental rights. Therefore I believe that art 26, in codifying the formal principle of equality, requires such protection. Conversely, in so far as I think that art 26 requires protection for lesbian and gay procreation and parenting on a par with heterosexuals, I also think that the best interpretation of arts 23 and 17 requires protection for lesbians' and gay men's procreative and parental rights. But I do not think that we can in conscience argue that equal treatment between lesbians or gay men and heterosexuals with respect to procreative and parental options is required under art 26 regardless of whether or not we can establish procreative and parental rights for lesbians and gay men under arts 23 and 17.

(b) *Young v Australia and X v Colombia*

The conclusion just reached — that we need to decide the issues involving lesbians' and gay men's interest in parenting arising under art 26 consistently with those arising under arts 23 and/or 17 — has important implications for the significance of a case decided in 2003 by the Human Rights Committee: *Young v Australia*.<sup>88</sup>

In *Young*, the Human Rights Committee, applying art 26, found certain legal provisions on pensions for the 'dependants' of war veterans discriminatory because they did not apply to same-sex partners while they did cover de facto and married different-sex partners.<sup>89</sup> Although receiving pension benefits serves one's well-being by satisfying one's interest in economic security rather than one's interest in establishing or cultivating familial relationships, the particular economic benefits at issue in *Young* were attributed on the basis of a familial relationship. Thus, even if the issues arising in *Young* did not trigger the application of the right to family life (art 17), to protection for the family (art 23(1)), or to found a family (art 23(2)), they inevitably involved implicit value judgements about the interest in establishing or cultivating certain family relationships. In particular, the Committee noted:

in previous communications the Committee found that differences in the receipt of benefits between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry with

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<sup>86</sup> Cf Ronald Dworkin, *Law's Empire* (1986) 164–7, 186–90, 214.

<sup>87</sup> *Contra* Wayne Morgan, 'Queering International Human Rights Law' in Carl Stychin and Didi Herman (eds), *Sexuality in the Legal Arena* (2000) 208, 222.

<sup>88</sup> UN Human Rights Committee, Communication No 941/2000, UN Doc CCPR/C/78/D/941/2000 (18 September 2003) ('*Young*').

<sup>89</sup> *Ibid* [10.4].

all the entailing consequences. It transpires from the contested sections of the [*Veteran's Entitlement Act 1986* (Cth)] that individuals who are part of a married couple or of a heterosexual cohabiting couple ... fulfill the definition of ... a 'dependant', for the purpose of receiving pension benefits. In the instant case, it is clear that the author, as a same sex partner, did not have the possibility of entering into marriage. Neither was he recognized as a cohabiting partner of Mr C, for the purpose of receiving pension benefits, because of his sex or sexual orientation ... The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced. In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author a pension on the basis of his sex or sexual orientation.<sup>90</sup>

Note that, according to the Committee, differential treatment between heterosexual married couples and heterosexual de facto couples is admissible. Furthermore, in finding a violation of art 26, the Committee's explicit comparison was between the treatment of de facto heterosexual and same-sex couples. From this one might conclude that the Committee was suggesting that states have to confer benefits on same-sex couples only if they decide — as they are free, but not obliged, to do — to bestow them upon heterosexual de facto couples.

However, it is noteworthy that the reason used by the Committee to justify its view that differential treatment between heterosexual de facto couples and married couples is admissible is that heterosexual couples can freely choose their status by marrying or failing to do so. Further, the Committee underscored that such a choice is not open to same-sex couples where marriage is defined heterosexually. These points suggest that, according to the Committee, whatever benefits are made available to heterosexual couples (even those that apply only as a result of entering marriage) need to apply also to same-sex couples unless a good reason exists to justify differential treatment. But if the benefits have to be equal between same-sex and different-sex (including married) couples, this has to be because lesbians' and gay men's interest in founding and cultivating sexually intimate adult relationships is presumptively no less valuable, under the *ICCPR*, than heterosexual people's interest in forming and maintaining such relationships. I say 'presumptively' because the Committee's argument does not rule out that in certain cases it may be reasonable not to extend some benefits to same-sex couples which are bestowed upon heterosexual couples. Indeed, the decision perhaps suggests that one of those benefits may be precisely the right to marry (as distinct from the legal consequences of marriage).<sup>91</sup>

