

Human Rights Pitted Against Man (II) – A Response

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The article responds to another article in this issue of the journal, ‘Human Rights Pitted Against Man (II) – the Network is Back’, by Jakob Cornides. It considers the arguments he puts forward regarding inaccuracy and lack of objectivity in an opinion and a report produced by two influential fundamental rights agencies of the European Union. It finds that the arguments are, for the most part, misconceived, but welcomes the opportunity for a debate on the larger issues raised by Cornides’ contribution.

Keywords: human rights; homophobia; sexual orientation

Introduction

I am grateful to have been asked to respond to Jakob Cornides’ article in this volume, ‘Human Rights Pitted Against Man (II) – the Network is Back’. Cornides makes some claims which I think are unfair and do not survive close scrutiny, but he also makes significant and thought-provoking arguments, some of which I agree, and some of which I aim here to refute.

Cornides’ article is an example of a growing trend for normally Europhile civil society organisations, such as the Roman Catholic Church, to challenge the European Union’s move towards value integration through law. His angry, often bitter, piece speaks of a lobbying environment from which the ordinary religious believer and even the ordinary public is excluded – and which in his view has been colonised by manipulative radicals:

‘There is a common theme: these radical groups have privileged, if not exclusive access to the institutions that tend to pontificate in the “creation” and radical re-interpretation of so-called new “fundamental rights” for European citizens, while the mainstream of society is, contrary to long-established democratic values, brazenly ignored and excluded.’

One of the aims of the Fundamental Rights Agency – the target of Cornides’ article – is to promote dialogue with civil society. This aim has an important political history. By 2001, the assault on the European Union’s legitimacy gap had become so fervent that the European Commission felt obliged to issue a White Paper on European Governance that laid down five principles of good governance. These centred around openness, participation, accountability, effectiveness and coherence¹ (and were to apply to civil society just as they were to apply to

¹ Commission of the European Communities, *European Governance: A White Paper*, 25.7.2001 COM(2001) 428, 10-11
http://ec.europa.eu/governance/white_paper/en.pdf (accessed 19 July 2009).

the European Commission itself).² As yet, critics remain unsatisfied: only last year, Cécile Leconte argued that we need to create ‘*spaces for normative contestation and extra-parliamentary public spheres where dissenting views on societal issues affected by EU-level decisions can be expressed*’.³ Cornides is not alone in his unhappiness.

But there is another thread to this debate. The Catholic Church itself has had ‘privileged, if not exclusive access’ to the law-makers of Europe. The Holy See, alone among religious communities, has an official representative in Brussels. Also, this representative, the Apostolic Nuncio, is a member of the Commission of the Bishops’ Conferences of the European Community (COMECE), which holds regular meetings with senior EU officials. The COMECE is often consulted at the pre-legislative stage of drafting. When ratified, the Lisbon Treaty will add Article 17 to the Treaties of the European Union, so that churches (and their counterparts and comparable non-religious organisations) have a special status: ‘*Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.*’

It is of course easier for larger churches and related organisations to meet the significant costs of maintaining a presence in Brussels – and thus maintain a dialogue rather than an occasional reactive response to individual, pre-defined initiatives. If we remember too that the Commission expects civil society organisations to apply its five principles to themselves, then our concern should range far beyond what EU agencies do, and consider what lobbying bodies do, to whom they are accountable, and which interests are still today effectively excluded from that lobbying. Cornides opens the door to an interesting debate, but we should hope that future articles in the journal extend it much further.

For now, what we see here is not an excluded organisation, but an organisation whose influence in the European law-making sphere has been encroached upon through the sheer success of lesbian, gay, bisexual and transgender (LGBT) and other liberal rights campaigns in developing fundamental law in the EU (not just transient sets of rights accrued in individual states with temporarily liberal governments). What we see here is a view from the other side, as traditionally influential bodies lose part of their privileged place in the legal process.

In the first part of his article, Cornides reprises an earlier article of his⁴ and attacks the Centre for Reproductive Rights (CRR) for their pro-abortion campaigning and their lobbying techniques. In particular he criticises their statement that there is a ‘*stealth quality*’ to the work they do. Yet the source he cites to attack their ‘*questionable*’ reputation is the website of the Catholic Family and Human Rights Institute, whose mission statement includes the ‘Vision’ of: ‘*The preservation of international law by discrediting socially radical policies at the United Nations and other international institutions.*’⁵ ‘Stealth’, ‘discrediting’ ... both are the language of lobby organisations, and the question is surely how much power either should

² Julian Rivers, ‘In pursuit of pluralism: the ecclesiastical policy of the European Union’, *Ecclesiastical Law Journal* (2004): 267.

³ Cécile Leconte ‘Opposing Integration on Matters of Social and Normative Preferences: A New Dimension of Political Contestation in the EU’, *Journal of Common Market Studies* 46, no.1 (2008): 1071, 1089.

⁴ Jakob Cornides, ‘Human Rights Pitted Against Man’ *International Journal of Human Rights*, 12, no. 1 (2008): 107.

⁵ http://www.c-fam.org/about_us/id.43/default.asp (accessed 19 July 2009). My thanks to Colin Gavaghan for drawing my attention to this.

have in European law-making. We cannot criticise one without considering the role of the other.

In the rest of this article, I will consider Cornides' detailed attack on what he claims is the influence of lobbyists, and unwarranted liberal opinion, on two important documents released on human rights. I will also ask what we should conclude from this.

The EU Network of Independent Experts on Fundamental Rights

In his previous article for this journal, Cornides criticised the decision-making processes of the EU Network of Independent Experts on Fundamental Rights, focusing on an Opinion they issued on religious conscientious objection and concordats concluded between EU member states and the Holy See.⁶ I do not have the space here to cover both articles, so I will treat the current one as it should be treated, as a free-standing piece, but readers may of course wish to read both.

In his article for this current issue, Cornides reprises some of his criticisms. One of the difficulties in responding is that he uses a scattergun approach, firing off attacks on a great many fronts, often with no precise citations provided. This makes it a painstaking task to respond. I will however consider some of the main attacks.

To begin with, he says:

'...it is certainly worthwhile to recall the specific circumstances that raised significant and widespread doubts about the good faith of the authors of that 'expertise'. There was a clear bias in the reasoning of the Network, which systematically used a manipulative vocabulary, describing abortion as a 'health service' and pregnancy as an 'illness specific to women', and accusing doctors who acted in compliance with a law that prohibited abortion to have 'inflicted an inhuman and degrading treatment on women' (i.e., not providing the desired abortion). Any argument supportive of a 'right to abortion', no matter how absurdly far-fetched, was given widest consideration, whereas compelling counter-arguments were, at best, overlooked, at worst, decidedly ignored. The selective case law quoted by the Network related to cases that had nothing to do with the invocation of 'conscientious objection' by medical practitioners and were thus irrelevant to the subject of the Opinion. Even more of an indictment, the Network did not bother to acquaint itself with the positions of the Slovak Government or the Holy See, which, given that the Opinion concerned a clause in the (draft) Concordat then under negotiation between these two States, would have been the minimum professional standard of care expected of 'experts' - at least of those wishing to guard their reputation of independence and fairness.

In short, the Opinion looked like a (clumsily drafted) position paper of a radical abortion lobby, rather than like the balanced analysis of serious-minded experts. And that precisely describes what it really was: for large portions of the Opinion's text were nothing other than direct quotes from a submission made by one of the most virulent pro-abortionist lobbies.'

And so on, with more in that vein. The actual Opinion, if one reads it, is so different as to be hardly recognisable from the description here.

