

DISCUSSION PAPER

A CONTEMPORARY VIEW OF 'FAMILY' IN INTERNATIONAL HUMAN RIGHTS LAW AND IMPLICATIONS FOR THE SUSTAINABLE DEVELOPMENT GOALS (SDGs)



No. 21, December 2017

MAGDALENA SEPÚLVEDA CARMONA
PROGRESS OF THE WORLD'S WOMEN 2018

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TABLE OF CONTENTS

SUMMARY/RÉSUMÉ/RESUMEN	I
------------------------	---

I. INTRODUCTION	1
-----------------	---

2. A CONTEMPORARY INTERPRETATION OF 'FAMILY' UNDER INTERNATIONAL HUMAN RIGHTS LAW	3
---	---

2.1 General overview of the rules of interpretation of international treaties	4
---	---

2.2 The specific object and purpose of human rights treaties	4
--	---

2.3 Concluding observations	7
-----------------------------	---

3. THE CONCEPT OF 'FAMILY' AND CONTEMPORARY INTERPRETATION OF KEY HUMAN RIGHTS PRINCIPLES	8
---	---

3.1 'Family' and the principle of equality and non-discrimination	8
---	---

3.2 'Family' and the protection of the best interests of the child	11
--	----

3.3 'Family' and the right to live a life free of violence	13
--	----

3.4 Concluding observations	15
-----------------------------	----

4. THE UNDERSTANDING OF 'FAMILY' AMONG HUMAN RIGHTS MONITORING BODIES	16
---	----

4.1 Recognizing the existence of various forms of families	16
--	----

4.2 Recognizing the relevance of other norms and principles to the concept of family	18
--	----

4.3 Concluding observations	19
-----------------------------	----

5. STATES' OBLIGATIONS REGARDING THE FAMILY	21
---	----

5.1 A proposed typology of relevant States' duties as included in human rights treaties	21
---	----

5.2 The indivisibility and interdependence of all rights	24
--	----

5.3 An evolving yet insufficient legal framework	24
--	----

6. IMPLEMENTATION OF STATE OBLIGATIONS PERTAINING TO FAMILIES AT THE DOMESTIC LEVEL	26
---	----

6.1 Cash transfers programmes	27
-------------------------------	----

6.2 Unpaid care work policies	30
-------------------------------	----

7. FINAL CONCLUSIONS	33
----------------------	----

BIBLIOGRAPHY	35
--------------	----

SUMMARY

The paper examines the interplay between the obligations related to the ‘family’ that States have assumed through various human rights treaties adopted over the decades, and the recent commitments undertaken under the 2030 Agenda for Sustainable Development.

International human rights instruments recognize the ‘family’ as the fundamental unit of society and include a variety of rights and obligations pertaining to the family (i.e. obligations not to interfere with the family life; obligations to ensure equality rights within the family and obligations to protect and assist the family). These obligations must be respected in all laws, policies and interventions pertaining to the family.

Under the 2030 Agenda, States committed to achieving sustainable development in its three dimensions – economic, social and environmental – in a balanced and integrated manner. Through the 17 Sustainable Development Goals (SDGs) and its 169 targets, the 2030 Agenda seeks to realize the human rights of all and to achieve gender equality and the empowerment of all women and girls (Preamble, paras. 19-20). Moreover, under this Agenda, world leaders committed to promote cohesive families (para. 25).

Given this context, it is essential to understand the concept of ‘family’ included in these instruments. If families have changed over time, what is a ‘family’ today? How do critical human rights principles such as equality and non-discrimination, the best interests of the child and the right to live a life free of violence shape the understanding of family? How should these human rights obligations guide the adoption of public policies that have an impact on the family? How should policies and programs ensure respect of the rights of all families? How can they be tailored to the diversity of families in a country?

This paper explores these critical questions. To this end, it is divided into three sections. The first section (chapters 2, 3 and 4), examines the concept of family under international human rights law. It focuses on the rules of interpretation of international human rights treaties. It shows that according to the rules of treaty interpretation, the concept of family should be interpreted in light of present-day conditions, in a manner that provides effective protection to all its members and in compliance with other critical human rights principles. It also shows how these rules of interpretation have been applied by human rights monitoring bodies on issues related to families.

In the second section (chapters 5 and 6), using a ‘contemporary’ understanding of the concept of family, the study briefly reviews the rights related to the family included in human rights treaties. It then provides a critique of two family-oriented policies for poverty reduction which have received prominent attention in the SDGs: cash transfer programs and unpaid care policies. The study reviews the extent to which the design and implementation of these policies take into account the contemporary interpretation of rights related to the family included in human rights treaties and the commitment to achieve gender equality and empowerment of all women and girls as required by the 2030 Agenda.

The third section (chapter 6), provides some concluding observations and identifies the measures that policy-makers should take to ensure that family-oriented policies comply with a contemporary interpretation of the rights and obligations pertaining to the family.

RÉSUMÉ

Ce document examine la relation entre les obligations liées à la famille que les États ont contractées par le biais des divers traités relatifs aux droits de l'homme adoptés au fil des décennies et les récents engagements souscrits en vertu du Programme de développement durable à l'horizon 2030.

Les instruments internationaux relatifs aux droits de l'homme considèrent que la famille est l'élément fondamental de la société ; ils englobent une multitude de droits et d'obligations en lien avec la famille (l'obligation de ne pas s'immiscer dans la vie familiale ; l'obligation d'exercer un droit à l'égalité au sein de la famille et l'obligation de protéger et d'aider la famille). Ces obligations doivent être respectées dans toutes les lois, politiques et interventions en lien avec la famille.

Dans le cadre du Programme de développement durable à l'horizon 2030, les États se sont engagés à réaliser le développement durable dans ses trois dimensions (économique, sociale et environnementale) d'une manière équilibrée et intégrée. Grâce aux 17 objectifs de développement durable (ODD) et à ses 169 cibles, le Programme de développement durable à l'horizon 2030 s'emploie à réaliser les droits de l'homme de tous et à parvenir à l'égalité des sexes et à l'autonomisation de toutes les femmes et filles (préambule, paras 19-20). En outre, dans le cadre de ce programme, les dirigeants mondiaux se sont engagés à promouvoir la cohésion des familles (para. 25).

Compte tenu de ce contexte, il est essentiel d'appréhender le concept de « famille » tel qu'il s'incarne dans ces instruments. Si les familles ont changé au fil du temps, qu'est-ce-qu'une « famille » de nos jours ? Comment des principes cruciaux relatifs aux droits de l'homme tels que l'égalité et la non-discrimination, les meilleurs intérêts de l'enfant et le droit à une vie exempte de violences façonnent-ils la compréhension de la famille ? Comment ces obligations liées aux droits de l'homme doivent-ils guider l'adoption de politiques publiques qui ont un impact sur la famille ? Comment les politiques et programmes doivent-ils

assurer le respect des droits de toutes les familles ? Comment peuvent-elles être adaptées à la diversité des familles dans un pays ?

Ce document examine ces questions fondamentales. À cette fin, il est divisé en trois sections. La première section (chapitres 2, 3 et 4) examine le concept de la famille en vertu du droit international relatif aux droits de l'homme. Il se concentre sur les règles d'interprétation des traités internationaux relatifs aux droits de l'homme. Il montre que sur la base des règles d'interprétation des traités, le concept de la famille doit être interprété à la lumière des circonstances actuelles d'une manière qui assure une protection efficace à tous ses membres et dans le respect d'autres principes cruciaux relatifs aux droits de l'homme. Il montre également que ces règles d'interprétation ont été appliquées par des organes de surveillance des droits de l'homme concernant des questions en lien avec la famille.

Dans la deuxième section (chapitres 5 et 6), sur la base d'une acception « contemporaine » du concept de la famille, l'étude examine brièvement les droits liés à la famille tels qu'ils figurent dans les traités relatifs aux droits de l'homme. Elle présente ensuite une critique de deux politiques orientées vers la famille aux fins de la réduction de la pauvreté qui ont suscité beaucoup d'attention dans les ODD : les programmes de transferts de fonds et les politiques en matière de soins non rémunérés. Cette étude examine combien la conception et la mise en œuvre de ces politiques tiennent compte de l'interprétation contemporaine des droits en lien avec la famille tels que cités dans les traités relatifs aux droits de l'homme et de l'engagement à parvenir à l'égalité des sexes et à l'autonomisation de toutes les femmes et filles telles que prévues par le Programme de 2030.