This makes it possible to reconcile *Young* with *Joslin*, such that *Young* may be viewed not to have impacted on the conclusion in *Joslin* that the right to marry is held exclusively by heterosexual couples. Yet, the recognition that lesbians' and gay men's interest in founding and cultivating sexually intimate adult relationships is relevant under the *ICCPR*, and presumptively as relevant as that

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<sup>90</sup> Ibid.

<sup>91</sup> *Joslin*, Human Rights Committee, Communication No 902/1999, UN Doc CCPR/C/75/D/902/1999 (30 July 2002) (Individual Opinion of Rajsoomer Lallah and Martin Scheinin (Concurring)).

of heterosexuals, should not be underestimated. That principle could not even implicitly be found in the majority opinion in *Joslin*. To the extent that that principle has now been formally recognised, and given that the textual and contextual arguments on which *Joslin*'s conclusion is based are, as explained above, dubious, I would argue that *Young* and *Joslin*, far from being consistent, pull in different directions.

This tension reflects the fact that, as regards the recognition of the human rights of lesbians and gay men, international law is still in a transitional phase — the process of discarding its traditionally heteronormative character<sup>92</sup> being well underway but still ongoing.<sup>93</sup> However, this tension calls for a resolution, for surely an approach to the *ICCPR* which safeguards its integrity is preferable to one that compromises it. Thus, *Young* must be viewed as having started to doubt the rationale used in *Joslin* to restrict the right to marry (and, by implication, the right to found a family) to heterosexual couples. Likewise, *Young* has implicitly confirmed that same-sex couples can claim the protection of arts 23(1) and 17.

Reaching this conclusion with respect to arts 23 and 17 is not a matter of reading these articles in light of the formal principle of equality contained in art 26 — as if that principle were not already a necessary, if implicit, component of arts 23 and 17.<sup>94</sup> It is simply a matter of consistently applying across the *ICCPR* a proposition that is the answer to a question that has most recently been addressed (if only implicitly) in *Young*, which happens to have considered it in the context of art 26. That question, which *Young* has implicitly answered in the affirmative, is whether the reasons which justify protecting heterosexual people's interest in forming and cultivating sexually intimate adult relationships also apply to lesbians and gay men.

What are the implications of all this for the protection of lesbians' and gay men's interest in parenting under the *ICCPR*? In implicitly doubting the correctness of *Joslin*, *Young*'s rationale makes it possible to avoid the implications of that decision with regard to the right to found a family (for instance, that lesbians and gay men have no procreative rights under art 23(2)). And in implying that same-sex relationships are protected under arts 23(1) and

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<sup>92</sup> Eric Heinze, 'Sexual Orientation and International Law: A Study in the Manufacture of Cross-Cultural "Sensitivity"' (2001) 22 *Michigan Journal of International Law* 283; Morgan, above n 87, 208, 218–21; Dianne Otto, 'Holding Up Half the Sky, But for Whose Benefit? A Critical Analysis of the Fourth World Conference on Women' (1996) 6 *Australian Feminist Law Journal* 7, 16, 25; Charlotte Bunch, 'Foreword' in Rachel Rosenbloom (ed), *Unspoken Rules: Sexual Orientation and Women's Human Rights* (1996) iii; Debra L DeLaet, 'Don't Ask, Don't Tell: Where Is the Protection Against Sexual Orientation Discrimination in International Human Rights Law?' (1997) 7 *Law and Sexuality* 31; Douglas Sanders, 'Getting Lesbian and Gay Issues on the International Human Rights Agenda' (1996) 18 *Human Rights Quarterly* 67; Rhoda E Howard-Hassmann, 'Gay Rights and the Right to a Family: Conflicts between Liberal and Illiberal Belief Systems' (2001) 23 *Human Rights Quarterly* 73; Sebastian Maguire, 'The Human Rights of Sexual Minorities in Africa' (2004) 35 *California Western International Law Journal* 1, 32–5.