⁶ 14 December 2005, CFR-CDF Opinion 4-2005
http://ec.europa.eu/justice_home/cfr_cdf/doc/avis/2005_4_en.pdf

Cornides does not at this point cite any sources which would amount to ‘*significant and widespread doubts about the good faith of the authors*’. As for his claim that the Opinion describes pregnancy as ‘an illness specific to women’: this phrase appears only once, at page 20 - and it is not a phrase used by the Network. It appears as an incidental part of a quote taken from a General Recommendation adopted by the UN Committee on the Elimination of Discrimination against Women.

The Opinion does not accuse doctors acting lawfully of having inflicted inhuman and degrading treatment on women. Its argument is very different: it is that *the State* having made abortion lawful has a responsibility to make it available: ‘*Denying to a woman the effective possibility to abort in circumstances where abortion is lawful under the regulations of the State concerned may moreover amount to the infliction of an inhuman and degrading treatment, in the meaning of Article 7 of the International Covenant on Civil and Political Rights.*’⁷ It cites case law on this very point, where a young woman was denied a lawful abortion in Peru: the circumstances of her case amounted to a violation of Article 7 and (among others) Article 2, because Peru was required to provide her with an effective remedy. The UN Human Rights Committee emphasised that Peru had an obligation to ensure that similar violations do not occur in the future.

Cornides also claims that ‘large portions’ of the text comprise quotes from the Centre for Reproductive Rights. In fact the portions amount to five paragraphs in a 32-page document, and an appendix. The material is not some special submission solicited for the purpose of the Opinion, as Cornides’ comment implies: it was a submission for a relevant case before the Grand Chamber of the European Court of Human Rights, *Tysiac v. Poland*.⁸ And far from being ‘virulent’, it consists of a detailed description of medical and legal provisions in member states.

Cases on the fundamental rights of a pregnant woman, such as *Tysiac*, are most certainly relevant here, because the individual practitioner’s right to religious conscientious objection must be provided for by the State in a way which also recognises the rights of the pregnant woman.

The Opinion is a careful and scholarly discussion of the religious conscientious objection and its status in relevant human rights law, which is what the Network was asked to provide. (Indeed, an earlier report of the Network on a related topic was quoted in *Tysiac*.⁹) Here, it was asked in particular whether certain agreements which protect the right of objection could amount to an incompatibility with fundamental rights and the law of the European Union, and the Network concluded that there were circumstances that it could. Cornides does not list what the ‘far-fetched’ arguments in favour of a right to abortion were, nor spell out his ‘compelling counter-arguments’, but given that the Grand Chamber shortly after went on to state specifically at para 116 of *Tysiac v. Poland* that ‘[o]nce the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real

⁷ Network Opinion, note 6, page 19.

⁸ *Tysiac v. Poland*, Application no. 5410/03, 20 March 2007, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=tysiac&sessionid=26856556&skin=hudoc-en> (accessed 19 July 2009).

⁹ *The Conclusions and Recommendations on the Situation of Fundamental Rights in the European Union and its Member States in 2004*, 15 April 2005, CFR-CDF.Conclusions.2004.en, http://ec.europa.eu/justice_home/cfr_cdf/doc/synthesis_report_2004_en.pdf (accessed 19 July 2009).

possibilities to obtain it', the onus is on him to show that they are compelling rather than defeated. (*Tysiac* had been decided by the time he wrote his articles.)

I also find it disturbing that Cornides, when turning next to his criticisms of the CRR, names three of its advisory human rights lawyers (providing no source for the claim that these individuals - Paul Hunt, Philip Alston and Martin Scheinin - do advise the Centre) even though two of them, Hunt and Alston, do not have anything to do with the Opinion. He also describes the advisers as "hired", which is inappropriate, because their work appears to be unremunerated.¹⁰

It is not clear here whether he is arguing that Martin Scheinin is not independent because of this role in the Center taken alongside his role as a member of the Network. There is however a difference between asking whether someone is politically active (whether or not it would affect their impartiality) and whether he *lacks independence*, which would be a conflict of interest. As there is no suggestion that Mr Scheinin had any pecuniary or proprietary interest in the Center, nor any other directing role, the implication can only be that he was politically active. This is worth pointing out, but by itself it is not proof of partiality.

More serious is the claim, which Cornides does back up with sources, by a former member of the Network, Bruno Nascimbene. Cornides cites a public statement by Nascimbene which denounced the Opinion, strongly insisting that medical staff should not be forced to take part in carrying out abortions (although this in fact is not a conclusion which the Opinion reached anyway). Mr Nascimbene also criticised the process by which it was reached, arguing that it had largely been written by the co-ordinator of the Network, Olivier de Schutter, and that he himself had not been consulted on its content and would not have approved it if he had.

This is a serious allegation to have published in this journal, so I contacted Mr de Schutter for his comments. Mr de Schutter stated in his reply to me that the Opinion was drafted in the normal way for the Network: it was written in draft by one member (in this case, Mr de Schutter), then circulated electronically to all members, including Mr Nascimbene. A meeting was then held at which the draft was discussed and amended over a period of 3-4 hours, and then recirculated. Mr de Schutter states that Mr Nascimbene did not attend the meeting and instead sent a delegate, who did not object to the text. He also states that Mr Nascimbene did not contact him at any point after the meeting or afterwards, and he adds that the network adopted this Opinion, as its others, by consensus.

Given that there is a formal statement in the Opinion itself at page 4 that '*A draft opinion was discussed at the meeting of the Network of 17 October 2005*' and that '*[t]his opinion takes into account the content of that discussion*', it seems reasonable to conclude provisionally that Mr de Schutter's statement regarding the events is to be preferred, given that no other member of the Network has made any claim about inappropriate practices. However, we await any further light being thrown on the claim. At this stage, it can be concluded overall that Cornides' attacks on the credibility and the integrity of the Network, and the quality of its legal reasoning, are at best weak.

From the Network to FRALEX

¹⁰ I took the precaution of clarifying this point by private correspondence with one of the individuals named, and was informed that the work is 'entirely unpaid'.

After engaging in this skewed assault on the reputations and motivations of those he opposes, Cornides implies that the Network has effectively reformed in the shape of FRALEX (Fundamental Rights Agency Legal Experts), a consultative body advising the new Fundamental Rights Agency (hereinafter FRA). He observes that around half of its members were members of the Network (but does not explain why they seem content to join an organisation which according to him produces documents they have no real influence over).

His first aim here is to cast doubt on the FRA's and FRALEX's objectivity and expertise, beginning with an assault on the way in which authorship is apportioned on a particular report, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States; Part I – Legal Analysis*¹¹ (hereinafter 'The FRA Report'). He claims that the authorship is not clear, and that the implication is that we cannot tell who is taking responsibility.

As is often the case in his article, the aim seems to be to suggest a vague sense of wrongdoing, rather than to offer a reasoned critique. Cornides fails to make it clear why the question of *responsibility* is significant. In fact, the Report specifically apportions responsibility for the relevant sections between FRALEX and FRA. Nor does he make it clear why the question of *authorship* is significant. In fact, the Report uses a normal method of citation and there seems no reason not to conclude that Olivier de Schutter is the author. The Report specifically states that the FRALEX members provided background material for the report on behalf of each of the member states, and that two other named bodies carried out empirical research.

The purpose of beginning with this criticism seems to be to throw an unspecified doubt on the Report's legitimacy. But surely the point of the authorship and disclaimer is that they provide a helpful explanation of who did what. Responsibility is not evaded here; instead it is clarified.¹²

The legal treatment of same-sex couples

Having cast these vague aspersions on the bodies and individuals responsible, Cornides then turns to the content of the Report. Here, he is on somewhat stronger ground. He takes issue with the statement on p.13 '*international human rights law requires that same-sex couples either have access to an institution such as registered partnership which provides them with the same advantages as those they would be recognised if they had access to marriage; or that, failing such official recognition, the de facto durable relationships they enter into leads to extending to them such advantages....*' A similar statement can be found on p.56.