La troisième section (chapitre 6) présente certaines observations finales et recense les mesures que les décideurs politiques doivent prendre pour veiller à ce que les politiques orientées vers la famille soient conformes à une interprétation contemporaine des droits et obligations liées à la famille.

RESUMEN

Este artículo examina la interacción entre las obligaciones relacionadas con la “familia” que los Estados han asumido en virtud de diversos tratados de derechos humanos adoptados con el paso de los años y los recientes compromisos contraídos conforme a la Agenda 2030 para el Desarrollo Sostenible.

Los instrumentos internacionales de derechos humanos reconocen a la “familia” como la unidad fundamental de la sociedad e incluyen toda una serie de derechos y obligaciones al respecto, a saber, obligaciones de no interferir en la vida familiar, obligaciones de garantizar la igualdad de derechos en el seno de la familia y obligaciones de proteger y asistir a la familia. Dichas obligaciones deben ser respetadas en todas las leyes, políticas e intervenciones sobre el tema.

Conforme a la Agenda 2030, los Estados se comprometieron a alcanzar de forma equilibrada e integrada el desarrollo sostenible en sus tres dimensiones: económica, social y ambiental. Mediante los 17 Objetivos de Desarrollo Sostenible (ODS) y sus 169 metas, la Agenda 2030 pretende que se materialicen los derechos humanos de todas las personas y que se logre la igualdad de género y el empoderamiento de todas las mujeres y las niñas (Preámbulo, párrs. 19-20). Además, según esta Agenda, los líderes mundiales se comprometieron a favorecer la cohesión familiar (párr. 25).

A la luz de este contexto, es esencial comprender el concepto de “familia” incluido en estos instrumentos. Habida cuenta de que las familias han ido cambiando con el paso del tiempo, ¿qué se considera “familia” hoy en día? ¿Cómo definen el concepto de familia los principios fundamentales de derechos humanos como la igualdad y la no discriminación, el interés superior del niño y la niña y el derecho a vivir una vida libre de violencia? ¿Cómo deberían esas obligaciones de derechos humanos guiar la adopción de las políticas públicas que repercuten en la familia? ¿Cómo deberían garantizar las políticas y los programas el respeto de los derechos de

todas las familias? ¿Cómo se pueden adaptar a la diversidad de familias de un país?

Este artículo aborda estas importantes preguntas y con esa finalidad se divide en tres secciones. La primera sección (capítulos 2, 3 y 4) analiza el concepto de familia con arreglo al derecho internacional de derechos humanos. Se centra en las reglas de interpretación de los tratados internacionales de derechos humanos. Pone de manifiesto que, conforme a esas reglas, el concepto de familia debería definirse teniendo en cuenta las condiciones actuales, de tal forma que proporcione protección eficaz a todos sus miembros y en cumplimiento de otros principios fundamentales de derechos humanos. También expone cómo han aplicado los órganos encargados de vigilar el cumplimiento de los derechos humanos estas reglas de interpretación con respecto a los problemas relacionados con las familias.

En la segunda sección (capítulos 5 y 6), partiendo de una definición “contemporánea” del concepto de familia, el estudio analiza sucintamente los derechos relacionados que se recogen en los tratados de derechos humanos. A continuación, presenta una crítica de dos políticas para la reducción de la pobreza orientadas a las familias que han recibido una gran atención en los ODS: los programas de transferencias de efectivo y las políticas relativas a los cuidados no remunerados. El estudio analiza en qué medida el diseño y la aplicación de estas políticas tienen en cuenta la interpretación contemporánea de los derechos relacionados con la familia incluidos en los tratados de derechos humanos y el compromiso con la igualdad de género y el empoderamiento de todas las mujeres y las niñas tal como exige la Agenda 2030.

La tercera sección (capítulo 6) ofrece algunas observaciones finales e identifica las medidas que deberían tomar las personas encargadas de la adopción de políticas para garantizar que aquellas orientadas a las familias cumplan la interpretación contemporánea de los derechos y las obligaciones familiares.

ACRONYMS AND ABBREVIATIONS

ACHR	American Convention on Human Rights
CCT	conditional cash transfer programme
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
LGBTI	lesbian, gay, bisexual, transgender and intersex
SDG	Sustainable Development Goal
UN CEDAW	United Nations Committee on the Elimination of Discrimination against Women Committee
UN CRC Committee	United Nations Committee on the Rights of the Child
UN CESCR	United Nations Committee on Economic, Social and Cultural Rights
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women
VCLT	Vienna Convention on the Law of Treaties

1.

INTRODUCTION

On 1 January 2016, the world officially began the implementation of the 2030 Agenda for Sustainable Development after its adoption by 193 countries in September 2015.¹ With its 17 Sustainable Development Goals (SDGs), the Agenda covers a comprehensive set of issues across the three dimensions of sustainable development: economic, social and environmental.

In line with a long-standing consensus on the role of the family in development,² the 2030 Agenda includes the commitment of States to promote cohesive families as part of an integrated and comprehensive approach to sustainable development.³ This commitment follows from the fact that as the fundamental unit in society, the family has social, legal, reproductive and economic dimensions that are closely linked to development. The family is often a basic unit of production and the prime mechanism for coping with social, economic and political adversity. It is also the basis for care-giving relations between generations.⁴

Yet, in most countries of the world, a range of factors are changing family socio-economic support systems, often increasing the vulnerability of families to poverty. Such factors include⁵ changes in family structure, increased migration, demographic changes (e.g., population ageing), changes in marriage patterns (e.g., rising rates of divorce)⁶ and diseases (e.g., HIV

and AIDS and Ebola).⁷ The situation of families has also become more pressing in the face of contextual variables such as increasing and recurrent natural disasters, armed conflict, financial crises and structural unemployment.⁸

The commitments towards families under the 2030 Agenda are thus now more important than ever. Yet, commitments to promote the cohesion of families cannot be seen in isolation from two critical elements of the SDGs: the realization of human rights of all; and the achievement of gender equality and empowerment of all women and girls (2030 Agenda, preamble).⁹ In fact under the SDGs, States explicitly commit to ensuring universal access to family planning (SDG 3.7) and the promotion of shared responsibility within the family (SDG 5.4).

This paper examines the interplay between the obligations of States regarding the rights related to the family in human rights treaties and their commitments under the SDGs. It seeks to emphasize that the way in which family relations are regulated and family-related policies are designed and implemented within a country is key to ensuring the contribution

1. United Nations General Assembly 2015.

2. For more than 40 decades, the UN General Assembly has been recognizing the role of families in development in a wide range of resolutions, from the Declaration on Social Progress and Development (1969) to the World Summit for Social Development (1995). For a comprehensive description of the evolution of this international policy framework, see United Nations Human Rights Council 2016, paras. 11–17.

3. United Nations General Assembly 2015, para 25.

4. Mokomane 2012. See also African Union 2004.

5. See background papers for the expert group meeting on 'Family Policy Development: Achievements and Challenges', held in New York in May 2015, which focused on changing families, regional trends and policy implications. Accessed 25 August 2017. <https://www.un.org/development/desa/family/publications/major-trends-affecting-families.html>

6. UN Women 2015a.

7. The impact of diseases is felt particularly in African countries. See, e.g., Mokomane 2012 and undg Western and Central Africa 2015.

8. See, e.g., Bonilla et al. 2003.

9. According to the preamble, the 17 SDGs and its 169 targets "seek to realize the human rights of all and to achieve gender equality and the empowerment of all women and girls". Moreover, "gender equality and women's empowerment" is recognized as a "crucial contribution to progress across all the goals and targets" (United Nations General Assembly 2015, para. 20) and is included as both a stand-alone goal (SDG 5) and a cross-cutting theme (e.g., gender specific targets are included in 11 other goals).

of all families to development as well as to women's economic empowerment.