<sup>93</sup> Douglas Sanders, 'Human Rights and Sexual Orientation in International Law' (2002) 25 *International Journal of Public Administration* 13.

<sup>94</sup> Each *ICCPR* article protecting a substantive right implicitly contains, for the purposes of its own subject matter, the formal principle of equality in a form such as this: 'Relevant legal or policy rules ought to be applied to all the people to whom they apply by virtue of sound moral reasoning as undertaken on the basis of the principles set out in this article'. This point draws on ideas articulated by Westen in the context of equality generally: Westen, above n 33, 65–72, 225–9.

17, *Young* makes it increasingly difficult to resist the conclusion that lesbian and gay families involving children are also protected by these articles.

Admittedly, *Young*'s recognition that lesbians' and gay men's interest in founding and cultivating sexually intimate adult relationships is fully relevant under the *ICCPR* may not be the same as recognising that under the *ICCPR* their interest in founding and cultivating parent-child relationships is also fully valued. Still, *Young* has laid the groundwork for such recognition, to the extent that both the interest in forming and cultivating sexually intimate adult relationships and the interest in parenting are particular instantiations of a more general interest in forming and cultivating familial relationships.

Since *Young*, then, the chances have increased that the following arguments will eventually become law under the *ICCPR*: first, that art 23(2) protects lesbians' and gay men's procreative rights, such as the right to use alternative insemination at home; secondly, that arts 17 and 23(1) protect their parental rights over the children they raise; and thirdly, that under art 26, access to reproductive technologies, where available in a certain state, should be available to lesbians and gay men on a par with heterosexuals. In short, *Young* may be viewed to have paved the way for the eventual inclusion of the interest in parenting of lesbians and gay men under all relevant provisions of the *ICCPR*.

Significantly, all the main points established in *Young* have been reaffirmed in the more recent case *X v Colombia*,<sup>95</sup> concerning the denial of survivor's pension benefits to the same-sex partner of a deceased man in circumstances where a survivor in an unmarried heterosexual relationship would have enjoyed the benefits. The Committee stated that differential treatment between unmarried heterosexual couples and unmarried same-sex couples could not be justified on the basis of the arguments advanced by Colombia,<sup>96</sup> which included the contention that same-sex couples were not 'families', unlike unmarried heterosexual couples.<sup>97</sup> Although the Committee did not expressly say that same-sex couples are families, the rejection of Colombia's arguments still amounts to an endorsement of the proposition that the reasons justifying the provision of legal protection to unmarried heterosexual familial units apply also to same-sex couples. The Committee also underscored the significance of the fact that it was not open to same-sex couples to marry in Colombia.<sup>98</sup> This, as in *Young*, implies a more radical claim than the principle on which ostensibly the decision is based (that where the law provides benefits to unmarried heterosexual couples it should extend them to unmarried same-sex couples). That claim is that where there is an avenue for heterosexual couples to enjoy legal protection as a family unit (marriage), some avenue must also be made available for same-sex couples to attract legal protection. Again, the implicit premise underlying such a claim is that the reasons justifying protecting heterosexual family units also apply to same-sex ones; or, to put it differently, that the interest in founding and cultivating sexually intimate same-sex relationships is no less valuable than that in founding and cultivating sexually intimate different-sex relationships.

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<sup>95</sup> UN Human Rights Committee, Communication No 1361/2005, UN Doc CCPR/C/89/D/1361/2005 (14 May 2007).