The Report is more circumspect later, such as where it says at p.58 that denying such benefits '*should be treated presumptively as a form of indirect discrimination on grounds of sexual*

¹¹ European Union Agency for Fundamental Rights *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I – Legal Analysis*
http://fra.europa.eu/fraWebsite/material/pub/comparativestudy/FRA_hdgso_part1_en.pdf (accessed 19 July 2009).

¹² For those who are interested, the Fundamental Rights Agency explains its data collection and analysis methods at pp.12-13 of its Annual Activity Report for 2008:
http://www.fra.europa.eu/fraWebsite/attachments/FRA-ActivityReport09_en.pdf (accessed 19 July 2009).

orientation'. But Cornides is right to ask that the Report be consistent, and to attack it where it appears not to be.

Although Cornides does not say so, the Report rests its argument on two stages. First, there is the legal position for EU member states and second, there is the effect of international human rights law on this EU position. He discusses only the second. I will return to that in a moment.

The European Court of Justice

The first argument, not discussed by Cornides, is based on the *Maruko* decision of the Grand Chamber of the European Court of Justice in 2008.¹³ The case concerned an allegation of discrimination in the right to survivors' benefits in Germany in which a same-sex couple had entered into a registered civil partnership, but had not been permitted under law to marry. The Court held that national laws on marital status must comply with the principle of non-discrimination (para. 59). In addition, the Court held Maruko's treatment to be *direct* discrimination – which cannot be objectively justified (unlike indirect discrimination, which can sometimes occur for justifiable reasons).¹⁴

But one crucial point is that the Court based its decision partly on the fact that German law had evolved to a position of harmonisation where life partnership was legally equivalent to marriage. Maruko's disadvantaged position was therefore anomalous in the light of the overall character of the German regime. The FRA Report is correct to state that '*where a Member State has created a form of union comparable to marriage, and open to same-sex partners, they may not create an arbitrary difference ...*'¹⁵, at least in areas falling within the authority of the Employment Equality Directive. But 'comparable to marriage' in this decision has been referring to a narrow meaning: it does not mean 'similar to', but 'equivalent to'.

Nonetheless, it should be noted that a 'comparable to' case in the wider sense could be classified as indirect discrimination, which can only be lawful if objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary.¹⁶ This is a high standard, notwithstanding the assurance in Recital 22 of the Directive that it is without prejudice to national laws on marital status and the benefits dependent thereon. *Maruko* nonetheless is not an unequivocal authority for the proposition the FRA Report puts forward.

Incidentally, Cornides asks why same-sex couples seeking the same advantages should not be subject to the same obligations. The answer is that they would be. The discrimination provisions in the Employment Equality Directive are symmetrical, so it would be open to a disadvantaged member of a heterosexual couple to make just such a challenge if same-sex couples were awarded advantages without obligations. In any case, the vector of social inclusion in national, EU and ECHR law has been strongly in the direction of 'normalisation'

¹³ *Maruko v. Versorgungsanstalt der Deutschen Bühnen* (Case C-267/06) [2008] 2 CMLR 32.

¹⁴ See Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 2(2)(a).
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:303:0016:0022:EN:PDF>
(accessed 19 July 2009).

¹⁵ FRA Report, note 10, 54; see also *Maruko*, note 12, paragraph 73.

¹⁶ Employment Equality Directive, note 13, Article 2(2)(b)(i).

– rights with responsibilities in a traditional style of relationship, as Carl Stychin foresaw.¹⁷ Such benefits are being developed for the same-sex couple who seek to participate in what is effectively the institution of marriage and nuclear family, extended to include them. The benefits are not for other LGBT individuals who have more radical plans.

The UN Human Rights Committee and the European Court of Human Rights

We turn now to the second stage identified in the FRA Report, which argues that the EC legal position read together with international human rights law creates an even more powerful right than the one it identified under EC law. According to the Report, even where a comparable partnership or marriage right for same-sex couples does not exist under national law, it is directly discriminatory for there to be differences in treatment on the ground of sexual orientation between couples in an actual or de facto marital union. Thus, same-sex couples should by any suitable mechanism be given the same material protection.

Cornides claims that this argument is ‘mainly’ based on the case of *Joslin v. New Zealand* (discussed later). However, what the FRA Report argues (although only by footnoting them) is that the key authorities are (a) the views reached by the United Nations Human Rights Committee (HRC) in cases involving the International Covenant on Civil and Political Rights (ICCPR) and (b) a judgment of the European Court of Human Rights. As the European Court of Justice made clear in *Kadi*,¹⁸ secondary legislation ‘*must be interpreted, and its scope limited, in the light of the relevant rules of international law*’, with particular status being accorded to the ECHR.

It would have been helpful if the FRA Report had spelt out its reasoning based on these cases. However, we can examine the decisions briefly here. To begin with, we should consider the HRC decision in *Toonen*, where the HRC reached the view that ‘sex’ in Article 2(1) (enjoyment of life) and Article 26 (equality and protection) should be interpreted as including ‘sexual orientation’.¹⁹ In *Young v. Australia* the HRC then made it clear that a legal distinction between heterosexual and same-sex couples could only be justified on ‘reasonable and objective criteria’.²⁰ In *X v. Colombia*,²¹ the HRC reiterated its decision in *Young* and added 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*’.²² The distinction in pension treatment had not been supported by any reasonable and objective criteria, and so was a violation of the non-discrimination provision in Article 26.

So, let us take these three together. We can conclude that unless a state can adduce reasonable and objective criteria for maintaining a distinction between unmarried heterosexual and same-sex couples, both in a ‘de facto marital union’, this is discriminatory, in the absence of choice for same-sex couples to marry, and where the provision falls within

¹⁷ Carl Stychin *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (Oxford: Hart Publishing, 2003) ch.3 and pp.108-111.

¹⁸ *Kadi v. Council of the European Union* (C-402/05 P) [2008] 3 CMLR 41, at paragraph 291.

¹⁹ *Toonen v. Australia* (Communication No. 488/1992, 4 April 1994, paragraph 8.7 <http://www.unhchr.ch/tbs/doc.nsf/0/d22a00bcd1320c9c80256724005e60d5> (accessed 19 July 2009).

²⁰ *Young v. Australia* (Communication No. 941/2000, 18 September 2003), paragraph 10.4 <http://www.unhchr.ch/tbs/doc.nsf/0/3c839cb2ae3bef6fc1256dac002b3034?OpenDocument> (accessed 19 July 2009).

²¹ *X v. Colombia* (2007) Communication No. 1361/2005, 30 March, 14 May 2007) and 24 BHRC 697.

²² *Ibid.*, at paragraph 7.2.

the province of the ICCPR. The HRC has extended this principle of non-discrimination on the grounds of sexual orientation to many areas of law during its reviews.²³

This is important, but not enough to support the Report's claim by itself.

Karner v. Austria again dealt with discrimination in the treatment of unmarried same-sex partners when compared to unmarried different-sex partners. The ECHR held that discriminating on succession to a tenancy was contrary to Article 8 (private and family life) when taken together with Article 14 (non-discrimination). The state party had argued that the aim of the relevant legislative provision was the protection of the traditional family unit. The court however stated:

'37. The court reiterates that, for the purposes of art 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see Petrovic v Austria (1998) 4 BHRC 232 at para 30). Furthermore, very weighty reasons have to be put forward before the court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention ... Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification ... 40. The court can accept that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment ... [but] [i]n cases in which the margin of appreciation afforded to member states is narrow, as the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary to exclude persons living in a homosexual relationship from the scope of application of s 14 of the Rent Act in order to achieve that aim. The court cannot see that the government has advanced any arguments that would allow of such a conclusion.

