

AMICUS CURIAE

So Sung-uk vs. the National Health Insurance Service
2023DU36800

submitted by
ILGA World
and
ILGA Asia

before
the Supreme Court Of the Republic Of Korea



ILGA
ASIA

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Amicus Brief

So Sung-uk vs. the National Health Insurance Service
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I. Introduction

ILGA World and ILGA Asia respectfully submit this amicus brief for *So Sung-uk vs. the National Health Insurance Service*, the case number 2023DU36800, in which the plaintiff So Sung-uk is seeking to be recognized as a dependent of his same-sex partner, Kim Yong-min, to qualify for obtaining benefits through the National Health Insurance Service (NHIS).

The case concerns So Sung-uk and Kim Yong-min, a same-sex couple cohabiting since 2017, who conducted a wedding ceremony in 2019. They sought legal recognition through an application for dependent status to South Korea's NHIS in February 2020. Although initially approved, this status was abruptly revoked following media coverage in October 2020. This revocation led to the imposition of a new premium and the reclassification of So Sung-uk to a non-employer scheme. In response, So Sung-uk filed a lawsuit against the NHIS in February 2021. After the Seoul Administrative Court dismissed the case in January 2022 (2022NU32797), the Seoul High Court reversed this decision in February 2023, ruling in favor of the plaintiff and recognizing the discriminatory nature of the differential treatment based on sexual orientation. The NHIS appealed this ruling to the Supreme Court in March 2023 (2023DU36800).

The NHIS currently extends dependent benefits to heterosexual couples - including those who are not legally married - but not to same-sex couples. This amounts to differential treatment of same-sex couples who are unable to access dependent benefits at par with heterosexual couples. This policy of the NHIS amounts to discrimination on the basis of sexual orientation and is in violation of international human rights guarantees. As the Supreme Court considers whether the NHIS policies comply with the Constitution of the Republic of Korea and related laws, ILGA World and ILGA Asia respectfully submit that the Court may consider 1) international and regional precedents addressing state recognition of same-sex partnerships; 2) how the NHIS guidelines are discriminatory towards lesbian, gay, bisexual, trans and intersex (LGBTI) people; and 3) the growing recognition of same-sex partnerships as a matter of equality in other comparative contexts. International human rights law has evolved to protect the rights of LGBTI persons, which are to be enjoyed independently of one's sexual orientation and/or gender identity. The subsequent section of this third-party intervention presents the states' international obligations concerning the equal protection of LGBTI rights, particularly regarding non-discrimination, the right to social security, and the right to health of same-sex partnerships.

II. Interest of ILGA World and ILGA Asia in the Case

ILGA World, the International Lesbian, Gay, Bisexual, Trans and Intersex Association, established in 1978, is a federation of more than 1,900 organizations from over 160 countries

and territories campaigning for LGBTI human rights. ILGA World enjoys the United Nations Economic and Social Council (ECOSOC) status, consistently engaging with United Nations human rights bodies, strategic litigation projects and conducts legal and socio-economic research on the situation of LGBTI persons. ILGA World supports local LGBTI civil society groups engaging with United Nations Treaty Bodies, Special Procedures and the Human Rights Council. Further information is available at <https://ilga.org>.

ILGA Asia, the International Lesbian, Gay, Bisexual, Trans and Intersex Association for Asia, is a regional organization committed to advancing LGBTI rights, inclusivity, and equality across Asia. The work of ILGA Asia is underpinned by empirical evidence, and ILGA Asia collaborates extensively with member organizations, governments, and civil society to foster a more accepting and equitable society for all, irrespective of sexual orientation, gender identity, or expression. Further information is available at <https://www.ilgaasia.org/>.

ILGA World and ILGA Asia have a strong and continuing interest in the promotion and protection of human rights for LGBTI people. Based on the extensive experience and work detailed above, ILGA World and ILGA Asia respectfully submit that they are well-placed to assist this Court in its determination of the legal issues that arise in this matter. In submitting this brief, ILGA World and ILGA Asia respectfully request the Court to consider the submissions made in its determination of the present case.

III. International Human Rights Law Standards

1. Non-Discrimination in International Human Rights Treaties

The principle of non-discrimination and equality before the law is a cornerstone of international human rights law. Discrimination is prohibited under various grounds by treaties, which provide non-exhaustive lists of prohibited discrimination. Although ‘sexual orientation’ and ‘gender identity’ are not explicitly mentioned in treaty texts,¹ they are considered part of the open-ended phrase ‘or other status,’ which encompasses various categories. The open list of ‘other status’ has been included in Article 2 of the Universal Declaration of Human Rights,² Articles 2(1)³ and 26⁴ of the International Covenant on Civil and Political Rights, Article 2(2) of the International Covenant on Economic, Social and Cultural Rights,⁵ Article 2(1) of the

¹ Although not a treaty, Principle 2 of the Yogyakarta Principles mentions that “Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status. States shall: a) **Embody the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions** or other appropriate legislation, if not yet incorporated therein, including by means of amendment and interpretation, and ensure the effective realization of these principles.”

² “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status**.”

³ “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, (...) or **other status**.”

⁴ “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, color (...) or **other status**.”

⁵ “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color (...) or **other status**.”

Convention on the Rights of the Child,⁶ Article 2 of the African Charter on Human and Peoples' Rights,⁷ Article 1 of the American Convention on Human Rights,⁸ and Article 14 of the European Convention on Human Rights.⁹

The United Nations Human Rights Committee (the HRCttee), in its General Comment No. 18 on non-discrimination, has broadened the interpretation of Article 2 (non-discrimination), stating that “while these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is **based on any ground** such as (...) **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.”¹⁰

Furthermore, various international legal mechanisms¹¹ have affirmed that when referring to non-discrimination based on ‘other status,’ it includes ‘sexual orientation.’ For instance, the HRCttee has stated in its jurisprudence that “the prohibition against discrimination under article 26 **comprises also discrimination based on sexual orientation**,”¹² and this precedent has been upheld in subsequent cases.¹³ Additionally, the HRCttee has asserted that

⁶ “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, color, sex, language, religion (...) or **other status**.”

⁷ “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, (...) or **other status**.”

⁸ “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, (...) or **any other social condition**.”

⁹ “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, (...) or **other status**.”

¹⁰ GC 18, HRCttee, para. 7.

¹¹ See also, European Court of Human Rights. *Salgueiro da Silva Mouta v Portugal*, 33290/96 (1996), para 28; *EB v France*, 43546/02 (2008), para 50; *Kozak v Poland*, 13102/02, paras. 91-92; *Alekseyev v Russia*, 4916/07, paras. 108-109; *Identoba v Georgia*, 73235/12, para 96; *S.L. v Austria*, 45330/99, para. 37. See also, Inter-American Court of Human Rights, *Duque v Colombia*, para. 104: “The Inter-American Court has established that a person’s sexual orientation and gender identity are categories protected by the Convention. Thus, **any discriminatory law, act or practice based on an individual’s sexual orientation is prohibited by the Convention**. Consequently, no rule, decision or practice of domestic law, either by State authorities or by private individuals, may diminish or restrict, in any way, the rights of a person based on their sexual orientation.”