The underlying idea of this paper is that States have voluntarily assumed a wide range of human rights obligations related to the 'family' that must be respected in all laws, policies and interventions pertaining to the family.

The paper is divided into three parts. The first part (sections 2, 3 and 4) examines the concept of 'the family' under international human rights law. While this concept is included in several human rights instruments, a critical question is how it should be interpreted today. These sections focus on the rules of interpretation of international human rights treaties. They show that according to these rules, the concept of family should be interpreted in light of present day conditions, in a manner that provides effective protection to all its members and in compliance with other critical human rights principles such as equality and non-discrimination, the best interests of the child and the right to live a life without violence. They also show

how these rules of interpretation have been greatly confirmed by human rights monitoring bodies.

In the second part (sections 5 and 6), using a 'contemporary' understanding of the concept of family, the paper briefly reviews the rights related to the family included in human rights treaties. It then gives a critique of two family-oriented policies for poverty reduction that have received prominent attention in the SDGs: cash transfer programmes and unpaid care policies. The study reviews the extent to which the design and implementation of these policies take into account the contemporary interpretation of rights related to the family included in human rights treaties and the commitment to achieve gender equality and empowerment of all women and girls as required by the 2030 Agenda.

The third part (section 6) provides some concluding observations and identifies the measures that policymakers should take to ensure that family-oriented policies comply with a contemporary interpretation of the rights and obligations pertaining to the family.

2.

A CONTEMPORARY INTERPRETATION OF THE CONCEPT OF ‘FAMILY’ UNDER INTERNATIONAL HUMAN RIGHTS LAW

The family is recognized as a fundamental institution in society, and as such international human rights instruments establish obligations for States to protect and assist it. Examples include the Universal Declaration of Human Rights (UDHR, Art. 16(3)); the International Covenant on Economic, Social and Cultural Rights (ICESCR, e.g., art. 10); the International Covenant on Civil and Political Rights (ICCPR, art. 23(1)); the Convention on the Rights of the Child (CRC, e.g., preamble); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW, e.g., art. 44(1)); and the Convention on the Rights of Persons with Disabilities (CRPD, e.g., preamble). The recognition of the family as the foundation of society requiring protection and assistance is also included in regional human rights instruments such as the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador, e.g., art. 15), and the African Charter on Human and Peoples’ Rights (art. 18).¹⁰

How is the concept of ‘family’ included in these instruments to be interpreted? Is the concept the same as that understood by the drafters? If families have changed over time, what is a ‘family’ today? How should other critical human rights principles such as equality and non-discrimination shape the understanding of family?

This section focuses on the general rules of interpretation of treaties and the specific rules applicable to human rights treaties.” Section 3 then examines the way in which other critical human rights principles should be considered when interpreting the concept of family in human rights treaties.

10. The African Charter differs from other human rights instruments because it not only enshrines the duty of States to protect and assist the family (art. 18) but also includes several ‘duties’ for individuals, such as the duty towards his/her family (art. 27), the duty to treat others without discrimination and to maintain relations of mutual respect and tolerance and the duty “to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need” (art. 28).

11. This section is based on Sepúlveda 2003, Chapter III.

2.1

General overview of the rules of interpretation of international treaties

To understand how human rights treaties are to be interpreted, a brief overview of the general rules for treaty interpretation is required. These rules are contained in articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT).¹² It is not the intention of this paper to look at these rules in detail but rather to outline those aspects relevant to the present discussion.¹³

The principal provision for treaty interpretation is article 31(1) VCLT.¹⁴ This provision contains various rules of interpretation. Yet, the interpretation process is a single combined operation and therefore the various means of interpretation of this provision interact.¹⁵

After stressing the importance of the principle of good faith,¹⁶ this provision states that treaties should be interpreted in accordance with their ordinary meaning (literal interpretation). However, the literal interpretation is not sufficient. It is also necessary to consider the context in which the treaty is applied. In other words, interpretation requires a systematic view

of the whole treaty (systematic interpretation),¹⁷ as well as a consideration of the object and purpose of the treaty (teleological interpretation).

As explained in this section, the intentions of the drafters, as included in the *travaux préparatoires* (preparatory work), are only a supplementary means of interpretation¹⁸ and are particularly problematic in the interpretation of human rights treaties.¹⁹ The *travaux préparatoires* can be ambiguous and confusing and may mislead an interpreter as to the drafters' intentions (e.g., they may include obsolete negotiating positions or fail to include crucial deliberations that took place in private).²⁰

12. Adopted on 23 May 1969; entered into force on 27 January 1980.

13. For a comprehensive study of the rules of interpretation of the VCLT and its application to human rights treaties, see, among others, Harris 1998, pp. 810–22; Brownlie 1998, pp. 631–38; Bernhardt 1984; Bernhardt 1988; van Dijk and van Hoof 1998, pp. 71–95; Newman and Weissbrodt 1996, pp. 423 et seq.; Steiner and Alston 2000, pp. 109–10; Mahoney 1990; Golsong 1993; Prebensen 2000; Bos 1980; Schwarzenberger 1968; van Dijk 1995; Hassan 1970; and Falk 1968.

14. Art. 31(1) VCLT: 'General rule of interpretation': "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

15. Brownlie 1998, p. 633.

16. The principle of good faith is contained in article 26 VCLT. This provision refers to the basic principle of *pacta sunt servanda*, which means that treaties 'must be performed in good faith'.

17. The second and third paragraphs of article 31 stress the importance of the systematic method of interpretation by clarifying the concept of 'context'. For the purpose of interpreting a treaty, the 'context' of a treaty entails "in addition to the text, including its preamble and annexes": (i) any agreement or instrument in connection with the conclusion of the treaty and related to it (article 31(2) VCLT); (ii) any subsequent agreement and practice regarding the interpretation of the treaty (article 31(3)(a)(b)); and (iii) any relevant rules of international law applicable in relations between the parties (article 31(3)(c)). Finally, article 31(4) stresses that if States agree to give a special meaning to a term, that meaning shall prevail.

18. Art. 32 VCLT: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable."

19. For example, in interpreting the Canadian Charter of Rights and Freedoms, the Canadian Supreme Court makes use of the 'living tree doctrine'. As stated by Chief Justice Antonio Lamer in *Re B.C. Motor Vehicle Act*, "If the newly planted 'living tree' which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth". *Re B.C. Motor Vehicle Act* 1985 CanLII 81 para 53, [1985] 2 SCR 486 (17 December 1985).

20. Martin 1991.

2.2

The specific object and purpose of human rights treaties

While the VCLT contain basic rules for interpreting treaties,²¹ it is well established that interpretation of human rights treaties requires taking into account their special character.²² These treaties are agreements between States, but rather than granting reciprocal

rights among the parties – as most other treaties do – they are intended to protect individuals who are not parties to the treaty.²³

The specific object and purpose of human rights treaties, which is the protection of the individual human person, play a central role in their interpretation. It requires taking into account, at a minimum, the two following principles: the effectiveness rule and the evolutive interpretation.²⁴

The effectiveness rule

Since the overriding function of human rights treaties is the protection of individuals' rights, their interpretation should make that protection practical and effective.²⁵ This principle has been stressed by both the Inter-American²⁶ and the European Courts of Human Rights.²⁷

Interpreting the provisions of a human rights treaty in a way that provides practical and effective protection to individuals often implies extending the duties