42. Accordingly, the court finds that the government have not offered convincing and weighty reasons justifying the narrow interpretation of s 14(3) of the Rent Act that prevented a surviving partner of a couple of the same sex from relying on that provision.'

Again this is an important decision for advocates of same-sex rights, but it does not address the marriage equivalence point directly. However, it clearly extends to it by implication, so any discrimination between marriage and same-sex de facto marital unions would have to be based on an objective and reasonable justification. Protecting the traditional family unit would only amount to such if the aim was achieved by a proportionate means - and one which was necessary. *Karner* seems a better authority for this argument than the other ECHR judgment in *Burden v. UK*, which is discussed at length in the FRA Report, but whose main value is its bracketing together of civil partnership and marriages, rather than any explicit statement of rights. I will discuss those in a moment.

This brings us to *Joslin v. New Zealand*, a case before the UN Human Rights Committee which was discussed in detail in the FRA Report. Two lesbian couples sought the right to marry in New Zealand. Article 23 of the ICCPR specifically provides for a right to marriage, and the women argued that to exclude same-sex couples from this was discriminatory (as per

²³ See the discussion in Michael O'Flaherty and John Fisher 'Sexual orientation, gender identity and international human rights law: contextualising the Yogyakarta principles' *Human Rights Law Review* 2008, 207 at 218.

Article 26). However, Article 23 refers (in contrast to the rest of the Covenant) to ‘*men and women*’ rather than for instance ‘*persons*’. This need not mean that same-sex couples have no right to marry; rather it may mean that the Covenant is silent on the issue.²⁴ What is important here is that the Committee thus concluded that New Zealand’s ‘*mere refusal to provide for marriage between homosexual couples*’²⁵ did not violate the couples’ rights.

However, two members of the Committee, Mr Rajsoomer Lallah and Mr Martin Scheinin, appended a concurring opinion that elaborated on the judgment. They said:

*‘This conclusion should not be read as a general statement that differential treatment between married couples and same-sex couples not allowed under the law to marry would never amount to a violation of article 26. On the contrary, **the Committee’s jurisprudence supports the position that such differentiation may very well, depending on the circumstances of a concrete case, amount to prohibited discrimination.** Contrary to what was asserted by the State party (para. 4.12), it is the established view of the Committee that the prohibition against discrimination on grounds of “sex” in article 26 comprises also discrimination based on sexual orientation. (a) And when the Committee has held that certain differences in the treatment of married couples and unmarried heterosexual couples were based on reasonable and objective criteria and hence not discriminatory, the rationale of this approach was in the ability of the couples in question to choose whether to marry or not to marry, with all the entailing consequences. (b) No such possibility of choice exists for same-sex couples in countries where the law does not allow for same-sex marriage or other type of recognized same-sex partnership with consequences similar to or identical with those of marriage. Therefore, a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26, **unless otherwise justified on reasonable and objective criteria.** However, in the current case we find that the authors failed, perhaps intentionally, to demonstrate that they were personally affected in relation to certain rights not necessarily related to the institution of marriage, by any such distinction between married and unmarried persons that would amount to discrimination under article 26.’ [my emphasis]*

Cornides criticises the FRA Report for emphasising this concurring opinion. He argues that none of the remaining thirteen members of the Committee agreed with it, and so he implies that it is a minority opinion rather than a concurring one.

In fact, the other members said no such thing – and it is the Committee’s published version itself that states that the opinion is ‘concurring’. This does not mean that it necessarily represents the view of the whole panel, but it is good reason to conclude that it might. The statement should be treated just as any similar opinion would be: a persuasive authority likely to indicate a trend in the development of the Committee’s jurisprudence.

Once more, however, these are important statements for advocates of same-sex partnership rights. Even where a signatory state has *not* created a right to civil partnership, members of a stable same-sex union might have a conditional right to treatment equal to that of heterosexual married couples. But Cornides is right to say that the *Joslin* concurring opinion

²⁴ My thanks to the reviewer for drawing my attention to this point.

²⁵ *Joslin v. New Zealand*, Communication No. 902/1999, 17 July 2002, CCPR/C/75/D/902/1999, para 8.3.
[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/e44ccf85efc1669ac1256c37002b96c9?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e44ccf85efc1669ac1256c37002b96c9?Opendocument)
(accessed 19 July 2009).

– even if it does represent the panel’s views - is not enough to amount to a general requirement in international human rights law to treat heterosexual and same-sex couples identically (even in the areas of law specifically considered by the Report). It suggests there is a requirement to treat them the same *in certain circumstances*, such as when there is no reasonable and objective criteria by which to distinguish.

The FRA Report itself recognises this in its discussion of *Joslin* (at pp.56-57). The problem lies, as Cornides points out, in the executive summary, which claims rather more.

Does ECHR case law strengthen the executive summary’s claim? The cases cited in the FRA Report do show a line of rapid development in both EU and some international human rights law - which Cornides underestimates. The move in ECHR interpretation is significant. The FRA Report highlights *Shackell v. UK* in 2000 and in contrast *Burden v. UK* in 2008.

In *Shackell*, the European Court of Human Rights (First Section) made a sharp ideological distinction between the two types of couple. The case dealt with a survivor of an unmarried heterosexual couple, and the important question for our purposes was whether she could use an Article 14 (non-discrimination) argument to compare herself to a widow, in other words a woman whose husband, as opposed to partner, had died. The Court however emphasised the legal differences between married and unmarried couples.²⁶ It made it clear, therefore, that Article 14 safeguards individuals from any discriminatory distinctions only when they are in relevantly similar positions, and it took marriage to be different from mere cohabitation.

It is very important then that in *Burden*, the majority clearly view marriage and civil partnership as being of a piece. At paragraph 65, they state: ‘*As with marriage, the Grand Chamber considers that the legal consequences of civil partnership under the 2004 Act, which couples expressly and deliberately decide to incur, set these types of relationship apart from other forms of cohabitation.*’ It distinguishes these from couples who ‘*choose to live together but not to become husband and wife or civil partners.*’²⁷ The two decisions of *Shackell* and *Burden* taken together make it clear that marriage and civil partnership are *prima facie* to be treated alike. *Shackell* emphasises the importance of marriage, and *Burden* emphasises that civil partnership (of the kind found in the UK) is akin to marriage and different from those who choose any unmarried relationship.

It is important also to note the wider trend in ECHR jurisprudence towards re-conceptualising the concept of marriage, as Clare McGlynn notes, pointing out that in other case law, the right to marriage has been extended to transgendered individuals.²⁸

Cornides is however correct to emphasise that in para 65, it is made clear that member states are permitted to make their own judgments about whether to create the kind of civil partnership with full rights which the UK has. The FRA Report draws on *Burden* to argue that ‘*any measures denying to same-sex couples benefits which are available to opposite-sex married couples, where marriage is not open to same-sex couples, should be treated presumptively as a form of indirect discrimination on grounds of sexual orientation:*

²⁶ *Shackell v. United Kingdom*, App. No. 45851/99, 27 April 2000, para. 2.
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=45851/99&sessionid=26625200&skin=hudoc-en> (accessed 19 July 2009).

²⁷ *Burden v. United Kingdom*, Application No.13378/05, 29 April 2008, (2008) 47 EHRR 38.

²⁸ Clare McGlynn, “Families, Partnerships and Law Reform in the European Union: Balancing Disciplinarity and Liberalisation” (2006) 69(1) *Modern Law Review* 92 at p.102.