¹² *Young v Australia* (HRCttee) 941/2000, para. 10.4: “The Committee recalls its earlier jurisprudence that **the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation**. (...) The Committee recalls its constant jurisprudence that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. **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. 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 sexual orientation.**”

¹³ *X v Colombia* (HRCttee) 1361/2005, para. 7.2: “The Committee notes that the author was not recognized as the permanent partner of Mr. Y for pension purposes because court rulings based on Act No. 54 of 1990 found that the right to receive pension benefits was limited to members of a heterosexual de facto marital union. **The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation**. It also recalls that in previous communications the Committee found that differences in benefit entitlements between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry or not, with all the ensuing consequences. The Committee also notes that, while it was not open to the author to enter into marriage with his same-sex permanent partner, the Act does not make a distinction between married and unmarried couples but between homosexual and heterosexual couples. The Committee finds that the State party has put forward no argument that might demonstrate that such a distinction between same-sex partners, who are not entitled to pension benefits, and unmarried heterosexual partners, who are so entitled, is reasonable and objective. Nor has the State party adduced any evidence of the existence of factors that might justify making such a distinction. In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author’s right to his life partner’s pension on the basis of his sexual orientation.”

the inclusion of sexual orientation under ‘other status’ is recognized not only under Article 26 of the International Covenant on Civil and Political Rights but also under Article 2(1).¹⁴

The Committee on Economic, Social and Cultural Rights (the CESCR Committee), in its General Comment No. 20 on non-discrimination in economic, social and cultural rights, has affirmed that ‘other status’ in Article 2, paragraph 2, is inclusive of sexual orientation. It has further emphasized that “states parties should ensure **that a person’s sexual orientation is not a barrier to realizing Covenant rights**, for example, in accessing survivor’s pension rights.”¹⁵ Lastly, it is important to underline that the CESCR Committee stated that “while acknowledging the diversity of morality and cultures, the Committee notes that national laws and practices must always adhere to the principles of universality of human rights and non-discrimination. Therefore, failure to comply with the International Covenant’s obligations **cannot be justified by reference to political, social, religious, cultural or economic considerations within the state.**”¹⁶¹⁷ In other words, rules rooted in religion or culture that discriminate based on sexual orientation, lack legitimacy.

2. Non-Discrimination Based on Sexual Orientation and the Imperative for Anti-Discrimination Legislation

As previously stated and further described herein, the right to non-discrimination on the basis of sexual orientation has been developed in the jurisprudence and laws of regional and international bodies.

The guarantee of the right to non-discrimination, along with ensuring the respect, protection, and fulfilment of the rights to equality and non-discrimination, underscores the imperative for **implementing anti-discrimination legislation** at the local level. It has been recognized that effective protection from discrimination necessitates the adoption of comprehensive anti-discrimination legislation, regardless of the existence of any specific laws or non-discrimination provisions already in force.¹⁸ Furthermore, the adoption of such legislation is **particularly crucial for the protection of minority rights.**¹⁹ In this regard,

¹⁴ *Toonen v Australia* (HRCttee) 488/1992, para. 8.7: “The State party has sought the Committee’s guidance as to whether sexual orientation may be considered an “other status” for the purposes of article 26. The same issue could arise under article 2, paragraph 1, and 26 is to be taken as including sexual orientation.”

¹⁵ GC 20, CESCR, para. 32.

¹⁶ CESCR Committee. Concluding observations on the third periodic report of Yemen. UN Doc E/C.12/YEM/CO/3, para. 30.
¹⁷ https://www.ohchr.org/sites/default/files/documents/publications/2022-11-28/OHCHR_ERT_Protecting_Minority%20Rights_Practical_Guide_web.pdf.

“It is established law that there is no legitimacy in maintaining rules, policies or practices enacted with reference to religious or affiliated cultural doctrines or sensitivities that discriminate on the bases of sex, sexual orientation, gender identity or other characteristics.”

¹⁸ *Ibid.*

¹⁹ *Ibid.*

states have received recommendations on the implementation of anti-discrimination laws,²⁰ including comprehensive ones.²¹

In the context of LGBTI persons, the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (Independent Expert) has emphasized the **interconnectedness between the right to non-discrimination and other rights, such as health, education, housing, access to social security, and employment.**²² Treaty Bodies, such as the CESCR Committee, have expressed concern in some cases about states where LGBTI persons face *de facto* discrimination in areas such as employment, social security, education, housing, and standard of living.²³ In some instances, UN Committees have referred to the right to non-discrimination of children of same-sex couples.²⁴

The right to non-discrimination has also been developed in the context of same-sex couples²⁵ and the recognition of their rights. For instance, in the Human Rights Council,

²⁰ Review of the Working Group on the Universal Periodic Review of Japan. Human Rights Council, Fifty-third session. UN Doc A/HRC/53/15:

“Pass comprehensive anti-discrimination legislation including protections based on sexual orientation, gender identity and expression, and sex characteristics and **provide legal recognition of same-sex marriage.**”

See also, the Report of the Working Group on the Universal Periodic Review, Latvia. Human Rights Council. Forty-eight session. UN Doc A/HRC/48/15.

See also the Report of the Working Group on the Universal Periodic Review of Slovakia, UN Doc A/HRC/41/13:

“End discrimination against same-sex couples and **legalize the registration of same-sex partnerships.**”

See also, CESCR Committee. Concluding observations on the combined second to fourth periodic reports of the former Yugoslav Republic of Macedonia. UN Doc E/C.12/MKD/CO/2-4, para. 26: “The Committee recommends that the State party take all measures necessary to ensure that discrimination based on sexual orientation or gender identity is explicitly prohibited in anti-discrimination legislation and that **same-sex couples have access to advantages now reserved for married couples.**”

See also, CESCR Committee. Concluding observations on the sixth periodic report of the Russian Federation. UN Doc E/C.12/RUS/CO/6, para. 23(a): “The Committee recommends that the State party take steps to adopt comprehensive anti-discrimination legislation, encompassing all grounds of discrimination, including sexual orientation and gender identity, taking into account the Committee’s general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights. It also recommends that the State party: (a) **Recognize that individuals in same-sex relationships are entitled to equal enjoyment of Covenant rights, including by extending to them benefits reserved to married couples,** and repeal or amend all legislation, including Federal Law No. 135, that could result in discrimination, prosecution and punishment of people because of their sexual orientation and gender identity.”

See also, CESCR Committee. Concluding observation on the fifth periodic report of Mauritius. UN Doc E/C.12/MUS/CO/5, paras. 17-18.

²¹ CESCR Committee. Concluding observations on the initial report of Guinea. UN Doc E/C.12/GIN/CO/1, para. 18: “While recognizing that the constitutional and legislative framework of the State party contains anti-discrimination provisions, including in the areas of employment, health and education, **the Committee notes the lack of a comprehensive anti-discrimination law.** Furthermore, discrimination on the basis of sexual orientation is not a prohibited ground of discrimination and article 274 of the Criminal Code criminalizes sexual relations between consenting adults of the same sex.”

²² Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. Protection against violence and discrimination based on sexual orientation and gender identity. UN Doc A/73/152.

See also, the Report of the Working Group on the Universal Periodic Review of Grenada, UN Doc A/HRC/44/13:

“Remove from the national legislation the criminalization of sexual relations between adults of the same sex, incorporate the prohibition of discrimination on the grounds of sexual orientation and gender identity and adopt the necessary measures to guarantee for lesbian, gay, bisexual, transgender and intersex people full enjoyment of their human rights, with special emphasis on access to health and social security.”

²³ CESCR Committee. Concluding observations on the sixth periodic report of the Netherlands. UN Doc E/C.12/NLD/CO/6, para. 18.

²⁴ This has been mainly addressed by the Committee on the Rights of the Child. Committee on the Rights of the Child. List of issues prior to submission of the seventh periodic report of Ecuador. UN Doc CRC/C/ECU/QPR/7, para. 11.

Committee on the Rights of the Child. List of issues prior to submission of the seventh periodic report of Ecuador. UN Doc CRC/C/ECU/QPR/7, para. 11.

²⁵ Report of the Working Group on the Universal Periodic Review on Lithuania. Human Rights Council, Fiftieth session. UN Doc A/HRC/50/10.

The right to recognize foreign same-sex couples and/or unions is also included.

some states were recommended to “work towards implementing comprehensive anti-discrimination legislation (...) and to recognize same-sex unions on the national level,”²⁶ as well as to “recognize the equality of same sex couples”²⁷ within the framework of the state’s anti-discrimination law or act. Peru was recommended to “adopt legislation that guarantees same-sex couples full equal rights, including the right to marry, as well as effective measures to combat all forms of discrimination and violence based on sexual orientation and gender identity.”²⁸ Similarly, the CESC Committee recommended Costa Rica to “take the necessary legislative and administrative measures to recognize the rights of same-sex couples (...)”²⁹

In this regard, the Committee on the Elimination of Discrimination against Women (the CEDAW Committee) has, for instance, requested Switzerland to “provide information on measures taken to: (...) **ensure that non-traditional forms of family relations**, including de facto and same-sex unions, **are fully recognized by law**.”³⁰ Additionally, in the context of Venezuela, the Committee noted with concern that “marriage and unions for same-sex couples are not legally recognized”³¹ and recommended the states to “draft legislation that recognizes marriage and unions for same-sex couples.”³² The CEDAW Committee also welcomed the

Regarding the right to recognize same-sex couples married abroad, the CESC Committee requested Hong Kong, China, to provide information on “Any measures taken to recognize same-sex couples, including those married abroad” (List of issues in relation to the fourth periodic report of Hong Kong, China. UN Doc E/C.12/CHN0-HKG/Q/4, para. 8).