21. This is apparent in the jurisprudence of the major human rights supervisory bodies, including the European Court of Human Rights, e.g., *Golder v. the United Kingdom*, Application No. 4451/70, Judgement of 21 February 1975, para. 29 and *Loizidou v. Turkey*, Application No. 1531/89, Judgement of 18 December 1996, para. 43. Also in the IACHR, for example, in *Inter-American Court Advisory Opinion OC-4/84*, 'Proposed amendments to the naturalization provisions of the Constitution of Costa Rica' paras. 21-23; *Advisory Opinion OC-3/83 'Restrictions to the death penalty (arts. 4(2) and 4(4) American Convention on Human Rights)'*, of 8 September 1983, Series A No. 3 and *Advisory Opinion OC-7/86*, 'Enforceability of the right to reply or correction (arts. 14(1), 1(1) and 2 American Convention on Human Rights)', of 29 August 1986, para. 21 and the Human Rights Committee, e.g., *Alberta Union v. Canada*, Communication No. 118/1982, inadmissibility decision of 18 July 1986, para. 6.
22. See International Court of Justice (ICJ) in its *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. "In such a Convention, the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties." *Advisory Opinion* of 28 May 1951 (ICJ Report 1951, p. 23). Over the years, the special character of human rights treaties has been stressed by human rights courts. For example, by the IACTHR, *Advisory Opinion OC-2/82 'The effect of reservations on the entry into force of the American Convention on Human Rights (arts. 74 and 75)'*, of 24 September 1982, para. 29. Reference to the specific object and purpose of the American Convention as a human rights treaty are also found in contentious cases, such as *Velásquez Rodríguez v. Honduras*, Preliminary Objections, Judgement of 26 June 1987, Series C No. 1, para. 30; *Fairén Garbí and Solís Corrales v. Honduras*, Preliminary Objections, Judgement of 26 June 1987, Series C No. 2, para. 35; and *Cayara v. Peru*, Preliminary Objections, Judgement of 3 February 1993, Series C No. 14, para. 37. The European Commission of Human Rights applied the same approach, see e.g., *Austria v. Italy*, Application No. 788/60, 4 Yearbook of the European Convention on Human Rights, 1961, pp. 116 et seq. and *Wemhoff v. Germany*, Application No. 2122/64, Judgement of 27 June 1968 para. 8.

23. See ICJ Report 1951, p. 23.

24. It is important to note that there are other rules for interpretation that should also be considered, such as that limitation provisions shall be construed and applied in a restrictive way. However, because other rules do not directly result from the special object and purpose of human rights treaties, their analysis is beyond the scope of the present study. Nevertheless, it should be noted that the interpretation process is a single combined operation where all methods of interpretation interact, and it is the interpreter who is called upon to find an appropriate balance among them.

25. As Brownlie (1998) notes, the International Law Commission did not provide a separate formulation of this principle, considering that it was reflected sufficiently in the doctrines of interpretation in good faith in accordance with the ordinary meaning (art. 31(1) VCLT) (p. 636). For a deeper analysis of the effectiveness principle, see van Dijk and van Hoof 1998, p. 74 et seq. and Merrills 1988.

26. *Velásquez Rodríguez v. Honduras*, loc. cit. (note 22), para. 30.

27. *Case of Soering v. the United Kingdom*, Application No. 14038/88, Judgement of 7 July 1989, para. 87. See also, for example, *Airey v. Ireland*, Application No. 6289/73, Judgement of 9 October 1979, para. 24; *Artico v. Italy*, Application No. 6694/1980, Judgement of 13 May 1980, para. 33; *McCann and others v. the United Kingdom*, Application No. 18984/91, Judgement of 27 September 1995, paras. 146-147; *Yasa v. Turkey*, Application No. 2249/93, Judgement of 2 September 1998, para. 64; and *Hugh Jordan v. the United Kingdom*, Application No. 24746/94, Judgement of 4 May 2001, para. 102.

imposed upon States.²⁸ Yet, according to the International Court of Justice (ICJ), the rule of effectiveness cannot justify attributing a meaning to a provision that is contrary to the letter and spirit of the instrument.²⁹

The evolutive interpretation

The protection of individuals (the object and purpose of human rights treaties) also requires an evolutive interpretation of such treaties. Human rights are not static, and therefore the effective protection of these rights involves taking into account developments in law and society.³⁰

The necessity of considering the changes occurring in society and in law is often emphasized by the European Court of Human Rights, which has frequently underlined that the European Convention on Human Rights (ECHR) is a “living instrument which must be interpreted in the light of present-day conditions”.³¹

In the landmark *Goodwin* case referring to the recognition of several rights, including the right to marry, for a post-operative male-to-female transsexual, the

European Court explicitly refers to these two rules of interpretation in its judgement, indicating that

“It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement.”³²

The Inter-American Court of Human Rights (IACtHR) also applies these principles of interpretation.³³ The Court itself has explained that, due to the evolution of international human rights law, in the interpretation process “[i]t is appropriate to look to the Inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and

28. See e.g., *Golder v. the United Kingdom*, loc. cit. (note 21), para. 36 and *Airey v. Ireland*, loc. cit. (note 27) para. 26.

29. See ICJ, Advisory Opinion on the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (1949–1950) of 18 July 1950 (ICJ Reports 1950, p. 229).

30. As the ICJ has held, “[t]he Court takes into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law [...]. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years [...] have brought important developments [...] In this domain, as elsewhere, the corpus iuris gentium has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.” Advisory Opinion on the ‘Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)’, notwithstanding Security Council Resolution 276 (1970), (ICJ Reports 1971, p. 16, para. 53).

31. See, e.g., the case of *Tyrer v. the United Kingdom*, Application No. 5856/72, Judgement of 25 April 1978, para. 15, where the Court noted, “the Convention is a living instrument which [...] must be interpreted in the light of the present-day conditions”; *Marckx v. Belgium*, Application No. 6833/74, Judgement of 13 June, para. 41; *Airey v. Ireland*, loc. cit. (note 27), para. 26; and *Loizidou v. Turkey*, Preliminary objections, Application No. 15318/89, Judgement of 23 March 1995, paras. 71–72.

32. Case of *Christine Goodwin v. the United Kingdom*, Application No. 28957/95, Judgement of 11 July 2002, para. 74. While the Court had previously examined several complaints about the position of transsexuals in the UK without finding the State in violation of its obligations, in this case the Court found it was necessary to look at the situation “in the light of present-day conditions” in order to determine “what is now the appropriate interpretation and application of the Convention” (para 75). See also *E.B. v. France*, Application No. 43546/02, Judgement of 22 January 2008, para 92. Yet, the European Court tends to use this ‘evolutive’ approach when it perceives a convergence of standards among member States. Thus, a still controversial family-related issue is same-sex marriage. The European Court has refused to recognize the denial of same-sex marriage as being in violation of the Convention (art. 12 ECHR), considering that in the absence of consensus, States enjoy a wide margin of appreciation. See case of *Schalk and Kopf v. Austria*, Application No. 30141/04, Judgement of 24 June 2010; *Hämäläinen v. Finland*, Application No. 37359/09, Judgement of 16 July 2014; and *Oliari and Others v. Italy*, Applications Nos. 18766/11 & 36030/11, Judgement of 21 July 2015.

33. See, e.g., IACtHR, *Paniagua Morales et al. v. Guatemala*, Preliminary Objections, Judgement of 25 January 1996, Series C No. 23, paras. 40–42 and Advisory Opinion No. 16 on ‘The right to information on consular assistance in the framework of the guarantees of the due process of law’, OC-16/99 of 1 October 1999, paras. 114–15. It is interesting to note that in the latter advisory opinion, the Court expressly notes that “international human rights law has made great headway thanks to an evolutive interpretation of international instruments of protection”.

significance which that instrument was believed to have had in 1948”.³⁴

The irrelevance of the drafters’ intention is also in line with the way in which the ICJ applies the VCLT. According to the ICJ, treaties should be interpreted and applied within the framework of the legal system prevailing at the time of the interpretation rather than at the time of the drafting or adoption of the text.³⁵

2.3

Concluding observations

The overriding object and purpose of human rights treaties require that their provisions be interpreted in a manner that makes their safeguards ‘practical and effective’ and that takes into account ‘present-day conditions’. When interpreting human rights treaties, courts and supervisory bodies should not give any significant role to the intention of the drafters, as reflected in the *travaux préparatoires*.³⁶ They should replace the search for the historic intention of the drafters with an analysis of subsequent developments

in domestic and international law.³⁷ This also seems to be the rule in the interpretation of constitutional provisions that seek to protect fundamental rights, where the intention of the drafters is also irrelevant.³⁸

This means that the ideas, beliefs and circumstances regarding the concept of ‘family’ prevailing at the time when human rights treaties were drafted are no longer valid.³⁹ According to the accepted rules for treaty interpretation outlined above, interpreting the concept of ‘family’ – as well as the duties to respect and protect the family included in human rights treaties – requires that the authorities look at the legal and social developments that have occurred regarding the family over time.