*individuals with a homosexual orientation are particularly disadvantaged by such measures, since they have not made the choice not to marry, but are facing a legal prohibition to do so.*²⁹

Cornides is wrong to say that the cases lend no support to the findings of the FRA Report. The Report makes an important point about denial of choice. Given the direction in which EU and ECHR law have been flowing, it may be that this denial of choice will eventually be treated as discriminatory. But for now, we do not have quite enough evidence to insist that it will come about before the member states themselves have moved towards a stronger legal consensus in favour of, at the least, relevantly similar treatment. The Report makes an interesting and thought-provoking case, but in one important respect Cornides is right: it goes further than it should. We are not there yet.

Free Movement for Same-Sex Partners

Cornides next turns his blunderbuss on the section of the FRA Report dealing with free movement between states and recognition of same-sex partners. His ire is directed not at the text of the Report, but at a table on p.62. This indicates that the partner in a same-sex couple who are legally married in their country of origin must be recognised as a ‘spouse’ by the host state too. The first point to emphasise here, in response to Cornides is that the Report specifically states that the table is ‘simplified’. Second, the word ‘spouse’ is placed in inverted commas. Third, the Report offers a more detailed table later, which begins at p.69. It might have been better for the simplified table to say ‘equivalent to a spouse’, but in the light of the whole discussion in the Report, it is disingenuous for Cornides to single this out.

Cornides then claims that *‘there is a complete lack of any argument’* for this, but in fact the discussion is a long and careful analysis of the legal difficulties, which recognises that the Free Movement Directive does not expressly require all member states to recognise the same-sex partners as equivalent to spouses.

What the Report argues, instead, at pages 63-64, is that this amounts to a violation of the principle of non-discrimination and equal treatment on the grounds of sexual orientation. It might be helpful here if we consider the Preamble to the Directive itself, which states at paragraph 31:

‘Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation.’ No exception follows.³⁰

Cornides states that the FRA Report, *‘when interpreting the Directive, should have carefully weighted arguments and counter-arguments’* but he does not offer any himself. In all, this is an unfair and misleading depiction of the Report’s discussion, and it is to be hoped that

²⁹ FRA Report, note 10, 58.

³⁰ Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 29 April 2004.
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:EN:PDF> (accessed 19 July 2009).

readers will (as throughout this debate published in this journal) prefer to turn to the Report and decide for themselves.

What is more, there certainly are trends towards the kind of recognition the FRA Report recommends. A European Parliament resolution of 14 January 2009 welcomes the publication of the Homophobia Report, and states that the Parliament:

‘75. Calls on those Member States who have adopted legislation on same-sex partnerships to recognise provisions with similar effects adopted by other Member States; calls on those Member States to propose guidelines for mutual recognition of existing legislation between Member States in order to guarantee that the right of free movement within the European Union for same-sex couples applies under conditions equal to those applicable to heterosexual couples;

76. Urges the Commission to submit proposals ensuring that Member States apply the principle of mutual recognition for homosexual couples, whether they are married or living in a registered civil partnership, in particular when they are exercising their right to free movement under EU law;

*77. Calls on those Member States who have not yet done so, and in application of the principle of equality, to take legislative action to overcome the discrimination experienced by some couples on the grounds of their sexual orientation’.*³¹

It may be that mutual recognition of married same-sex couples is not so far away.

Part II of the Homophobia Report: the Sociological Analysis

We turn now to consider Cornides’ criticism of the sociological analysis which the FRA undertook. This second part³² was released after Cornides wrote his article, but this does not prevent him from presuming that its findings will be based on the flimsiest of data: *‘the second part of the Study, rather than providing factual information, will provide explanations why such information cannot be provided.’* He later asserts that the first part of the study is at best *‘hopelessly scientific’* and at worst *‘manipulative and specious’* with potentially *‘dangerous consequences’* for member states implementing its recommendations. Based on some initial remarks in the first report, he describes as *‘astounding ... the way in which statistical evidence is interpreted.’*

He goes on to make the ironic observation that *‘if the statistics do not offer any evidence for discrimination on grounds of sexual orientation being a problem frequently encountered, it must be that these statistics are at fault.’* In his view, if few data are available to show that there is a problem, then we have no reason to conclude that a problem exists.

³¹ European Parliament resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008 (2007/2145(INI)), at paras. 73-77.

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0019+0+DOC+XML+V0//EN> (accessed 19 July 2009).

The Parliament has a long history of such calls for equality for same-sex relationships: for a discussion of earlier statements, see Clare McGlynn, *Families and the European Union: Law, Politics and Pluralism* (Cambridge: Cambridge University Press, 2006), 150.

³² FRA *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States Part II: The Social Situation*.

http://www.fra.europa.eu/fraWebsite/attachments/FRA_hdgso_report-part2_en.pdf (accessed 19 July 2009).

But statistics do not have an independent existence separate from reporting and recording mechanisms. Cornides' impassioned attack is unjustified. It is perfectly reasonable for the author of the Part II Report, Morten Kjærum, to argue (a) that new equality bodies are not yet having cases reported to them and (b) that people fearful of persecution may not want to draw further attention to their sexual identity by reporting a case to an official body. Far from being an outrageous claim, this is normal in the early days of new monitoring regimes. In the absence of this, there is only limited information to draw on from bodies such as tribunals. As I will suggest in an example taken from the UK (the member state with which I am most familiar), sexual orientation claims there are not so different from those on other grounds of discrimination.

Cornides claims that '*[t]he truth is that the lack of reliable data affected only some Member States (for which no statistics were available), whereas for other Member States statistics were readily available and, no doubt, complete.*' By 'complete' he means that those which were reported and recorded. He bases this assumption of completeness on the country reports for each Member State. It has to be said that the raw data in these country reports are presented in an unhelpful fashion, but let us look at them more closely. Cornides emphasises the small number of cases which have led to a successful finding of discrimination, and points out for instance that in the UK, 1324 complaints over three years (2004/05 – 2006/2007) led to only 35 findings of discrimination. (It may help readers of Cornides' article to know that this information is not in fact in the Report itself, but can be calculated by looking at each individual country report. The one for the UK is available online and the statistics are in the annex.³³)

This sounds devastating. However, let us take the example of sexual orientation cases in the UK. The statistics cited in the UK country report come from the Tribunals Service and can be found online.³⁴ For England, Wales and Scotland (the Northern Irish data is more complex), 470 complaints were accepted in the year 2006/2007. 384 were disposed of that year. Although these will not be the same cases (some will have been accepted in previous years and some will have been still pending), the breakdown is still helpful for our purposes.

For a start, 157 of those cases, or 41%, were settled by Advisory, Conciliation and Arbitration Service (ACAS) conciliation. We do not know how many were successful for the complainant, but it is unreasonable to assume that none was. Furthermore, 21, or 5% were successful – which in fact is the highest rate of success for any of the six forms of discrimination proscribed under EU law. Are we really to assume that there is negligible race or sex discrimination because those rates of success were even lower?

Few would be so blithe as to assume that the full extent of race discrimination and xenophobia in the UK amounted that year to 102 incidents (a success rate, by the way, of only 2% of complaints).

The simple fact is that tribunal data are not much indication of the extent of any complex social problem that can manifest itself in everything from employment discrimination to

³³ http://fra.europa.eu/fraWebsite/attachments/FRA-hdgso-NR_UK.pdf (accessed 19 July 2009).

³⁴ Tribunals Service, Employment Tribunal and EAT Statistics (GB) 1 April 2006 to 31 March 2007, Ministry of Justice <http://www.employmenttribunals.gov.uk/Documents/Publications/AnnualStatistics0607.pdf> (accessed 19 July 2009).

crime to antipathetic media reporting and exclusionary government policy. Yet in a continuing attempt to minimise the significance of the Austrian cases further, Cornides inexplicably refers to the prevalence of all crimes reported and recorded in Austria, as if any meaningful comparison could be made between a selective set of civil statistics and the entire body of criminal incidents of all kinds known to the Austrian police.