²⁶ Report of the Working Group on the Universal Periodic Review of Japan. Human Rights Council, Fifty-third session. UN Doc A/HRC/53/15.

²⁷ Report of the Special Rapporteur on violence against women, its causes and consequences. Visit to Bulgaria. Doc A/HRC/44/52/Add.1, para. 65.

See also the Report of the Working Group on the Universal Periodic Review on Lithuania. Human Rights Council, Fiftieth session. UN Doc A/HRC/50/10.

This has been followed by the HRCtee. Concluding observations on the fourth periodic report of Bulgaria. UN Doc CCPR/C/BGR/CO/4, paras. 11, 12(b): “The State party should: (...) (b) Amend the Protection against Discrimination Act to explicitly include gender identity as a ground of discrimination and **fully recognize the equality of same-sex couples**.”

See also, the Committee’s Concluding observations on the sixth periodic report of the Dominican Republic. UN Doc CCPR/C/DOM/CO/6, para. 10: “(...) it should adopt laws to prohibit discrimination and hate crimes on grounds of sexual orientation or gender identity and **fully recognize the equality of same-sex couples**.”

See also, the Report of the Working Group on the Universal Periodic Review. Human Rights Council, Forty-sixth session. UN Doc A/HRC/46/13.

²⁸ Report of the Working Group on the Universal Periodic Review on Peru. Human Rights Council. UN Doc A/HRC/53/8.

²⁹ CESC Committee, Concluding observations on the fifth periodic report of Costa Rica. UN Doc E/C.12/CRI/CO/5, para. 21: “The Committee recommends that the State party adopt a policy that comprehensively addresses discrimination on grounds of sexual orientation and gender identity. The Committee also **recommends that the State party take the necessary legislative and administrative measures to recognize the rights of same-sex couples** (...)”

³⁰ CEDAW Committee, List of issues and questions prior to the submission of the sixth periodic report of Switzerland. UN Doc CEDAW/C/CHE/QPR/6, para. 24.

This has also been addressed by the HRCtee. See Concluding observations on the sixth periodic report of Hungary. UN Doc CCPR/C/HUN/CO/6: “The Committee is concerned that the ban on discrimination in the Fundamental Law does not explicitly list sexual orientation and gender identity among the grounds of discrimination and that **its restrictive definition of family may give rise to discrimination, since it does not cover certain types of family arrangements, including same-sex couples**.”

³¹ CEDAW Committee, Concluding observations on the ninth periodic report of the Bolivarian Republic of Venezuela. UN Doc CEDAW/C/VEN/CO/9, paras. 53-54.

See also, CESC Committee, Concluding observations on the third periodic report of Slovakia. UN Doc E/C.12/SVK/CO/3, paras. 14-15: “The Committee is concerned about discrimination based on gender identity and sexual orientation and regrets that, **in the absence of the recognition of same-sex marriage, there exists no legal institution, such as registered partnerships or civil unions, that provides protection equivalent to marriage to those in same-sex relationships**.”

See also, HRCtee, Concluding observations on the second periodic report of Honduras. UN Doc CCPR/C/HND/CO/2, paras. 10-11: “The Committee is further **concerned about the discrimination** experienced by lesbian, gay, bisexual, transgender and intersex persons, **including with respect to the rights of same-sex couples** and the identity of transgender persons.”

³² CEDAW Committee, Concluding observations on the ninth periodic report of the Bolivarian Republic of Venezuela. UN Doc CEDAW/C/VEN/CO/9, paras. 53-54: “It also recommends that the State party (...) **draft legislation that recognizes marriage and unions for same-sex couples**.”

progress achieved by Cyprus, noting the creation of legislative reforms “under which the right of lesbian, bisexual and transgender women to enter into same-sex civil unions and cohabitation is recognized.”³³³⁴ On the other hand, the HRCtee has not only referred to the *legal recognition*³⁵ of same-sex couples but also to their *protection*³⁶ and *equal treatment*.³⁷ Furthermore, some states have received recommendations to **include an explicit prohibition of discrimination on the basis of sexual orientation in their Constitution** and to amend their legislations and policies accordingly.³⁸

3. Same-sex ‘Partnerships,’ ‘Relationships,’ ‘Unions’ and ‘Couples’

³³ CEDAW Committee, Concluding observations on the eight periodic report of Cyprus. UN Doc CEDAW/C/CYP/CO/8, para. 4(d).

³⁴ In the same note, the Committee “**takes note of the adoption of Act No. 76/2016**, in May 2016, which **recognizes the right of lesbian, bisexual and transgender women to enter into same-sex civil unions and cohabitation**”. See Concluding observations on the seventh periodic report of Italy. UN Doc CEDAW/C/ITA/CO/7, para. 5.

The HRCtee, in its observations on Viet Nam, welcomed “the efforts made by the State party to improve the situation of lesbian, gay, bisexual, transgender and intersex persons, **including by eliminating the prohibition on same-sex marriage** (...)”.

See also, HRCtee, Concluding observations on the third periodic report of Viet Nam. UN Doc CCPR/C/VNM/CO/3, paras. 15, 16(c).

See also the Concluding observations on the seventh periodic report of Colombia. UN Doc CCPR/C/COL/CO/7, para. 16: “The Committee recognizes the efforts made by the State party to protect the rights of lesbian, gay, bisexual, transgender and intersex persons, including the decisions of the Constitutional Court that **guarantee the rights of same-sex couples to enter into civil marriages and to adopt children, and its efforts to combat discrimination and violence directed at them.**”

³⁵ HRCtee. List of issues prior to the submission of the seventh periodic report of Japan. UN Doc CCPR/C/JPN/QPR/7, para. 7(b): “Despite many legislative and policy initiatives, the Committee is concerned about stigmatization, discriminatory attitudes and violence towards lesbian, gay, bisexual, transgender and intersex persons in the State party. It is also **concerned at the absence of legal recognition of and protection for same-sex couples** and regrets the lack of information provided by the State party in this regard (arts. 2, 3, 6, 7, 17, 23).”

See also, HRCtee. Concluding observations on the sixth periodic report of Peru. UN Doc CCPR/C/PER/CO/6, para. 18: “Despite many legislative and policy initiatives, the Committee is concerned about stigmatization, discriminatory attitudes and violence towards lesbian, gay, bisexual, transgender and intersex persons in the State party. **It is also concerned at the absence of legal recognition of and protection for same-sex couples and regrets the lack of information provided by the State party in this regard** (...)”.

Concluding observations on the seventh periodic report of Poland. UN Doc CCPR/C/POL/CO/7, para. 16(e):

“The State party should continue strengthening its efforts to prevent and eradicate all acts of, among others, racism, xenophobia, Islamophobia, anti-Semitism and homophobia, by, inter alia: (...) e) **Reviewing the legal status of same-sex couples and parents, with a view to ensuring their enjoyment of the right to non-discrimination in law and in fact.**”

³⁶ HRCtee. List of issues in relation to the second periodic report of Macao, China. UN Doc CCPR/C/CHN-MAC/Q/2, para. 5: “Please also indicate the extent to which Macao, China, has taken steps to provide legal recognition of and protection for same-sex couples, and the measures taken or envisaged to extend the purview of Law No. 2/2016 to protect same-sex couples under the law.”

See also, HRCtee. Concluding observations on the fifth periodic report of the Sudan. UN Doc CCPR/C/SDN/CO/5, para. 16(c): “The State party should: (...) guarantee the protection and enjoyment, on an equal footing, of Covenant rights for all persons including adults engaged in same-sex consensual activities.”