<sup>96</sup> *Ibid* [7.2].

<sup>97</sup> *Ibid* [4.11].

<sup>98</sup> *Ibid* [7.2].

## V CONCLUSION

It is important to secure adequate procreative and parenting options for lesbians and gay men under the rights to found a family, to protection for the family, and to family life, as other provisions of the *ICCPR* may offer only a second-best alternative means of securing such options. Consider, in particular, the right to be protected from unlawful and arbitrary interferences with one's home and private life.<sup>99</sup> Given that, as Wintemute has argued in the context of the *ECHR*, this right is 'the most likely to serve as a residual guarantee of "liberty"',<sup>100</sup> it might be thought to provide an attractive means to seek protection for the procreative rights of lesbians and gay men (such as home insemination).

I do not wish to deny that there would be important practical advantages to thus obtaining legal protection for lesbians' and gay men's procreative rights. But the right to home and privacy remains a discursively unsatisfactory foundation on which to base claims to such protection to the extent that it depoliticises such claims. The potential that affirming procreative rights has for disrupting the construction of lesbian and gay identity as non-familial and anti-family<sup>101</sup> risks being unnecessarily contained by the privacy connotation that procreative rights would receive if established under the right to home and private life. We may concede too much to heteronormative and homophobic ways of thinking when we accept that the standard procreative practice of lesbians and gay men (home insemination) is protected under the *ICCPR* only to the extent that providing otherwise would unnecessarily interfere with the integrity of private life, rather than as part of the right to found a family.

Admittedly, the notion of 'privacy' in international human rights law has partly evolved to involve not so much 'questions of disclosure or nondisclosure but ... the right to choose certain intimate aspects of one's life, free of government regulation'.<sup>102</sup> This circumstance may temper to some extent the significance of the conclusion reached at the end of the previous paragraph. However, even this redefined notion of privacy — referring as it does to the idea of individual moral autonomy vis-à-vis state tolerance and neutrality — remains a less than satisfactory basis to assert lesbian and gay procreative rights. Asserting procreative rights under the right to privacy conjures up the image of society turning a blind eye to the making of the relevant individual decisions, or, if you will, engaging in a 'suspension of judgement'. Asserting procreative rights under the right to found a family, on the contrary, suggests that societal recognition can be exacted for the relevant choices because of their goodness.<sup>103</sup>

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<sup>99</sup> *ICCPR*, above n 6, art 17.

<sup>100</sup> Wintemute, above n 25, 97.

<sup>101</sup> See generally Cheshire Calhoun, *Feminism, the Family and the Politics of the Closet: Lesbian and Gay Displacement* (2000) on this construction.

<sup>102</sup> Mark W Janis, Richard S Kay and Anthony W Bradley, *European Human Rights Law: Text and Materials* (2<sup>nd</sup> ed, 2000) 278. See also *Coeriel v The Netherlands*, Human Rights Committee Communication No 453/1991, UN Doc CCPR/C/52/D/453/1991 (9 December 1994) [10.2].

<sup>103</sup> See Jenni Millbank, 'Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation' (2003) 18 *Georgetown Immigration Law Journal* 71, 109–10; Wayne Morgan, 'Identifying Evil for What It Is: Tasmania, Sexual Perversity and the United Nations' (1994) 19 *Melbourne University Law Review* 740, 751–4.

The human rights to found a family, to protection for the family and to family life contained in arts 23 and 17 of the *ICCPR* respectively seem the best candidates for the task of promoting lesbians' and gay men's procreative and parental rights. An isolated look at the approach taken by the Human Rights Committee to arts 17 and 23 may initially suggest otherwise. In particular, from the Committee's approach to art 23(2), it is relatively clear that the procreative rights of lesbians and gay men *qua* lesbians and gay men are not protected under the *ICCPR*. And from the Committee's approach to arts 17 and 23(1), it is unclear whether their parental rights are protected, at least to the extent that the individuals concerned wish to create parenting configurations which deviate from those well-established in the heterosexual context: one mother and one father or single mothers.