One incident that will not appear in the UK's civil statistics is a particularly famous and brutal murder during that time – the homophobic battering to death of young gay man, Jody Dobrowski. The BBC report of the conviction of his repeat offending murderers stated that Jody '*was beaten so severely his own family did not recognise him and he had to be identified by his fingerprints.*' His death was unprovoked. His assailants had had a pre-meditated plan to '*kill a gay man*'.³⁵

Far from making a '*gratuitous assertion*' that there is underreporting, as Cornides claims, the Report relies on the research to be summarised in the forthcoming second part of the study. But since Cornides is so suspicious of what the FRA and equality organisations have to say about the prevalence of discrimination, perhaps we should look at what the European public have to say themselves.

The Eurobarometer survey is a study of attitudes about discrimination and equality in Europe which carries out around 1000 interviews in each of the member states of the European Union. The second one was carried out in 2008. Its methods are described in detail in the appendix to its 2008 Report.³⁶ There is a brief discussion of these in the FRA Report Part II,³⁷ but it is useful to look at the fuller discussion.

One of the questions asks '*For each of the following situations, please tell me using this scale from 1 to 10 how you would personally feel about it. On this scale, '1' means that you would be "very uncomfortable" and '10' means that you would be "totally comfortable" with this situation. ... Having a homosexual (gay man or lesbian woman) as a neighbour.*' Overall in the 27 member states, 5% chose 1, the option ranked as most uncomfortable. If one in twenty participants described themselves at the furthest extreme of discomfort about something as inconsequential as having a homosexual man or woman as a neighbour, this surely throws a keen light on lesbian, gay and bisexual individuals' reluctance to publicise their sexual orientation. And while this example by itself does not provide evidence of that such people, given the opportunity, will actively discriminate, it shifts the burden of proof to those who argue it is likely that little discrimination exists.

Another question asked '*Please tell me whether, in your opinion, in (OUR COUNTRY) there is a law which prohibits the following types of discrimination when hiring new employees ... Discrimination on the basis of sexual orientation.*' Overall in the 25 member states in which this question was asked, 30% thought there was, 45% thought there was none, and 25% did not know – the lowest level of knowledge of all the six strands of discrimination. Is it really so odd for the FRA to presume that there might be underreporting?

³⁵ BBC News, 'Men jailed for gay barman murder', 16 June 2006
<http://news.bbc.co.uk/1/hi/england/london/5087286.stm> (accessed 19 July 2009).

³⁶ European Commission, *Special Eurobarometer 296: Discrimination in the European Union: Perceptions, Experiences and Attitudes*, 2008.
http://ec.europa.eu/public_opinion/archives/ebs/ebs_296_en.pdf (accessed 19 July 2009).

³⁷ FRA Report Part II, note 30, 28-29 and 63.

There is of course an immense scholarly literature on the phenomenon of underreporting. Instead of recognising any of this, Cornides instead resorts to mocking the proposals to make it easier for people to report discrimination to equality bodies. He snorts that they would ‘*find “homophobia” wherever they search for it, in every grocery and every gooseberry bush*’. He adds that the Report’s suggestions ‘*remind one of a new kind of Holy Inquisition, vehmic court or witch-hunt rather than of a democratic society under the rule of law.*’ Really? Expulsion, torture, and execution? The Catholic Church has long left such practices behind. But it ill reflects on a supporter of that Church to use its history to make jokes about the very people who were among its victims.

Equal Treatment or Identical Treatment?

Cornides’ next broadside is directed at the FRA Report’s discussion of discrimination. He singles out a quote which criticises the lesser extent of protection for sexual orientation when compared with race and ethnic origin.³⁸ He takes this to mean a call for simple equal treatment, and he makes the reasonable point that different types of disadvantage require different solutions. He then goes on to make an extended case for not treating all identically. In his view, the argument is ‘*simplistic, maybe purposefully so*’. He concludes that ‘*[t]he simplistic reasoning that all possible grounds of discrimination must be addressed by the same measures means that we are not anymore dealing with the unequal treatment of persons in comparable situations on the grounds of a specific criterion (e.g. men and women in the labour market), but that we are now comparing everything with everything.*’ Then, having earlier made some rather disturbing oblique references to the ‘claim’ that homosexuality should not be put on an equal footing with paedophilia, he then makes the utterly bizarre suggestion that the FRA’s suggestion would prevent us from distinguishing between different types of heating oil.

This, not surprisingly, is a world away from the reasoned legal arrangement the FRA Report seeks. Again, Cornides has impuned the FRA’s motives and quoted selectively before pouring out a stream of accusations. In fact the Report calls for ‘*an equivalent degree of protection*’ (at page 12), not a simplistic model of identical treatment. The quote with which Cornides maligns the Report is as follows:

*‘Under current EU law, the prohibition of discrimination on grounds of race and ethnic origin is stronger and more extended than the prohibition of discrimination on any of the other grounds mentioned in Article 13 EC, including sexual orientation, and with the exception of sex. However, while the establishment of such a ‘hierarchy of grounds’ is not per se incompatible with international human rights law, it is in contrast with the recognition of sexual orientation as a particularly suspect ground and appears increasingly difficult to justify.’*³⁹

We should recall here that the ‘Race’ Equality Directive is immensely powerful. It extends far beyond work, into such areas of public life as social security, healthcare, education and access to and supply of goods and services, including housing.⁴⁰ The General Framework

³⁸ FRA Report, note 10, 11.

³⁹ Ibid., 11-12.

⁴⁰ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

Directive which prohibits sexual orientation discrimination (and the other five heads of discrimination) does so only in the areas of employment, occupation and vocational training.⁴¹ The FRA Report here is making the quite reasonable suggestion that the benefits of the Race Equality Directive be extended.

Just this sort of harmonisation is already in process. The European Commission in July 2008 proposed a new Equal Treatment Directive⁴² covering religion or belief, disability, age and sexual orientation, to extend into the areas covered by the Race Equality Directive (with significant exceptions rather than identical treatment throughout). This is not a ‘strange idea’, but a proposal already being consulted upon.

And whatever the result, it would be surprising if the draft Directive did not comply with the basic principle of non-discrimination which allows for exceptions where these are reasonably and objectively justified: in other words, a situation-sensitive approach rather than blanket provision. Articles 2 and 3 of the draft Directive deal with the concept of discrimination and exceptions, and the Explanatory Memorandum for the draft Directive states: *‘there will be differences of treatment in the areas mentioned in Article 3 that should be allowed. However, as exceptions to the general principle of equality should be narrowly drawn, the double test of a justified aim and proportionate way of reaching it (i.e. in the least discriminatory way possible) is required.’*⁴³

Demanding a double test may be, but it is a space within which opponents of any particular manifestation of equal treatment can make their case.

‘Homophobia’ as the term of choice

Cornides also criticises the use of the word ‘homophobia’, noting that there is no definition in the Report itself. This is true: a definition only appears in the Part II Report. It is effectively identical to the one he adopts from the European Parliament.⁴⁴ The Part II definition states: *‘Homophobia is the irrational fear of and aversion to homosexuality and to lesbian, gay and bisexual (LGB) people based on prejudice.’*⁴⁵ It also goes on to state that a “strictly accurate list of the issues covered in this report would be “homophobia, transphobia, and discrimination on grounds of sexual orientation, gender identity and gender expression” (all of which are defined on page 6).

http://europa.eu/eur-lex/pri/en/oj/dat/2000/l_180/l_18020000719en00220026.pdf (accessed 19 July 2009).

⁴¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:303:0016:0022:EN:PDF> (accessed 19 July 2009).