34. See, e.g., IACtHR Advisory Opinion No. 10 on ‘Interpretation of the American Declaration of the Rights and Duties of Man within the framework of article 64 of the American Convention on Human Rights’, OC-10/90 of 14 July 1989, para. 37; Advisory Opinion No. 16 on ‘The right to information on consular assistance in the framework of the guarantees of the due process of law’, OC-16/99 of 1 October 1999 para. 114 and Advisory Opinion No. 17 on ‘Juridical Condition and Human Rights of the Child’, OC-17/02 of 28 August 2002 para. 21. See also, Villagrán Morales et al. v. Guatemala, Judgement of 19 November 1999, Series C No. 77, para. 193.

35. ICJ, Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) of 21 June 1971 (note 30, p. 31).

36. This is often the case. For example, it is not rare to find decisions of the European Court of Human Rights that are contrary to the express intentions of the drafters (see, Mahoney 1990, p. 62 and Prebensen 2000 pp. 1132–36). Yet, there are decisions in which human rights monitoring bodies have given undue weight to the *travaux préparatoires*. For example, in Ms. Juliet Joslin et al. v. New Zealand, Communication No. 902/1999 (U.N. Doc. A/57/40 at 214 (2002)), the UN Human Rights Committee held that the ICCPR recognized marriage as “only the union between a man and a woman wishing to marry each other” (para. 8.2). Taking this decision, the Committee seems to have relied on a literal interpretation of art. 23 of the ICCPR and the preparatory work of the Covenant (para. 4.4).

37. See the Case of Dudgeon v. the United Kingdom, Application No. 7525/76, Judgement of 22 October 1981 and Marckx v. Belgium, op. cit. (note 31).

38. Nihal 2002, p. 164.

39. Bernhardt 1984, pp. 70–71.

3.

THE CONCEPT OF ‘FAMILY’ AND CONTEMPORARY INTERPRETATION OF KEY HUMAN RIGHTS PRINCIPLES

Of relevance for a contemporary understanding of ‘family’ are the ways in which other human rights norms and principles have also evolved. For example, the ways in which international human rights courts and United Nations treaty bodies have interpreted the right to privacy, encompassing the protection of women’s reproductive freedoms, the protection against marital rape⁴⁰ as well as an adult’s decision whether to engage in sexual conduct with a same-sex partner,⁴¹ undoubtedly influence the interpretation of provisions related to the family.

While the interpretation of a number of human rights provisions may have a direct influence on the concept of ‘family’, this section focuses on the contemporary interpretation of three critical human rights principles: equality and non-discrimination; the best interests of the child; and the right to live a life free of violence.⁴²

3.1

‘Family’ and the principle of equality and non-discrimination

In international law, the protection of the family is intrinsically linked to the principle of equality and non-discrimination. As agreed in the Beijing Declaration and Platform for Action, reading the concept of family in light of the principle of equality and non-discrimination is essential to ensure the well-being of families and the consolidation of democracies.⁴³

Applying this principle to human rights treaties implies that all laws, policies and practices regarding the family should be undertaken without discriminating against any form of family or against the individual members of the family. An assessment of when a law, policy or practice has a discriminatory impact depends not only on the circumstances of the case but also on the point in time when the assessment is made.

Over the years, perceptions as to what forms of treatment are acceptable from an equality and non-discrimination point of view have evolved, providing a

40. See, e.g., UN Human Rights Committee 2000, para. 20.

41. For example, Case of Nicholas Toonen v. Australia, Human Rights Committee Views of 31 March 1994, Communication No. 488/1992, para. 8.2.

42. These rights are so fundamental that they are often called ‘principles’.

43. “Equal rights, opportunities and access to resources, equal sharing of responsibilities for the family by men and women, and a harmonious partnership between them are critical to their well-being and that of their families as well as to the consolidation of democracy” (Beijing Platform for Action, para 15).

broader protection to the individual. In areas relevant to the concept of family, that evolution is found, for example, in the protection of children born out of wedlock,⁴⁴ same-sex partners⁴⁵ and single-parent families. In many countries, these different forms of families are now provided with legal recognition and protection. Human rights monitoring bodies are increasingly considering this evolution when interpreting human rights instruments (see section 4).

Scope and content of the principle of equality and non-discrimination

The UN treaty bodies⁴⁶ and international human rights courts⁴⁷ have responded to changes in the concept

of equality and non-discrimination by expanding the obligations derived from it. Thus, to assess whether or not there has been discrimination in the enjoyment of rights related to the family, it is necessary to understand the scope of the principle and the way in which it has evolved over the years. It is not the intention here to provide a comprehensive review of the principle but just to highlight the most critical areas.

The fact that all persons are equal before the law and must enjoy their rights without discrimination of any kind does not mean that identical treatment is required. A distinction, exclusion, restriction or preference is compatible with the principle of equality when (a) it has objective and reasonable justification; (b) it pursues a legitimate aim under human rights law; and (c) there is a reasonable relationship of proportionality between the means employed and the aim sought to be realized.⁴⁸ Differences in treatment that comply with the criteria mentioned above are not discriminatory and do not infringe the principle of equality and non-discrimination.

Under international human rights law, a discriminatory impact depends on the effect and not the intention of the law, policy or measure. Thus, discrimination may arise not only from an explicit unequal treatment in the law but also from laws that at face value are neutral but in practice have a disproportionate impact on the enjoyment or exercise of rights on an equal footing.⁴⁹ For example, a law stating that the surviving partner of a heterosexual relationship is entitled to a pension would indirectly discriminate against same-sex couples. Recognizing that discrimination is frequently encountered in the private sphere, States are also obliged to adopt measures, including legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds.⁵⁰

44. For example, during the drafting of the CRC, proposals were made to include a specific provision prohibiting discrimination against children born out of wedlock. However, consensus was not reached on the inclusion. (For further analysis see Detrick 1999, pp. 75–78.) Yet, nowadays it is evident that this type of discrimination is forbidden under the Convention. This is also the view under the ICCPR and the ICESCR, as is clear under UN Human Rights Committee 1989, para. 5 and UN CESCR 2009, para. 26.

45. For example, many countries have instituted forms of registration for same-sex couples, and in some same-sex marriage has also been legislated, e.g., Belgium (2003), Spain (2005), Norway (2007), Sweden (2007), Portugal (2010), Iceland (2010), Argentina (2010), Denmark (2012), Brazil (2013), France (2013), Uruguay (2013), Finland (2017) and Germany (2017). Additionally, several national courts have considered that the denial of same-sex marriage violates constitutional anti-discriminatory provisions. See, e.g., *Reference Re Same-Sex Marriage* [2004] 3 S.C.R. 698, 2004 SCC 79 (Supreme Court of Canada); *Minister of Home Affairs and Another v. Fourie and Another, Lesbian and Gay Equality Project and Others v. Minister of Home Affairs and Others*, [2005] ZACC 19 (South African Constitutional Court); *James Obergefell et al. v. Richard Hodges, Director, Ohio Department of Health, et al* 135 S.Ct. 2071, 4 May 2015 (US Supreme Court); and *Judgement SU-214/16 of 28 April 2016* (Colombian Constitutional Court).

46. See, e.g., General Comments adopted by the UN CESCR, in particular No. 20 (2009), No. 16 (2005) and No. 3 (1990). See also General Comments adopted by the UN Human Rights Committee, such as No. 28 (2000) and No. 18 (1989). Moreover, this principle has been further expanded by the work of the supervisory bodies dealing with the two Conventions specifically aiming at the prohibition of discrimination: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD).