See also, HRCtee. Concluding observations on the third periodic report of Viet Nam. UN Doc CCPR/C/VNM/CO/3, paras. 15, 16(c): “The State party should: (...) (c) **Consider providing legal recognition of and protection for same-sex couples.**”

³⁷ HRCtee. Concluding observations on the fourth periodic report of Czechia. UN Doc CCPR/C/CZE/CO/4, para. 13(a): “The State party should: (a) **review relevant legislation to fully ensure the equal treatment of same-sex couples**, including by considering recognizing their right to joint adoption of children.”

See also, HRCtee. Concluding observations on the second periodic report of Honduras. UN Doc CCPR/C/HND/CO/2, paras. 10-11: “It should (...) fully recognize the equality of same-sex couples (...)”

See also, HRCtee. Concluding observations on the fourth periodic report of Bulgaria. UN Doc CCPR/C/BGR/CO/4, paras. 11, 12(b): “(...) It also notes with concern that same-sex couples cannot enter into any form of legally recognized union or adopt children, and that those married overseas and their children are denied access to civil registration”, “The State party should: (...) fully recognize the equality of same-sex couples.”

See also, HRCtee. Concluding observations on the sixth periodic report of the Dominican Republic. UN Doc CCPR/C/DOM/CO/6, para. 10: “The State party should: (...) fully recognize the equality of same-sex couples.”

³⁸ Report of the Working Group on the Universal Periodic Review, Belize. Human Rights Council. Fortieth session. UN Doc A/HRC/40/14.

In regard to same-sex partnerships, UN Treaty Bodies have referred to partnerships, other than those composed of persons of opposite sexes, as ‘partnerships,’ ‘couples,’ ‘relationships,’ or ‘unions,’ and have often categorized them as either legally ‘registered’ and ‘not registered.’³⁹ Treaty Bodies have frequently welcomed the progress shown by states that have **recognized the legal registration of same-sex couples**⁴¹ or have incentivized states to allow or implement such a legal framework.⁴²

For instance, the CEDAW Committee inquired about Austria’s “efforts to remove the remaining differential provisions for LBT women and intersex persons living in registered partnerships, denying them the same rights afforded to other couples, including in relation to childcare allowances for mothers, maintenance and distribution of property and assets upon

³⁹ In the case of the state review of Honduras, the CEDAW Committee noted “with concern that **same-sex couples have no possibility to register their partnerships** in the State party.” See CEDAW Committee, Concluding observations on the combined seventh and eighth periodic reports of Honduras. UN Doc CEDAW/C/HND/CO/7-8, paras. 48, 49(d).

The HRCtee, enquired Honduras to “**Please report on measures taken to ensure respect for the rights of same-sex couples, and on any steps taken towards the legal recognition of same-sex couples**, including with respect to adoption rights” (List of issues in relation to the second periodic report of Honduras. UN Doc CCPR/C/HND/Q/2, para. 6).

This was also followed in regards to Hong Kong, China. See List of issues in relation to the fourth periodic report of Hong Kong, China (UN Doc CCPR/C/CNH-HKG/Q/4, para. 8).

The HRCtee expressed, in the case of Bulgaria, that “It also notes with concern that same-sex couples cannot enter into any form of legally recognized union or adopt children, and that those married overseas and their children are denied access to civil registration,” and the Committee made a recommendation in that regard. Concluding observations on the fourth periodic report of Bulgaria.

⁴⁰ Some committees have also noted the different treatment granted to unregistered partnerships. For instance, the CEDAW Committee stated that “despite the fact that women in registered partnerships have most of the rights and duties and married women, registered partnerships are not recognized under the joint and second parent adoption scheme, which creates **legal, administrative and practical barriers for children living with same-sex parents** and disproportionately affects lesbian and bisexual women” (Concluding observations on the ninth periodic report of Hungary, CEDAW/C/HUN/CO/9, para. 41(b)). See also, CESCR Committee. Concluding observations on the third periodic report of Slovakia, E/C.12/SVK/CO/3, paras. 14-15. It stated that “The Committee is concerned about discrimination based on gender identity and sexual orientation and regrets that, **in the absence of the recognition of same-sex marriage, there exists no legal institution, such as registered partnerships or civil unions, that provides protection equivalent to marriage to those in same-sex relationships.**” This has been followed in the Committees recommendations to Yemen. Concluding observations on the third periodic report of Yemen. UN Doc E/C.12/YEM/CO/3, paras. 29-30.

See also, CESCR Committee. Concluding observations on the combined second to fourth periodic reports of the former Yugoslav Republic of Macedonia. UN Doc E/C.12/MKD/CO/2-4, para. 26: “The Committee recommends that the State party take all measures necessary to ensure that discrimination based on sexual orientation or gender identity is explicitly prohibited in anti-discrimination legislation and that **same-sex couples have access to advantages now reserved for married couples.**”

⁴¹ See, for instance, CEDAW Committee, Concluding observations on the combined fifth and sixth periodic reports of Estonia. UN Doc CEDAW/C/EST/CO/5-6, para. 4(a): “The Committee welcomes the progress achieved since the consideration in 2007 of the State party’s fourth periodic report (CEDAW/C/EST/4) in undertaking legislative reforms, in particular the adoption of: (a) The 2014 Registered Partnership Law which entered into force on 1 January 2016, granting persons in civil union nearly identical rights to those of married couples and legalizing same-sex partnerships.”

⁴² See, for instance, CEDAW Committee, Concluding observations on the combined seventh and eighth periodic reports of Honduras. UN Doc CEDAW/C/HND/CO/7-8, paras. 48-49(d): “The Committee (...) notes with **concern that same-sex couples have no possibility to register their partnerships in the State party,**” “Recalling the Committee’s General Recommendation No. 29 (2013) on article 16 of the Convention, the Committee recommends that the State party: (d) Consider practices from countries in the region that allow the registration of same-sex partnerships.”

See also, HRCtee, List of issues in relation to the sixth periodic report of Mongolia. UN Doc CCPR/C/MNG/Q/6, para. 5: “Please report on the measures taken to ensure respect for the rights of same-sex couples and whether any steps have been taken towards the legal recognition of same-sex couples.”

See also, Concluding observations on the sixth periodic report of Peru. UN Doc CCPR/C/PER/CO/6, para. 18.

⁴³ See also, CEDAW Committee, List of issues and questions in relation to the ninth periodic report of Austria. UN Doc CEDAW/C/AUT/Q/9, para. 21. “Please elaborate on efforts to remove the remaining differential provisions for lesbian, bisexual and transgender women and intersex **persons living in registered partnerships, denying them the same rights afforded to other couples**, including in relation to childcare allowances for mothers, maintenance and distribution of property and assets upon dissolution of the relationship.”

See also, CEDAW Committee, Concluding observations on the initial report of Cabo Verde. UN Doc E/C.12/CPV/CO/1, paras. 20-21: “(...) The Committee recommends that the State party take steps towards the legal formalization of same-sex unions, with a view to **offering same-sex couples the same rights and protection as heterosexual couples.**”

See also, HRCtee, Concluding observations on the fifth periodic report of Costa Rica. UN Doc E/C.12/CRI/CO/5, para. 21.

dissolution of the relationship.”⁴⁴ These inquiries and recommendations issued by the CEDAW Committee underscore the importance of **equal rights for all couples, regardless of sexual orientation or gender identity**, and highlight the need for continued progress towards inclusive policies and legal frameworks for same-sex couples.

Additionally, Treaty Bodies have advocated for the notion of ‘family’ to be inclusive of same-sex couples and de facto unions,⁴⁵ and for such an understanding of ‘family’ to be incorporated into all state laws, policies, programs and strategies.