⁴² Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426 final, 2 July 2008

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0426:FIN:EN:PDF> (accessed 19 July 2009).

⁴³ Equality Directive Proposal, note 40, 7-8.

⁴⁴ <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2006-0018&language=EN> (accessed 19 July 2009).

⁴⁵ Part II Report, note 30, 25.

One need not query only the use of term ‘homophobia’. Sociologist Matthew Waites has powerfully pointed out that even the apparently innocuous term ‘sexual orientation’ tends to lead us to think of a fixed sexuality that is a core part of a person’s identity (pushing aside those who have discontinuous sexual attractions, or experience bisexuality, or who define themselves as asexual or for whom sexual relationships are unimportant). It also leads us to think of fixed genders of male and female (excluding those, for instance in cultures where concepts of several genders are seen as ‘normal’). All this may seem arcane, but Waites gives the example of Egypt, where an activist argues that the focus of law and political suppression is on conduct, not identity – what people do, not what they ‘are’.⁴⁶ Still, as with the term homophobia, we begin where we begin, and human rights campaigning on sexual orientation began with traditional (in a ‘heteronormative’ terrain) concepts of gender and of family in domestic and international law.

So what, then, is problematic about describing the phenomenon as ‘homophobia’? Cornides makes the point that the essence of the term is ‘irrational fear’, which links it to a psychological disorder rather than to an ‘immoral ideology’ such as the ones shared by racists or anti-Semites.⁴⁷ Should we not provide treatment for those who suffer an irrational fear, he says, rather than regard it as a matter for criminal sanction? It is true that the word is not particularly helpful today: the reason that it came about, however, was that it was a reaction to the social circumstances of the time. As Cornides notes, it was popularised (not coined) by activist George Weinberg,⁴⁸ at a time when in fact it was homosexuality itself which was seen as a psychiatric disorder. The year after Weinberg published his book, the American Psychiatric Association agreed to remove homosexuality from the DSM (Diagnostic and Statistical Manual of Mental Disorders),⁴⁹ the ‘bible’ of psychiatry. It is important to understand this social history to have an appreciation of how the term came about. It is not the best choice of term today, but it is rooted in a time, not so very long ago, when to have a same-sex orientation was viewed as a psychiatric disorder.

The word is unhelpful for another reason, though: it focuses on individual pathological thinking, rather than systematic social processes of discrimination, or on social discourses which influence the thinking of individuals. So for reasons other than Cornides’ own, I agree with him that a better term could be chosen.

Nonetheless, the term is the chosen appellation for now. Cornides’ next objection is what he sees as a failure to distinguish between an aversion to people of a same-sex orientation and an aversion to homosexuality itself; ‘[w]hy would it be inconceivable or illegitimate to repudiate the practice of homosexuality while at the same time fully respecting homosexual people and treating them with dignity?’ If we do not distinguish between the two, he maintains, we condemn all those who have a moral opposition, so that they are seen as either irrational or evil in the same way that racists or anti-Semites are evil.

⁴⁶ Matthew Waites, ‘Critique of ‘sexual orientation’ and ‘gender identity’ in human rights discourse: global queer politics beyond the Yogyakarta Principles’ *Contemporary Politics* 15, no. 1 (2009): 137.

⁴⁷ We use the word ‘Semite’ here as Cornides does, in its modern political connotation as referring to those of Jewish faith or origin, rather than its traditional sense, defined in the Oxford English Dictionary as ‘A person belonging to the race of mankind which includes most of the peoples mentioned in Gen. x. as descended from Shem son of Noah, as the Hebrews, Arabs, Assyrians, and Aramæans. Also, a person speaking a Semitic language as his native tongue.’

⁴⁸ George Weinberg, *Society and the Healthy Homosexual* (New York: St. Martin's Press, 1972).

⁴⁹ Gregory M. Herek, ‘Beyond “Homophobia”: Thinking About Sexual Prejudice and Stigma in the Twenty-First Century’, *Sexuality Research and Social Policy* 1, no.2 (2004): 6.

One answer to this is that the FRA and the European Parliament definition expressly condemn such attitudes *where they are based on prejudice*. It is one thing to express a rational objection; another to have a fear or aversion based on prejudice. For an example of EC legal protection of a limited right to object and to act on that objection, we need only consider the exemptions permitted in the Equal Treatment Directive, such as the ‘good faith’ exception in Art.4(1) to uphold a religious ethos, or the protection of the rights and freedoms of others in Art. 2(5).

Nature, Family and Sexuality

Cornides’ criticism runs deeper, though. Without a moral footing that rests in the ‘biological fact that the primary purposes of sexuality is procreation’, he argues, there is nothing on which to base a distinction between ‘normal’ and ‘disordered’ sexual orientations such as paedophilia. There is however a familiar standard, which although it may not appeal to Cornides, is central to ECHR law, and was enunciated by the European Court of Human Rights in the sexual orientation discrimination case of *Smith and Grady v. UK*.⁵⁰

‘87. An interference will be considered “necessary in a democratic society” for a legitimate aim if it answers a pressing social need and, in particular, is proportionate to the legitimate aim pursued. (See Norris v. Ireland (A/142): (1991) 13 E.H.R.R. 186, para. 41). Given the matters at issue in the present case, the Court would underline the link between the notion of “necessity” and that of a “democratic society”, the hallmarks of the latter including pluralism, tolerance and broadmindedness. (See Vereinigung Demokratischer Soldatinnen Österreichs and Gubi v. Austria (A/302): (1995) 20 E.H.R.R. 55, para. 36, and Dudgeon v. United Kingdom, loc. cit., para. 53.)

88. The Court recognises that it is for the national authorities to make the initial assessment of necessity, though the final evaluation as to whether the reasons cited for the interference are relevant and sufficient is one for this Court. A margin of appreciation is left open to Contracting States in the context of this assessment, which varies according to the nature of the activities restricted and of the aims pursued by the restrictions. (See Dudgeon v. United Kingdom, loc. cit., paras 52 and 59.)

89. Accordingly, when the relevant restrictions concern “a most intimate part of an individual’s private life”, there must exist “particularly serious reasons” before such interferences can satisfy the requirements of Article 8(2) of the Convention. (ibid. , para. 52.)’

The test for the Court then to distinguish between ‘normal’ and ‘disordered’ sexuality is one which relies on some of the most fundamental principles of ECHR law. It asks whether allowing discrimination against those who express a particular sexual orientation is necessary in a democratic society for a legitimate aim. It also asks whether that discrimination answers a pressing social need and is proportionate to pursuing that legitimate aim. In deciding this, the Court must take account of pluralism, tolerance and broadmindedness, and must divine particularly serious reasons before permitting an interference in a most intimate part of an individual’s private life.

⁵⁰ *Smith and Grady v. United Kingdom*, Application Nos 33985/96 and 33986/96, (2000) 29 EHRR 493, 529-30. (It dealt with exclusion from the armed forces on grounds of national security.)

This seems a reasonable way of distinguishing between same-sex relations between consenting adults and paedophilia. Practising lesbian, gay and bisexual adults, although they may shock or offend others, do not directly harm particularly vulnerable sections of the population. Practising paedophiles, who select those too young to consent, cause direct harm to their highly vulnerable victims.

Cornides nonetheless takes the view that a heterosexual marriage cannot be comparable to a stable lesbian or gay union. He bases this opinion on the claim that the heterosexual couple *'is by nature able to procreate'* and *'found a family'*, and thus *'provides an important contribution to ensuring the future of society'*, which also requires the couple to make *'considerable economic sacrifices'* for which they should be given support. The fact that same-sex couples are capable of enduring love is, he argues, *'of no relevance'*. Further, if a *'family'* was defined in any other way than one in which the parents are biologically capable of producing children, this would turn it into an *'artificial construct, removed from biological reality'*, apparently open to a legislator's arbitrary whim.