However, I have argued that the Committee has now implicitly established in *Young* and *X v Colombia* the principle that, under the *ICCPR*, the interest in founding and cultivating interpersonal relationships in lesbian and gay families is no less valuable than the corresponding interest in heterosexual families. The Committee did reach this conclusion in the context of the art 26 guarantee to the equal protection of the law, rather than that of the rights to found a family or to protection for family life. But there is no logical or acceptable way of arguing that one conclusion on whether lesbian and gay families deserve the protection of the *ICCPR* applies in the context of art 26, and another one in the context of arts 17 and 23. If the text of arts 17 or 23 did exclude lesbian and gay families from the protection provided by those articles (which is what *Joslin* incorrectly implied with regard to the right to found a family), it would have precluded the Committee from reaching, in *Young* and *X v Colombia*, the conclusion that lesbian and gay families are covered by art 26 (at least so long as this is understood to codify no more than the principle that equals should be treated equally). A different view would unacceptably compromise the principle of integrity in the interpretation of the *ICCPR*. Fortunately, neither in arts 17 and 23 nor elsewhere does the text of the *ICCPR* preclude the conclusion that the family-related interests of lesbians and gay men, including their interest in parenting, are owed the protection of the Covenant. Inasmuch as *Young* and *X v Colombia* are based on the principle that the family-related interests of lesbians and gay men deserve protection under the *ICCPR*, and since the point of arts 17 and 23 is to provide protection to family-related interests, the *ICCPR* rights to found a family,<sup>104</sup> to protection for the family<sup>105</sup> and to family life<sup>106</sup> may prove an important tool for promoting the procreative and parental rights of lesbians and gay men. To the extent that arts 17 and 23 are capable of being interpreted in accordance with this principle, their best interpretation is that they do support the moral procreative and parental rights of lesbians and gay men.

Likewise, following *Young* and *X v Colombia*, the equality guarantee in art 26 may prove useful in arguing that the interest in parenting of lesbians and gay men deserves the same level of protection accorded by states to that of heterosexuals, even if that level is higher than that required by arts 17 and 23 (as

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<sup>104</sup> *ICCPR*, above n 6, art 23(2).

<sup>105</sup> *Ibid* art 23(1).

<sup>106</sup> See generally *ibid* art 23.

when states provide or tolerate the provision of assisted reproductive technology services).

The realisation of the implications of these two decisions for issues of lesbian and gay parenting may be unnecessarily delayed if the principle that underlies *Young*'s rationale (that is, that the family-related interests of lesbians and gay men deserve recognition under the *ICCPR*) is characterised narrowly. According to the narrow characterisation of the rationale of *Young* and *X v Colombia*, these decisions have established the principle that the *ICCPR* requires recognition for the interest in forming and cultivating same-sex sexually intimate adult relationships rather than, more broadly, lesbian and gay family relationships, including parent-child ones. But even narrowly characterised, that principle ultimately seems to lead to the future acceptance of the broader proposition that lesbian and gay families should also be protected under the *ICCPR* where they include children. Heteronormative approaches to the provisions of international human rights documents have traditionally constrained their potential for serving the rightful interests of lesbians and gay men. However, there is an increasing awareness among the actors in the international human rights field of the moral imperative to realise that potential, including with respect to family rights. In this connection, the *Yogyakarta Principles*<sup>107</sup> enjoin states to protect the right to found a family, including through access to adoption or assisted procreation, without discrimination on the basis of sexual orientation, and to recognise the diversity of family forms.

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<sup>107</sup> *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (2007) <[http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm)> at 23 May 2008 ('*Yogyakarta Principles*'). The *Yogyakarta Principles* were adopted by a group of distinguished human rights experts. They purport to represent a peremptory statement of international human rights law obligations in relation to sexual orientation and gender identity.