47. Worth noting are the European Court of Human Rights case *Marckx v. Belgium*, op. cit. (note 31), *Judgement of 13 June 1979*; IACtHR Advisory Opinion No. 4 ‘Proposed amendments to the naturalization provisions of the Constitution of Costa Rica’, OC-4/84 of 19 January 1984, para. 57.

48. These requirements have been developed by some of the major human rights supervisory bodies. See, e.g., *Marckx v. Belgium*, op. cit. (note 31), para. 33; IACtHR Advisory Opinion No. 4 ‘Proposed amendments to the naturalization provisions of the Constitution of Costa Rica’, OC-4/84 of 19 January 1984, para. 57; UN Human Rights Committee 1989, para. 13; and UN CESCR 2009.

49. See, e.g., UN CESCR 2009, para. 7.

50. See, e.g., art. 2 CEDAW and CESCR 2009, para. 11.

The interpretation of the prohibited grounds for non-discrimination has expanded over the years. Today, it is well established that those included in human rights treaties are not exhaustive and the inclusion of an ‘other status’ category has been interpreted to include grounds of discrimination that were not listed,⁵¹ such as ‘sexual orientation’ and ‘gender identity’.⁵² For example, both the European and Inter-American Courts of Human Rights have found a violation of the principle of equality when a gay father in Portugal and a lesbian mother in Chile, respectively, were denied custody rights on the ground of their ‘sexual orientation’.⁵³

The principle of equality and non-discrimination does not entail only a negative obligation to not discriminate (i.e., differential treatment on prohibited grounds⁵⁴) but also an obligation to recognize differences between individuals and to take ‘affirmative actions’ to achieve substantive equality. Such preferential treatment is not considered to be discriminatory when it has as its purpose to diminish or eliminate conditions that cause or help to perpetuate discrimination.⁵⁵ Thus, any law, programme or practice that seeks the amelioration of disadvantaged conditions of individuals or groups cannot be considered discriminatory. Under international law, it would be legitimate to the extent that it represents reasonable, objective and proportional means to redress de facto

discrimination and is discontinued when equality has been sustainably achieved.⁵⁶

Affirmative actions must be of a temporary character, meaning that they may not continue after their objectives have been achieved. However, in some instances, such as reasonable accommodations for persons with disabilities, affirmative actions may need to be of a permanent nature.⁵⁷

Substantive equality

As noted above, the obligations imposed by human rights treaties aim to achieve ‘substantive equality’. In contrast with ‘formal equality’, which requires that everyone, regardless of their individual circumstances, be treated in an identical manner, ‘substantive equality’ recognizes that in some circumstances it is necessary to treat different individuals differently in order to achieve equality of outcome.⁵⁸

The concept of substantive equality has been developed principally regarding gender equality. Nowadays, it is evident that formal gender equality (i.e., treating women and men in comparable situations equally regardless of the result) is not enough. Due to a legacy of historical inequalities, structural disadvantages, biological differences (primarily around reproduction) and biases in how laws and policies are implemented in practice,⁵⁹ ensuring that women can enjoy the same rights as men imposes on States the obligation to adopt a comprehensive set of measures from reforming discriminatory laws and regulations to changing social norms and prejudices that prevent women from enjoying their rights in an equal manner as men.⁶⁰ As noted by the United Nations Committee on the Elimination of Discrimination against Women (UN CEDAW Committee), a substantive equality approach in respect to the economic dimensions of family

51. International human rights instruments prohibit discrimination as to “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (see, e.g., art. 2 of both the ICESCR and ICCPR). However, the phrase “other status” indicates that this is an open-ended list. See, e.g., UN Human Rights Committee 1989, para. 12; and the Case of Edward Young v. Australia, Human Rights Committee Views of 6 August 2003, Communication No. 941/2000.

52. See, e.g., Organization of American States 2008 as well as several resolutions of the Parliamentary Assembly of the Council of Europe, including on the situation of lesbians and gays in Council of Europe member States (2000).

53. European Court of Human Rights, case of *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, Judgement of 21 December 1999 and IACtHR, case of *Atala Riffo and daughters v. Chile*, Judgement of 24 February 2012.

54. See note 51.

55. UN Human Rights Committee 1989, para. 10 and UN CESCR 1990, para 9.

56. See, e.g., UN CEDAW 2004 and UN CESCR 1990, paras. 8 and 9.

57. See, e.g., UN CESCR 1990, para. 9.

58. The achievement of substantive equality is understood as having four dimensions: (a) redressing disadvantage; (b) countering stigma, prejudice, humiliation and violence; (c) transforming social and institutional structures; and (d) facilitating political participation and social inclusion. For a more comprehensive explanation, see Fredman and Goldblatt 2015.

59. UN Women 2015a, pp. 35–36.

60. Fredman and Goldblatt 2015.

relations must address matters such as discrimination in education and employment, the compatibility of work requirements and family needs, and the impact of gender stereotypes and gender roles on women's economic capacity.⁶¹

While the concept of substantive equality has evolved specifically to deal with the challenges of tackling discrimination against women and pursuing gender equality, over the years human rights monitoring bodies have further determined the scope and content of the principle of substantive equality in reference to various groups. Family members who are discriminated against on the basis of their sexual orientation may particularly benefit from affirmative action and policies that seek to move beyond formal equality and to proactively improve their situation.

The evolving understanding of gender equality in international human rights law is most evident in relation to issues of domestic/intimate partner violence, sexual violence and other forms of sexual abuse, and sexual harassment. While the prohibition of these practices was not expressly included in early human rights treaties, there is agreement now that they constitute forms of discrimination against women and that as a result States are required to take a wide variety of measures to prevent, investigate and punish these behaviours. Moreover, an increasing range of protections relating to gender non-conforming practices and expression, including for transgender persons is taking shape in human rights law within the scope of gender equality.⁶²

Equality within and between families

In light of the principle of equality and non-discrimination, all laws, policies and practices towards the family must equally benefit all its members. States must ensure that nobody in the family is discriminated against on any ground (including sex, age, health status, sexual orientation or gender identity) in

their enjoyment of family-related rights (e.g., custody, inheritance and property rights).

Any differential treatment between family members (e.g., between spouses/partners or between siblings), between families (e.g., different rights or benefits between families created by de facto couples and married couples, between same-sex couples and heterosexual couples or between single-parent families and two-parent families) must be justified as being objective, reasonable and proportional.

3.2

'Family' and the protection of the best interests of the child

The principle of the best interests of the child is a paramount principle under the Convention on the Rights of the Child (CRC). The principle is also expressly included in some regional human rights instruments such as the African Charter on the Rights and Welfare of the Child (art. 4) and the American Convention on Human Rights (ACHR). Expressly related to the protection of the family, the ACHR states that in the case of dissolution of marriage, States must ensure protection of any children solely on the basis of their own best interests (e.g., art. 17(4) ACHR). While the European Convention of Human Rights does not contain a similar provision, the European Court has applied it as an interpretative principle.⁶³

Art. 3(1) CRC states,⁶⁴

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

61. UN CEDAW Committee 2013, para. 3.

62. See, e.g., Protecting Human Rights of Transgender Persons. A short guide to legal gender recognition, Council of Europe, November 2015. At the national level, see e.g., United Kingdom Equality Act 2010, Section 7, Argentina Law 26.743 (2012), Colombia Decree 1.227 (2015) and Ireland Gender Recognition Act (2015).

63. See, e.g., *Johansen v. Norway*, Application No. 24/1995/530/616, of 7 August 1996; *S.C. v. The United Kingdom*, Application No. 60958/00, Judgement of 16 June 2004 and *C. v. Finland*, Application No. 18249/02, Judgement of 9 May 2006.

64. The CRC also refers to the best interests of the child in other provisions, such as articles 9(1)(3), 18(1), 21, 37(c) and 40(2)(iii) as a reference point to ensure effective realization of all rights contained in that instrument.