Indeed, he fears, this *'unavoidably'* reminds him of the novel *Brave New World*, in which *'all women are sterile, there is no marriage and no family any more, and having sex is merely a banal leisure-time amusement, devoid of any other purpose than experiencing "pleasure", and without the love and responsibility that naturally accompany the sexual act'*. A nightmare! I can only wish the deranged puppeteers of Cornides' fantasy FRA well in their attempt to win over the European public.

I quote this at length because (omitting the *Brave New World* fantasy, I hope), Cornides sees these aims as *'clearly implicit in the expert group's findings'*. Considering that the entire legal discussion he has attacked is about a legally-recognised loving relationship between two people who wish to be together for life, this is quite an assault. I now address his claims.

First, even if one accepts that the purpose of marriage is reproduction, which carries an economic cost, it would be entirely possible to frame a legislative regime in which both heterosexual and same-sex couples could marry, but in which only those caring for children would be entitled to social assistance. This disposes of the argument that marriage should only be available for those who raise children. There must therefore be some other ground on which to deny same-sex couples the right to this recognition.

The objection then must be that same-sex stable relationships are less moral than heterosexual stable relationships, and not deserving of the status of marriage. Cornides does not sufficiently acknowledge the value choices he has made. He asserts his own value choices to be a communal tradition, and is entitled to do so, because they represent one recognised and established European tradition. But among many, it is only one. What he would like is not just less state recognition of same-sex unions, but less lesbian, gay and bisexual activity of any kind. But he has yet to offer a convincing reason to those who engage in it that they shouldn't.

The truth is that there can be no resolution to this argument capable of satisfying all parties to the debate. There can only be better and worse contributions. A better contribution recognises that there are a range of views held reasonably by different people who are otherwise regarded as morally upstanding individuals by current prevalent Western standards (we cannot be absolutely guided by past societies, and cannot predict what moral standards a future society might respect).

Accepting that no final answer can be reached either by logic or by faith (because there is no consensus on faith), we can only aim for the best discussion we can. Challenging Cornides' perspective, I will argue that a same-sex relationship between consenting adults is capable of being as morally good as its heterosexual counterpart.

I have explained that marital economics could privilege childrearing, so that reproduction alone cannot be the reason to exclude same-sex couples from *marriage*. The next question Cornides' attack raises is why, as he claims, the purpose of *sex* must be reproduction. Cornides bases his claim on nature. But if we take biological propensities as any measure of this, then Cornides must contend with the findings of animal biologists, who argue that same-sex sexual behaviour is found persistently not just in human groups, but throughout the animal kingdom. It is not just that Bruno Bagemihl's famous survey records same-sex relations in over 400 different species⁵¹. '*Same-sex interactions occur in an enormous variety of taxonomic groups*', observe biologists Nathan W. Bailey and Marlene Zuk, and more than this, '*[s]ame-sex sexual behavior is prevalent enough to influence the social dynamics of wild populations in some species*' (albeit not others).⁵² The fact is that same-sex sexual behaviour is 'natural' for a great many animal species, including our own. It may be either morally good or morally bad in our estimation, but it is part of everyday 'nature'.

If instead we were to argue that 'nature' is that which is self-evidently morally good, rather than biologically determined, then we would have to show what quality of moral good a committed same-sex relationship self-evidently lacks. Here we should take account of the classic comment by philosopher Thomas Nagel, who argued that 'unnatural' sexual inclinations are those in which the participants lack full reciprocity and awareness of the other. He therefore saw no reason to view same-sex relations as unnatural.⁵³

If we were to argue that sex is only to be valued and respected if it might produce children, then it is not clear why we should not condemn the sexual activity of post-menopausal women, or of individuals who are knowingly sterile. If instead they adopt children, what differentiates them from a same-sex couple who do the same? Cornides could cite philosopher John Finnis who tried to defend this distinction (and Andrew Koppelman who maintains that that the differentiation cannot work⁵⁴), but he does not. He merely claims that heterosexual parenting is what '*nature foresees*' for children, but nature (or plain old evolution) seems to have more complex designs.

And what about a marriage between fully capable heterosexual individuals who decide to use a calendar-based method to prevent conception because they intend never to have children? Without an objective source of predisposition emanating from research in human or animal biology, and without a compelling moral argument that demonstrates a self-evident moral lack in same-sex loving relationships, Cornides can appeal only to social consensus about moral good. And it is highly unlikely that there remains a social consensus in modern-day Europe that sex is only morally good when it takes place for the purpose of reproduction, and

⁵¹ Bruno Bagemihl *Biological Exuberance* (New York: St Martin's Press, 1999).

⁵² Nathan W Bailey and Marlene Zuk, 'Same-sex sexual behavior and Evolution' *Trends in Ecology & Evolution*, In Press, Corrected Proof, available online 17 June 2009. See also Marlene Zuk, 'Family values in black and white' *Nature*, 439, no. 7079 (2006): 917.

⁵³ Thomas Nagel, 'Sexual Perversion', *Journal of Philosophy* 66, no. 1 (1969): 5.

⁵⁴ It has been an ongoing debate, but in particular see their respective chapters in Alan Soble and Nicholas Power, *The Philosophy of Sex: Contemporary Readings* (Lanham: Rowman & Littlefield Publishers, 5th edition, 2007).

that marriage is only valuable when it is intended to lead to childrearing. There is not a majority in favour of same-sex marriage, but there are probably far fewer who favour such a restrictive view of the morality of sex. He is then left with tradition, and one can construct any number of knock-down arguments based on traditions we are today very glad to have left behind.

If biology does not prove the point; if capability to consent and to love does not prove the point; if social consensus does not prove the point and if argument from tradition does not either, what are we left with?

It can only be religious conviction. And while Cornides is very much entitled to hold a religious conviction and to have it respected if it is cogent, serious, cohesive and respectful of human dignity, his argument that his conclusions therefrom are ‘natural’, logical’ or ‘fundamental’ has no persuasive power for those who do not share his religious beliefs.

Beyond that, there are only suppositions. Cornides supposes that same-sex parenting of adopted children is on balance likely to prove in the long term to be harmful, but can only *demonstrate* at best that it is somewhat novel (or rather, atypical, since it is hardly new to human societies, however rare it may have been in the past). Likewise, he supposes that extending the conception of ‘family’ to include stable same-sex unions (those being the focus, we should remember, of the FRA Report he targets) will lead down a slippery slope to loveless, destructive individualism. He can suppose it all he likes, but he *demonstrates* it only by citing a novel.

We are left then, not with certainty, but with fundamental disagreement. There is no trump card argument which explains why procreation and parenthood should remain the *sine qua non* of marriage in a changing world. Without such a trump card, why not return to the fundamental, the most basic principles of human rights? Why not respect the requests of all those consenting couples who wish to love and to marry?

What is most extraordinary – and revealing – about Cornides’ critique is that he is sceptical about the possibility that lesbian, gay and bisexual individuals are capable of love. Where would be the dividing line here? Are people who are mostly heterosexual but with bisexual leanings capable of profound love? Is someone capable of love when they are in a heterosexual relationship, but when later in life they happen to fall in love with someone of their own sex, are they no longer emotionally competent?

Cornides concludes by attacking the ‘*preposterous*’ invocation of human rights for a ‘*self-serving*’ agenda. Those of us, however, who see things differently, who are painfully aware of the terrible and brutal oppression of sexual minorities over thousands of years, believe that equal treatment serves the interests of us all. And I am glad of the opportunity to debate this. The true witch-hunt is not for Cornides’ imagined petty victims, but for another group who still today face torture and death. There are many countries in the world in which such a debate is impossible.