4. Socio-economic Rights

Broadly, the right to social security has been established in Article 9⁴⁶ of the International Covenant on Economic, Social and Cultural Rights and Article 26,1 of the Convention on the Rights of the Child.⁴⁷ In regard to social security and its relation to same-sex partnerships, the CESCR Committee, in its General Comment No. 19 on the right to social security, noted that “Whereas everyone has the right to social security, states parties should give special attention to those individuals and groups who traditionally face difficulties in exercising this right, in particular (...) **minority groups**.”⁴⁸ Moreover, the Independent Expert positively noted the case of Sweden and Mexico, where benefits in situations of illness and maternity insurance are extended to the spouse of the insured or pensioner, **“regardless of whether it is a marriage between persons of the same sex.”**⁴⁹ The Independent Expert also noted that in Argentina, “surviving spouses in same-sex couples can receive a widow’s/widower’s pension.”⁵⁰ Furthermore, in the Human Rights Council, Brazil recommended Czechia to “enact legislation ensuring equal rights to same-sex couples, including **their recognition and access to social security protection.**”⁵¹

⁴⁴ CEDAW Committee, List of issues and questions in relation to the ninth periodic report of Austria. UN Doc CEDAW/C/AUT/Q/9, para. 21. Similar recommendations have been issued to Luxembourg. See CEDAW Committee, Concluding observations on the combined sixth and seventh periodic reports of Luxembourg. UN Doc CEDAW/C/LUX/CO/6-7, para. 52(a): “The Committee recommends, in line with its general recommendation No. 29 (2013) on the economic consequences of marriage, family relations and their dissolution, that the State party: (a) Harmonize the treatment of all women, including those in de facto unions and same-sex relationships, with regard to the distribution of property upon dissolution of their union or relationship and to the recognition of paternity in cases of medically assisted procreation and in the adoption of stepchildren, regardless of their civil status.”

⁴⁵ CEDAW Committee, List of issues and questions in relation to the sixth periodic report of Lithuania. UN Doc CEDAW/C/LTU/Q/6, para. 19: “Please provide information on the steps taken by the State party to give effect to the Committee’s recommendation (...) in order to ensure that non-traditional families, including same-sex couples and de facto unions, are fully encompassed in the notion of family used in all State laws, policies, programmes and strategies, in line with the Committee’s general recommendation No. 21 (1994) on equality in marriage and family relations and No. 29 (2013) on the economic consequences of marriage, family relations and their dissolution.”

⁴⁶ “The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.”

⁴⁷ “States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.”

⁴⁸ GC 19, CESCR, para. 31.

⁴⁹ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. Protection against violence and discrimination based on sexual orientation and gender identity. UN Doc A/74/181, paras. 48, 67.

⁵⁰ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity on his mission to Argentina. Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Thirty-eight session. UN Doc A/HRC/38/43/Add.1*, para. 16.

⁵¹ Report of the Working Group on the Universal Periodic Review, Czechia. Human Rights Council. Fifty-third session. UN Doc A/HRC/53/4.

See also the Report of the Working Group on the Universal Periodic Review of Slovakia, UN Doc A/HRC/41/13: “Provide couples of different sexes and same-sex couples who live together with the rights that correspond to their situation, for example, in the areas of housing, social assistance and inheritance, in particular by establishing a civil partnership.”

Moreover, judgements have further developed the relationship between the right to non-discrimination of same-sex couples and socio-economic rights. For instance, the Inter-American Court of Human Rights established that “Based on the foregoing considerations, this Court concludes that **the State is responsible for the violation of the right to equality and non-discrimination** established in Article 24 of the Convention, in relation to Article (1) thereof, (...) **given that he was not permitted to apply for a survivor’s pension under conditions of equality**, as established in Colombia’s domestic legislation.”⁵²

There has been advancement towards recognizing different forms of partnerships and granting same-sex couples the social security benefits afforded to couples of the same sex.⁵³ In this regard, UN Committees, such as the CESCR, have expressed their concern about “**the absence of any legal recognition of same-sex couples**, which may restrict the protection of same-sex partners upon separation, or following the illness or death of a partner.”⁵⁴

Moreover, **discrimination faced by LGBTI individuals can affect the fulfillment of the human rights of same-sex couples and partnerships**. For instance, there is a correlation between discrimination in employment and social security faced by LGBTI persons and how this discrimination manifests and affects the rights of same-sex couples. As LGBTI persons face discrimination in *access to* and *in* employment, this can result in reduced contributions to pension schemes, leading to reduced income in their later years, which directly affects the same-sex partnership they might be involved in. On top of that, some **individuals may be ineligible for the pension benefits afforded to same-sex partners**, impacting their right to housing. Additionally, there may be legal constraints that prevent them from leaving property to a surviving partner.⁵⁵

Yogyakarta Principle No. 13⁵⁶ has referred to the right to social security and other social protection measures for LGBTI persons, **including same-sex spouses or partners**. Furthermore, the CESCR Committee, in its General Comment No. 19 on the right to social security, has specifically referred to non-discrimination on the basis of sexual orientation,

⁵² Inter-American Court of Human Rights, *Duque v Colombia*, para. 138.

⁵³ Report of the Working Group on the Universal Periodic Review, Latvia. Human Rights Council. Forty-eight session. UN Doc A/HRC/48/15.

⁵⁴ CESCR Committee, Concluding observations on the fifth periodic report of Mauritius. UN Doc E/C.12/MUS/CO/5, para. 17.

See also, CESCR Committee, Concluding observations on the third periodic report of Lithuania. UN Doc E/C.12/LTU/CO/3, para. 13(a)(b)(c)(d): “(...) the Committee recommends that the State party: (...) **Develop a legal institution, such as registered partnership or civil union, that provides protection equivalent to marriage to those in same-sex relationships.**”

See also, CESCR Committee, Concluding observations on the fifth periodic report of Mauritius. UN Doc E/C.12/MUS/CO/5, paras. 17-18: “It is further **concerned about the absence of any legal recognition of same-sex couples, which may restrict the protection of same-sex partners upon separation, or following the illness or death of a partner** (...)”

⁵⁵ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. Protection against violence and discrimination based on sexual orientation and gender identity. Human Rights Council, Seventy-fourth session. UN Doc A/74/181, paras. 26, 67: “Lack of legal recognition of relationships restricts the inclusion of significant individuals in family treatment or decision-making roles. The Committee on Economic, Social and Cultural Rights has called on States to ensure that individuals in same-sex unions are entitled to equal enjoyment of their economic, social and cultural rights (see E/C.12/ITA/CO/5), which includes the consultation and inclusion of same-sex partners in health-related decision-making or recognition by health insurance companies.”

⁵⁶ “States shall: (A) Take all necessary legislative, administrative and other measures to ensure equal access, without discrimination on the basis of sexual orientation or gender identity, to social security and other social protection measures, including employment benefits, parental leave, unemployment benefits, health insurance or care or benefits (including for body modifications related to gender identity), other social insurance, family benefits, funeral benefits, pensions and benefits with regard to the loss of support for spouses or partners as the result of illness or death.”

stating that “The obligation of States parties to guarantee that the right to social security is enjoyed without discrimination (...). The Covenant thus prohibits any discrimination, whether in law or in fact, whether direct or indirect, on the grounds of (...) sexual orientation.”⁵⁷

The Inter-American Court of Human Rights has expanded the scope of socio-economic rights of same-sex couples, and has stated that:

“The Court has also noted that **there is an increasing list of rights, benefits and responsibilities that same-sex couples could benefit from and enjoy**. These aspects include, *inter alia*, taxes, inheritance and property rights, rules on intestate succession, spousal privilege as established by the law of evidence and procedural law, authority to take medical decisions, survivors’ rights and benefits, birth and death certificates, professional ethical standards, financial restrictions in electoral matters, workers’ compensation benefits, health insurance, and child custody. **All of this, in the Court’s opinion, must be ensured without any discrimination to families composed of same-sex couples.**”⁵⁸

In respect with the right to health, in the context of the Human Rights Council, it has been stated not only that the “lack of legal recognition of relationships restricts the inclusion of significant individuals in family treatment or decision-making roles,”⁵⁹ but also that Czechia, for instance, must “put in place **legal provisions to ensure that there is no inequality of rights to the detriment of same-sex couples, particularly with regard to family law and social security.**”⁶⁰ References have also been made to the **promotion of access of same-sex couples to sexual and reproductive health.**⁶¹ Additionally, Hungary received the recommendation to “take concrete measures to prevent and prohibit discrimination against LGBTI people, and **specifically same-sex couples and their children**, in the fields of **employment, education, healthcare, and access to social benefits.**”⁶² On the other hand, the CESCR Committee⁶³ requested Kenya to provide information on the measures taken to “ensure that no one is discriminated against in accessing health care, other social services or other rights **as a result of their sexual orientation or gender identity.**”⁶⁴

IV. Growing recognition of same-sex partnerships as a matter of equality in other comparative contexts

⁵⁷ GC 19, CESCR, para. 29.