This provision has been described as an ‘umbrella’ provision that prescribes the approach to be followed “in all actions concerning children”. As such, this principle can serve to evaluate laws, practices and policies relating to children.⁶⁵ It is important to stress that, as recognized by the United Nations Committee on the Rights of the Child (UN CRC Committee), the best interests of the child is a dynamic concept that encompasses issues that are continuously evolving.⁶⁶ Thus, it requires an assessment appropriate to the specific context. The concept must be interpreted and applied in a manner consistent with the evolving human rights standards.

According to the UN CRC Committee, the best interests of the child should be respected not only in judicial and administrative decisions but also in all stages of the adoption of laws, policies, strategies, programmes, plans, budgets, legislative and budgetary initiatives and guidelines concerning children in general or as a specific group.⁶⁷

To this end, States parties are obliged to undertake measures including amending domestic legislation to incorporate this principle; upholding the child’s best interests in the coordination and implementation of policies at the national, regional and local levels; upholding the child’s best interests in the allocation of national resources for programmes and measures aimed at implementing children’s rights; and combating all negative attitudes and perceptions that impede the full realization of the right of the child to have his or her best interests assessed and taken as a primary consideration.⁶⁸

Under the CRC, preventing family separation and preserving family unity are important components of the child protection system. In this regard, ‘family’ should be understood in a broad sense, including biological, adoptive or foster parents or, where applicable, members of the extended family or community as provided for by local custom.⁶⁹ Children shall not be

separated from their parents against their will and shall maintain personal contact with them (art. 9 CRC). However, such separation and cutting of the linkages between the child and his/her parents is legitimate when necessary for the best interests of the child (e.g., in the case of abuse or neglect of the child by parents determined by a competent authority).

From the case law of domestic courts and human rights monitoring bodies there should be no doubt that in cases involving the care and custody of minors, the determination of the child’s best interests cannot be based on speculation, assumptions or stereotypes regarding the parents’ lifestyles or on traditional concepts of family. The assessment should be based on specific parental behaviours and their impact on the child’s well-being.⁷⁰ In the case of *Atala and daughters v. Chile*, for example, the IACtHR found that the judicial decisions that sought to protect the best interests of three young girls by depriving their mother of their custody because she was a lesbian and living with her partner were not appropriate to achieve such purpose.⁷¹ Today, it is clear that the sexual orientation of the parents alone is not relevant in determining the best interests of the child in custody cases. As stated in the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity,⁷² “the sexual orientation or gender identity of the child or of any family members or other persons may not be considered incompatible with such best interests”.⁷³

The best interests of the child is linked with other general principles of the CRC, including the right to non-discrimination (art. 2 CRC). As mentioned earlier,

65. See, e.g., Detrick 1999, pp. 90–92 and Alston and Gilmour-Walsh 1996, p. 37.

66. UN CRC Committee 2013, para. 11.

67. *Ibid.*, para. 10.

68. *Ibid.*, para. 15.

69. *Ibid.*, para. 59.

70. IACHR, case of *Atala Riffo and daughters v. Chile*, Judgement of 24 February 2012. See also *In the Marriage of C. and J.A. Doyle* (1992) 15 Fam L.R. 274 (Australia); and *Joycelyn Pablo-Gualberto v. Crisanto Rafaelito Gualberto*, G.R. No. 156254 of 28 June 2005 (Supreme Court of the Philippines).

71. IACHR, case of *Atala Riffo and daughters v. Chile*, Judgement of 24 February 2012, paras. 109 and 146.

72. Adopted in March 2007 by a group of human rights experts convened by the International Commission of Jurists and the International Service for Human Rights on behalf of a coalition of human rights organizations.

73. Principle No. 24.

this principle requires positive measures aimed at redressing a situation of real inequality.⁷⁴

The best interests of the child principle is also consistently applied by other human rights monitoring bodies. The IACtHR has noted,

“To effectively protect children, all State, social or household decisions that limit the exercise of any right must take into account the best interests of the child and rigorously respect provisions that govern this matter.” (emphasis added)⁷⁵

When referring to the interpretation of the provision regarding the protection of children in the American Convention, the Court expressly noted that this provision must be examined in light of present day conditions. In the words of the Court:

“Today, this precept [article 19] requires a dynamic interpretation that responds to the new circumstances on which it will be projected and one that addresses the needs of the child as a true legal person, and not just as an object of protection.”⁷⁶

3.3

‘Family’ and the right to live a life free of violence

Over the years, internationally agreed standards (e.g., regional instruments and documents adopted under the auspices of the United Nations), as well as the work of human rights treaty monitoring bodies, have further developed the scope and content of the right to live a life free of violence, in particular regarding women, children, persons with disabilities and older persons. From these developments, it is evident that States have a positive duty to prevent, protect and punish cases of violence even when the harm takes place within the family.

The right of women not to be subject to violence or abuse within the family has been addressed in detail by the UN CEDAW Committee. In its General Recommendation No. 19 (1992) on violence against women, the Committee confirmed that “[u]nder general international law and specific human rights covenants, States may [...] be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation”. It also noted that family violence (domestic violence) is one of the most insidious forms of violence against women and is prevalent in all societies.⁷⁷

Subsequently, the Declaration on the Elimination of Violence Against Women⁷⁸ confirmed that violence against women in the family refers to any physical, sexual and psychological violence “including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation” (art. 2(a)). It also recognized the obligation of State of due diligence, which requires prevention, investigation and punishment of acts of violence against women “whether those acts are perpetrated by the State or by private persons” (art. 4).

Through the reporting mechanism, the UN CEDAW Committee regularly requests States to provide information on legal measures that have been taken to overcome violence against women, including marital rape,⁷⁹ and the effectiveness of such measures.⁸⁰ It also examines the obligation of States parties to enact, implement and monitor legislation to address violence against women in its review of cases under the Optional Protocol to CEDAW. For example, in the case of *A.T. v. Hungary*,⁸¹ the Committee found that the lack of specific legislation to combat domestic

74. UN CRC Committee 2013, para. 41.

75. IACHR, Advisory Opinion OC-17/2002 of 28 August 2002, para. 65.

76. *Ibid.*, para. 28.

77. UN CEDAW Committee 1992, para. 6.

78. United Nations General Assembly 1993.

79. See, e.g., Concluding observations of the UN CEDAW Committee on Norway, CEDAW/C/NOR/CO/8, 9 March 2012 and Concluding observations on the combined fourth and fifth periodic reports of India, CEDAW/C/IND/Q/4-5, 24 July 2014.

80. See, e.g., UN CEDAW Committee 1992, para. 24.

81. UN CEDAW Committee, *A.T. v. Hungary*, communication No. 2/2003, views adopted 26 January 2005.

violence and sexual harassment constituted a violation of human rights and fundamental freedoms, particularly the right to security of person.

At the regional level, treaties such as the Convention on the Prevention, Punishment and Eradication of Violence against Women ('Convention of *Belém do Pará*'), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence ('Istanbul Convention') have further imposed detailed obligations on States to prevent, investigate and punish violence against women including within the family. These treaties have promoted the adoption of domestic legislation on violence against women. In Latin America, for example, there are now 16 countries with this type of law.⁸²

Thus, it is now commonly accepted that under human rights treaties the obligation of due diligence to prevent, investigate and punish acts of violence against women means States are required to take effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including abuse and sexual assault in the family.

The prohibition of violence against children is specifically covered by the CRC, which requires States to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse" in the family context (art. 19(1) CRC). The UN CRC Committee recognizes that the majority of violence against children takes place in the context of families; therefore, it stresses that intervention and support are required when children become the victims of hardship and distress imposed on, or generated in, families.⁸³

The prohibition of 'all forms of violence' against children includes physical and mental violence, corporal punishment or other cruel or degrading forms of

punishment, neglect or negligence, sexual abuse and exploitation.⁸⁴ States' obligations regarding violence against children include the obligation of ensuring due diligence and the obligations to prevent violence, protect child victims, investigate and to punish those responsible and provide access to redress in case of violations.⁸⁵

The Convention on the Rights of Persons with Disabilities (CRPD) imposes on States an obligation to protect persons with disabilities from all forms of exploitation, violence and abuse, including gender-based violence within the home (art. 16(1) CRPD). To this end, States are required to take a wide variety of measures to protect persons with disabilities and prevent these practices including by identifying, investigating and, where appropriate, prosecuting. All these measures must be gender- and age-sensitive.