⁵⁸ Inter-American Court of Human Rights, Advisory Opinion OC-24/17, on Gender Identity, and Equality and Non-discrimination of Same-sex Couples, para. 197.

⁵⁹ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. Protection against violence and discrimination based on sexual orientation and gender identity. Human Rights Council, Seventy-fourth session. UN Doc A/74/181, paras. 26, 48.

⁶⁰ Report of the Working Group on the Universal Periodic Review on Czechia. Human Rights Council, Fifty-third session. UN Doc A/HRC/53/4.

⁶¹ Report of the Working Group on the Universal Periodic Review on Slovenia. Human Rights Council, Forty-third session. UN Doc A/HRC/43/15.

⁶² Report of the Working Group on the Universal Periodic Review on Hungary. Human Rights Council. Forty-ninth session. UN Doc A/HRC/49/8.

⁶³ GC 25, CESCR, para. 13. In the context of socio-economic rights, and particularly regarding the access to water, the CESCR has mentioned that: “The obligation of States parties to guarantee that the right to water is enjoyed without discrimination (art. 2, para. 2), and equally between men and women (art. 3), pervades all of the Covenant obligations. The Covenant thus proscribes any discrimination on the grounds of race, colour, (...) **sexual orientation** (...)”

⁶⁴ CESCR Committee. List of issues in relation to the sixth periodic report of Kenya. UN Doc E/C.12/KEN/Q/6, para. 11.

As of today, 36 countries in the world legally recognize same-sex marriage: Andorra, Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Denmark, Ecuador, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Luxembourg, Malta, Mexico, the Netherlands, New Zealand, Norway, Portugal, Slovenia, South Africa, Spain, Sweden, Switzerland, Taiwan, the United Kingdom, the United States of America and Uruguay.⁶⁵ The following are some examples of recent regional judicial, legislative and administrative precedents advocating equality for same-sex partnerships.

1. Japan

On March 14, 2024, the Tokyo District Court and Sapporo High Court separately made historic decisions on two same-sex marriage cases. The Tokyo District Court first ruled that the current legal framework, which does not recognize same-sex marriage, cannot be reasonably justified in the light of the dignity of the individual and the fundamental equality of the sexes, and should be considered a violation of Article 24(2) of the Constitution. Then, in Japan's first High Court decision on same-sex marriage, Sapporo's High Court ruled that the provisions of the Civil Code and the Family Register Act that do not recognize same-sex marriage are unconstitutional, as they violate Article 24(1) and (2) and Article 14 (1) of the Constitution.⁶⁶ Further, on October 25, 2023, the Supreme Court issued a ruling in a family law case, declaring that the stipulation of the Special Law on Gender Identity Disorder, which mandates surgical sterilization as a prerequisite for gender reassignment, is unconstitutional in Japan. This decision was based on the determination that the sterilization requirement runs counter to Article 13 of the Constitution, which emphasizes the importance of equality and nondiscrimination for every individual irrespective of gender identity or sexual orientation.⁶⁷

2. India

On October 17, 2023, the Supreme Court of India held in *Supriyo Chakraborty v Union of India* that there is no fundamental right for same-sex marriage in the Indian Constitution. However, the Supreme Court extended recognition to same-sex relationships and queer families by observing that “familial relationships may take the form of domestic, unmarried partnerships or queer relationships,” while noting that an “atypical” manifestation of a family unit is as real as its traditional counterpart and deserves protection under the law. Further, the Supreme Court recognized the indirect discrimination faced by same-sex couples regarding entitlement to compensatory benefits or welfare entitlements tied to marital status. The Supreme Court noted that these discrepancies should be addressed and eliminated by the government as they enable discrimination against same-sex couples solely on the basis of sexual orientation. The Supreme Court instructed the government to nullify the executive

⁶⁵ Human Rights Campaign, ‘Marriage Equality Around the World’ <<https://www.hrc.org/resources/marriage-equality-around-the-world>>

⁶⁶ ‘Groundbreaking same-sex marriage rulings a long-awaited victory for LGBTI rights’ (March 14, 2024, Amnesty International) <<https://www.amnesty.org/en/latest/news/2024/03/japan-groundbreaking-same-sex-marriage-rulings-a-long-awaited-victory-for-lgbti-rights/>>

⁶⁷ ‘Supreme Court Strikes Forced Sterilization Requirement for Gender Recognition in Landmark Victory for Transgender Rights’ (October 25, 2023, ILGA Asia) <<https://www.ilgaasia.org/news/2023/11/10/japan-supreme-court-strikes-forced-sterilization-requirement-for-gender-recognition-in-landmark-victory-for-transgender-rights>>

guidelines that can be changed to ensure certain benefits, such as opening joint bank accounts and nominating partners in life insurance policies, can also be extended to same-sex couples.⁶⁸

3. Nepal

On June 28, 2023, Nepal's Apex Court passed an interim order to allow for the registration of same-sex marriages which would allow same-sex couples to avail all benefits that are tied to marriage.⁶⁹ Although Nepal's civil code currently describes marriage as being between a man and a woman, Justice Til Prasad Shrestha ordered the government to immediately begin registering same-sex marriages while it prepares legislation to amend the law in line with the constitution of Nepal which prohibits gender discrimination and upholds the rights of sexual minorities.⁷⁰

4. Taiwan

In May, 2019, Taiwan's Legislative Yuan approved the Enforcement Act of Judicial Yuan Interpretation No. 748 - a special law legalizing same-sex marriage in Taiwan. This is the very first law passed in Asia to recognize same-sex marriage. The Act was passed after Taiwan's Constitutional Court held that the prohibition of same-sex marriage in the current Civil Code violates the principles of equality in the constitution. Under the new law, same-sex couples are granted the same right to legally marry as opposite-sex couples, and many of the same rights and obligations applied to opposite-sex couples under the existing regulations in the Civil Code will be applied to same-sex couples.⁷¹

5. Thailand

Thailand has taken a historical step closer to marriage equality after the lower house of the parliament passed a bill giving legal recognition to same-sex marriage in March 2024. The Marriage Equality Act makes important amendments to the civil and commercial code language concerning spouses, in particular by changing "men and women" and "husband and wife" to "individuals" and "marriage partners." The new law will give LGBTI couples equal rights to receive marital tax savings, to inherit property, and to give medical treatment consent for partners who are incapacitated. Under the law, married same-sex couples can also adopt children. Thailand already has laws that ban discrimination over gender identity and sexual orientation. If enacted, the law will make Thailand the only South East Asian country to recognize same-sex unions.⁷²

⁶⁸ 'End Discrimination Against Queer Couples, Address Exclusion Of Same-Sex Partners From Benefits: Supreme Court To State' (October 17, 2023, Live Law) <<https://www.livelaw.in/top-stories/end-discrimination-against-queer-couples-address-exclusion-of-same-sex-partners-from-benefits-supreme-court-to-state-240402>>

⁶⁹ Binaj Gunubacharya, 'Same-sex couples and LGBTQ+ rights activists in Nepal celebrate interim court ruling' (29 June 2023, Associated Press) <<https://apnews.com/article/nepal-lgbtq-samesex-marriage-supreme-court-1bc6d1ee2eef83f7707915bdd7579e7>>

⁷⁰ The Constitution of Nepal, 2015 <<https://lawcommission.gov.np/en/wp-content/uploads/2021/01/Constitution-of-Nepal.pdf>>

⁷¹ 'Taiwan becomes first in Asia to legalize same-sex marriage after historic bill passes' (May 17, 2019, Amnesty International) <<https://www.amnesty.org/en/latest/press-release/2019/05/taiwan-same-sex-marriage-law/>>

⁷² 'Ensure Equal Access to Marriage and Other Rights to LGBTI+ Persons' (26 March 2024, Fortify Rights) <<https://www.fortifyrights.org/tha-inv-2024-03-26/>>

6. The Philippines

On June 24, 2023, the government of Quezon City launched a ‘Right to Care’ card, allowing same-sex couples, through a special power of attorney, to make health-related decisions for each other.⁷³ Prior to the launch of the card, hospitals and other medical facilities only allowed legal spouses or next of kin to make important medical decisions on behalf of an individual. This excluded same-sex partners from doing the same. On June 5, 2018, the Philippine city of Mandaluyong approved an ordinance to protect the rights of LGBTI people from discrimination prohibiting discriminatory acts as denying or limiting employment-related access; denying access to public programs or services; refusing admission, expelling or dismissing a person from educational institutions due to their sexual orientation, gender identity and expression (SOGIE).⁷⁴ Further, a member of the House of Representatives has renewed the push for a same-sex civil partnership law in the Philippines, so that same-sex couples under civil partnerships can avail the same tax benefits as married couples.

7. Hong Kong

In 2018, the Hong Kong Court of Final Appeal (the CFA) held that denial by the Director of Immigration of dependent status under an employment visa for a same-sex partner was based on a stated policy which was counterproductive, plainly not rationally connected to advancing the “talent” aim, and not rationally connected with the legitimate objective of strict immigration control. Whether the spouse was heterosexual or gay could not possibly be relevant, and such unjustified policy constituted indirect discrimination against the same-sex couple on the ground of sexual orientation.⁷⁵ The principles in this case was subsequently applied by the CFA in another case where the CFA found that denial of medical and dental benefits to a same-sex partner available to “spouses” of civil servants and denial of their election to be jointly assessed for salaries tax, constituted unlawful discrimination on the basis of sexual orientation.⁷⁶ In 2020, the Hong Kong Court of First Instance held that the policy and decisions by the Housing Authority excluding same-sex couples from eligibility to apply for public rental housing as “ordinary families” under the “general application” category was unlawful and unconstitutional because it amounted to unjustified discrimination based on sexual orientation.⁷⁷ This decision was upheld by the Court of Appeal. The Court of Appeal also confirmed that same-sex marriage lawfully performed abroad is to be treated the same as heterosexual marriages under the Intestates’ Estates Ordinance and the Inheritance (Provision for Family and Dependents) Ordinance, and that the exclusion of such same-sex married couples’ right to claim as “surviving spouses” thereunder constituted unlawful discrimination on the grounds of sexual orientation.⁷⁸

⁷³ ‘QC gov’t launches ‘Right to Care’ card’ (June 25, 2023, Manila Bulletin) <<https://mb.com.ph/2023/6/24/qc-gov-t-launches-right-to-care-card>>

⁷⁴ Carlos H. Conde, ‘Philippine City Passes Law Against LGBT Discrimination’ (June 5, 2018, Human Rights Watch) <<https://www.hrw.org/news/2018/06/05/philippine-city-passes-law-against-lgbt-discrimination>>

⁷⁵ *QT v Director of Immigration* (2018) HKCFA 28, QT.

⁷⁶ *Leung Chung Kwong v Secretary for Civil Service* (2019) HKCFA 19.

⁷⁷ *Infinger v Hong Kong Housing Authority* (2020) HKCFI 329.

⁷⁸ *Ng Hon Lan Edgar v Secretary for Justice* (2023) HKCA 1224.

8. United Kingdom

The United Kingdom (the UK) has recognized civil partnerships for same-sex couples since 2005. Same-sex marriage was legalized in England, Wales and Scotland in 2014 and in Northern Ireland in 2020. In this context, a number of cases have come before the English courts in which an individual has alleged that a denial of access to benefits – including those predicated on a dependent status – constitutes sexual orientation discrimination in violation of UK laws and international human rights laws. The Human Rights Act 1998 (HRA) requires the UK courts to interpret all legislation compatibly with the European Convention on Human Rights (the ECHR)⁷⁹ as far as possible. In 2004, the House of Lords (then the UK’s highest court) held in *Ghaidan v Godin-Mendoza*⁸⁰ that a housing legislation amendment which extended spousal succession rights to surviving, unmarried partners “living with the original tenant as his or her wife or husband”⁸¹ was discriminatory in excluding cohabiting same-sex couples, and must be interpreted to include same-sex couples pursuant to s.3 HRA to comply with Art. 14 ECHR. The court found no justified, legitimate aim in the legislation’s differential treatment. A legitimate aim of privileging marriage or protecting the traditional family unit did not apply, since marriage was not a pre-requisite to protection under the statute for opposite sex couples. If alternatively, the aim was to discourage same-sex relationships generally, such objective “cannot now be regarded as a legitimate aim.”⁸² In 2009, the Privy Council went further in *Rodriguez v Minister of Housing of Gibraltar*,⁸³ finding that a social housing policy restricting joint tenancy rights to married couples and couples with children in common amounted to sexual orientation discrimination – notwithstanding that the exclusion applied to all unmarried couples – on the basis that same-sex couples were unable to marry or have children in common, and so were particularly severely impacted by the exclusion. As to whether the policy was justified by a legitimate aim of privileging marriage, the court held that denying benefits to same-sex couples, who could not marry, was not a rational means of furthering this aim.⁸⁴ In 2017, the UK Supreme Court (the UK’s highest court) ruled in *Walker v Innospec*⁸⁵ that denying an employee of contributory spousal benefits earned during employment on the grounds of sexual orientation was incompatible with the non-discriminatory aims of the UK legislation and EU law.⁸⁶

9. Germany

In Germany, until same-sex marriages were legally recognized in 2017, same-sex couples could be legally recognized and protected as civil registered partnerships (*eingetragene Lebenspartnerschaften*), a concept introduced into German law only in 2001. In 2009, the

⁷⁹ s.3. HRA.

⁸⁰ [2004] UKHL 30.

⁸¹ Rent Act 1977, Sch. 1, para 2(2) (version in force until 4 December 2005).

⁸² *Ibid*, para 143.

⁸³ [2009] UKPC 52 (N.B. the basis of the appellant’s discrimination claim derived from the Gibraltar Constitution. However, the Privy Council referred to and considered the ECHR, which was extended to Gibraltar in 1953, and to which the Gibraltar Constitution refers).

⁸⁴ *Ibid*, para 26. See also *In re McLaughlin* [2018] UKSC 48, at para 36-37.

⁸⁵ *Walker v Innospec Limited* [2017] UKSC 47.

⁸⁶ *Ibid*, para 60-61. See also *In re McLaughlin* [2018] UKSC 48, para 38-39 (regarding both means-tested and contributory benefits).

German Federal Constitutional Court held for the first time that the unequal treatment of civil registered partnerships in comparison to marriages was discriminatory in regards of the entitlement to supplementary pensions under an occupational pensions scheme.⁸⁷ This jurisprudence was confirmed in numerous following rulings in the fields of the Gift and Inheritance Tax Act,⁸⁸ the civil service family allowance,⁸⁹ the Real Estate Transfer Tax Act,⁹⁰ the non-admission of successive adoption,⁹¹ the exclusion from tax spouse splitting,⁹² and the supplementary pension in the public sector.⁹³ This established jurisprudence by the German Federal Constitutional Court is based on the general principle of equality under Art. 3 of the German Constitution (also referred to as the Basic Law or “*Grundgesetz*”) according to which “*all persons shall be equal before the law [and] no person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions.*” According to the German Federal Constitutional Court this constitutional principle of equality means that there is no difference that is of such weight that could justify the disadvantage to civil partners in comparison to spouses. Such unequal treatment can only be justified in the case of particularly serious reasons but not by a mere difference in the life situation of married couples and civil partners.⁹⁴ What is more, according to the Court, granting a privilege to married spouses and not to civil partners under the law cannot be justified solely by reference to the state’s duty to provide special protection of the marriage as an institution and the family under Art. 6.1 of the Basic Law.⁹⁵

10. Austria

In Austria, prior to January 1, 2019 when same-sex marriage has been legally recognized, same-sex couples could seek recognition and protection in registered partnerships, a concept introduced into Austrian law only in 2010. In its 2017 judgment to recognize same-sex marriages in Austria, the Austrian Constitutional Court relied on the general principle of equality laid down in Article 7.1 of the Austrian Constitution, according to which it is illegal to discriminate against people on the basis of personal characteristics such as sexual orientation or gender.⁹⁶ The Court concluded that the legal separation of opposite-sex and same-sex relationships into two different legal institutions violates the principle of equality which prohibits discrimination against people on the basis of personal characteristics such as sexual orientation.⁹⁷ The principle of non-discrimination against same-sex couples is far-reaching. In

⁸⁷ BVerfG, Order of the First Senate of 7 July 2009 -2009 1 BvR 1164/07, paras 77-122, 125-126.

⁸⁸ BVerfG, Order of the First Senate of 21 July 2010 1 BvR 611/07, 1 BvR 611/07, paras 73-119.

⁸⁹ BVerfG, Judgment of the Second Senate of 19 June 2012 -2 BvR 1397/09, paras 52-76.

⁹⁰ BVerfG, Judgment of the First Senate of 18 July 2012 - 1 BvL 16/11, paras 27-50.

⁹¹ BVerfG, Judgment of the First Senate of 19 February 2013 - 1 BvL 1/11, paras 39-102, 104-105.

⁹² BVerfG, Judgment of the Second Senate of 07 May 2013 - 2 BvR 909/06, paras 72-103.

⁹³ BVerfG, Judgment of the First Senate of 11 December 2019 - 1 BvR 3087/14, paras 6-17.

⁹⁴ BVerfG, Order of the First Senate of 7 July 2009 -2009 1 BvR 1164/07, para. 88; BVerfG, Order of the First Senate of 21 July 2010 1 BvR 611/07, 1 BvR 611/07, para. 83; BVerfG, Judgment of the Second Senate of 19 June 2012 -2 BvR 1397/09, paras 57-58; BVerfG, Judgment of the First Senate of 18 July 2012 - 1 BvL 16/11, para. 35; BVerfG, Judgment of the First Senate of 19 February 2013 - 1 BvL 1/11, paras 72, 75; BVerfG, Judgment of the Second Senate of 07 May 2013 - 2 BvR 909/06, para. 75; BVerfG, Judgment of the First Senate of 11 December 2019 - 1 BvR 3087/14, para. 9.

⁹⁵ BVerfG, Order of the First Senate of 7 July 2009 -2009 1 BvR 1164/07, para. 105; BVerfG, Order of the First Senate of 21 July 2010 1 BvR 611/07, 1 BvR 611/07, para. 91; BVerfG, Judgment of the First Senate of 19 February 2013 - 1 BvL 1/11, paras 64-65; Art. 6.1 of the Basic Law states that “Marriage and the family shall enjoy the special protection of the state.”

⁹⁶ “All citizens are equal before the law. Privileges of birth, gender, status, class and creed are prohibited..”

⁹⁷ VfGH, Judgment on 04 December 2017, G 258-259/2017-9, para 17.

2022, the Austrian Constitutional Court held that it is unconstitutional to deny adoption based on the sexual orientation of the parents.⁹⁸ The Court held that there are no particularly serious reasons for denying registered partners of the same sex joint adoptive parenthood.

11. United States

In 2013, the U.S. Supreme Court ruled in *United States v. Windsor* that Section 3 of the Defense of Marriage Act (DOMA), which had limited the terms “marriage” and “spouse” to opposite-sex couples for purposes of all federal laws, was unconstitutional because it violates the Fifth Amendment’s guarantee of equal protection.⁹⁹ In 2015, the U.S. Supreme Court further ruled in *Obergefell v. Hodges* that states must allow same-sex marriage and recognize same-sex marriages performed in other states.¹⁰⁰ Prior to *Windsor* and *Obergefell*, several cases allowed government health, welfare, and other benefits to same-sex domestic partners. For example, before same-sex marriage was legalized in any state, the New York State Court of Appeals issued its decisions in *Braschi v. Stahl Assocs. Co.* in 1989 and became the first American appellate court to recognize that a nontraditional, same-sex, committed, family-like relationship is entitled to legal recognition, and that the non-traditional family member is entitled to receive non-eviction protections.¹⁰¹ In *In re Levenson*, the court found that the DOMA, as applied to preclude a federal defender’s request for federal health benefits for his same-sex spouse, violated the Due Process Clause of the Fifth Amendment.¹⁰² Similarly, in *In re Fonberg*, the court held that the denial of health benefits to an employee’s same-sex domestic partner under the District of Oregon’s Employment Dispute Resolution Plan amounted to unlawful discrimination.¹⁰³ In *Latta v. Otter*, the court held that Idaho’s ban on same-sex marriage violated the Equal Protection Clause of the Fourteenth Amendment, in part because it prevented same-sex couples from receiving government benefits such as health care.¹⁰⁴ In *Bassett v. Snyder*, the court held that a Michigan law prohibiting public employers from providing medical benefits to same-sex partners violated the Equal Protection Clause. Some state courts have also held that a same-sex domestic partner was entitled to seek to recover for the allegedly wrongful death of his or her partner¹⁰⁵, and that one or both partners were entitled to benefits related to taxation¹⁰⁶, where such rights were provided in a legislative enactment or executive order pertaining to domestic partnerships.¹⁰⁷

V. Conclusion

There is a clear trend within the Asian region and globally around the recognition of same-sex unions, with recognition that the equality and substantive rights of same-sex partners

⁹⁸ VfGH, Judgment on 18 June 2022, G 30/2022-12.

⁹⁹ *United States v. Windsor*, 570 U.S. 744 (2013).

¹⁰⁰ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

¹⁰¹ *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201 (1989).

¹⁰² *In re Levenson*, 560 F.3d 1145 (9th Cir. 2009); *In re Levenson*, 587 F.3d 925 (9th Cir. 2009).

¹⁰³ *In re Fonberg*, 736 F.3d 901 (9th Cir. 2013).

¹⁰⁴ *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014).

¹⁰⁵ *Armijo v. Miles*, 127 Cal. App. 4th 1405 (2d Dist. 2005); *Bouley v. Long Beach Memorial Medical Center*, 127 Cal. App. 4th 601 (2d Dist. 2005).

¹⁰⁶ *Hennefeld v. Township of Montclair*, 22 N.J. Tax 166 (2005).

¹⁰⁷ *Validity of Legal Claim Predicated on Nonmarital Same-Sex Relationship*, 8 A.L.R.6th 339 (2005).

suffer when the state denies them any opportunity to enshrine their relationships in law.¹⁰⁸ Further, a growing body of regional and international jurisprudence recognizes that states ought to protect the rights of same-sex partners irrespective of whether or not they legally recognize same-sex marriage or unions.

The lack of legal recognition of same-sex unions should not exempt the state from ensuring that same-sex couples can access welfare benefits without facing discrimination on the basis of their sexual orientation or gender identity. Therefore, denying health insurance coverage to same-sex couples solely on the basis of sexual orientation will violate the principles of equality and non-discrimination.

The lack of legal recognition of same-sex unions and differential access to social benefits will exacerbate the existing human rights concerns that affect LGBTI individuals in South Korea and create an environment of impunity for unjustified discrimination by relaying the message that same-sex partnerships are not valid in the eyes of the state.¹⁰⁹

The state's decision not to extend the same protections and benefits to same-sex partners that it extends to heterosexual partners violates the rights to equality and non-discrimination of LGBTI persons in South Korea. Therefore, we respectfully urge the Court to give due consideration to this submission in its deliberation on the present appeal and ensure that same-sex partners are able to access state benefits on equal footing.

¹⁰⁸ Kyle Knight, 'Taiwan's Same-Sex Marriage Law Should Encourage Rights Reform Across Asia' (27 May 2019, Nikkei Asia) <<https://asia.nikkei.com/Opinion/Taiwan-s-same-sex-marriage-law-should-encourage-rights-reform-across-Asia>>

¹⁰⁹ Ryan Thoreson, 'South Korea Shouldn't Backslide on LGBT Rights' (27 November 2019, Human Rights Watch) <<https://www.hrw.org/news/2019/11/27/south-korea-shouldnt-backslide-lgbt-rights>>