While there is no specific binding human rights treaty regarding older persons, commitments to avoid any physical, physiological, emotional, sexual or financial abuse against older persons within the family are included in political commitments such as the Political Declaration and Madrid International Plan of Action on Ageing⁸⁶ and further developed by human rights monitoring bodies.⁸⁷ For example, the UN CEDAW Committee has addressed the issue of violence against older women in its general recommendations, particularly General recommendation No. 27 on older women and protection of their human rights.⁸⁸

From the case law of human rights monitoring bodies, it is clear that States' obligations regarding the right to live a life free of violence are not exhausted by simply taking legislative or other measures; they must also ensure that the measures are 'practical and effective'. For example, in the case of *M.C. v. Bulgaria*,⁸⁹ the European Court of Human Rights found that while the prohibition of rape in Bulgaria's penal code did not

82. ECLAC 2016.

83. UN CRC Committee 2011, para. 3.

84. See e.g., *ibid.* and UN CRC Committee 2006, para. 5.

85. UN CRC Committee 2011, para. 5.

86. Adopted at the Second World Assembly on Ageing, Madrid, Spain, 8–12 April 2012.

87. See, e.g., United Nations Human Rights Council 2011.

88. UN CEDAW Committee 2010, paras. 37–38.

89. European Court of Human Rights, *M.C. v. Bulgaria*, Application No. 39272/98, Judgement of 4 December 2003.

mention any requirement of physical resistance by the victim, physical resistance appeared to be required in practice to pursue a charge of rape.⁹⁰ Therefore, it found that the flaws in the application of the legislation – as well as in the investigation – amounted to a breach of the State’s positive obligations under art. 3 (prohibition of torture and inhuman or degrading treatment) and art. 8 (right to respect for private and family life) of the ECHR.

That it is not enough to have laws in place, but that they must be enforced and upheld, has also been emphasized by the Inter-American Commission on Human Rights in the case of *Maria da Penha v. Brazil*.⁹¹ In this case, which refers to domestic violence, the Commission found the Brazilian Government in breach of its human rights obligations due to significant judicial delay and incompetence in the investigation of the violence suffered by Maria da Penha at the hands of her husband.

90. In this case, the Court looked at the “changing conditions within Contracting States” and concluded that the requirement that the victim must resist physically as an element for the definition of a rape was no longer present in the laws of European countries. The Court noted that any rigid approach to the prosecution of sexual offences, such as requirement of physical resistance, jeopardized the effective protection of the individual’s sexual autonomy (ibid., paras. 156–66).

91. *Maria da Penha v. Brazil*, Case No. 12.051, Report No. 54/01. OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000).

3.4

Concluding observations

Over the years, the interpretation of the principles of equality and non-discrimination, best interests of the child and the right to live a life free of violence have evolved and their scope of protection has increased. The consequences of this are far-reaching. While the concept and legal protection of the ‘family’ may vary from country to country, the application of human rights norms and standards described in earlier sections should be ensured by all branches of the State (i.e., executive, legislative, and judicial). This means, for example, that when adopting laws, designing policies or deciding on a judicial case, authorities should recognize the diversity of families within the country concerned and ensure that all families and family members enjoy their rights without discrimination of any kind, with due respect of the principles of the best interests of the child and the right to live a life free of violence.

Specifically, in regard to obligations related to assisting and supporting families, this implies, for example, that States must take all necessary legislative, administrative and other measures to ensure that all families have equal access to poverty reduction programmes such as cash transfers programmes, without discrimination of any kind, including on the basis of sexual orientation or gender identity of any family member. The obligation to ensure equal access without discrimination applies to all family-related policies, including care policies, parental leave, unemployment benefits, health insurance benefits and housing policies. Thus, a social benefit that directly or indirectly discriminates against single-parent families (most of the time, women-headed households) or families of same-sex parents would be against human rights law. Similarly, it would be against these evolving standards if any pension, social insurance or funeral benefits provided in the case of loss of support for spouses or partners as the result of illness or death is denied to some families solely on the basis of the sexual orientation or sexual identity of a family member.

4.

THE UNDERSTANDING OF 'FAMILY' AMONG HUMAN RIGHTS MONITORING BODIES

The rules of treaty interpretation reviewed in previous sections show that the specific object and purpose of human rights treaties – the protection of the individual – require interpreting human rights provisions in light of present day conditions and making their safeguards practical and effective. They also require taking into account other human rights norms and principles, which have evolved over the years and provide a broader protection to individuals. This section briefly reviews the extent to which human rights monitoring bodies have applied these principles of treaty interpretation to the concept of 'family'.

4.1

Recognizing the existence of various forms of families

Based on internationally agreed documents,⁹² it seems there is consensus today on the existence of various forms of family, depending on different cultural, political and social systems, as well as the changes undergone by the family as a social institution. This consensus is reflected in the work of human rights monitoring bodies.

The United Nations monitoring bodies have been emphatic in recognizing the existence of various forms of families. From their work, it is evident that these families can arise from a formal and lawful marriage

or can exist without such marriage. For example, the UN Human Rights Committee has noted that,

"The concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition. [...] In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, States parties should also indicate whether and to what extent such types of family and their members are recognized and protected by domestic law and practice."⁹³

The UN Committee on Economic, Social and Cultural Rights (UN CESCR) has stated that,

"The forms of families have changed and will continue to change. Therefore, we encounter very different family forms today. This is not surprising against the background of the economic, cultural and political changes, but rather a normal part of the continuous change of society in general. Today families comprise married and unmarried parents who raise their children together or alone including stepparents, adoptive parents and foster-parents. One feature which all these long-term relationships have in common is

92. See, e.g., International Conference on Population and Development, principle 26(h); Beijing Declaration and Platform for Action, paras 29, 113-115 and Copenhagen Declaration and Programme for Action, principle 26(h).

93. UN Human Rights Committee 1990, para. 2. See also UN Human Rights Committee 2000, para. 27.

the reliable relationship between the children and their parents. They all have the same right to protection and assistance even if they do not succeed in living together as a family.”⁹⁴

The UN CRC Committee has urged that,

“references to ‘family’ [...] not be understood as narrowly defined. The references to ‘family’ (or to ‘parents’) must be understood within the local context and may mean not only the ‘nuclear’ family, but also the extended family or even broader communal definitions including grandparents, siblings, other relatives, guardians or care providers, neighbours, etc.”⁹⁵

The Working Group on Laws and Practices that Discriminate against Women has stated that,

“The family exists in various forms. The expression ‘diverse families’ encompasses, for example, single-parent families; families headed by women; intergenerational families including, among others, grandparents; families headed by children, such as orphans or street children; families comprising lesbian, gay, bisexual, transgender and intersex (LGBTI) persons; extended families; self-created and self-defined families; families without children; families of divorced persons; polygamous families; and non-traditional families resulting from interreligious, intercommunity or inter-caste marriages.”⁹⁶

A broad interpretation of family has also been adopted by international human rights courts. For example, the IACtHR has noted that,

“The Court confirms that the American Convention does not define a limited concept of family, nor does it only protect a ‘traditional’ model of the family. In this regard, the Court reiterates that the concept of family life is not

limited only to marriage and must encompass other de facto family ties in which the parties live together outside of marriage.”⁹⁷

The European Court of Human Rights also maintains a flexible approach to the interpretation of family. It has reiterated that,

“the notion of ‘family’ [...] is not confined to marriage-based relationships and may encompass other de facto ‘family’ ties where the parties are living together out of wedlock.”⁹⁸

There are several cases where the European Court has recognized the diversity of modern family arrangements. For example, already 30 years ago, the Court recognized that unmarried couples who live together with their children will normally be said to enjoy “family life” (art. 8 ECHR).⁹⁹ More recently, it has also recognized that the relationship of cohabiting same-sex couples, living in a stable de facto partnership, falls within the notion of family life, “just as the relationship of a different-sex couple in the same situation would”¹⁰⁰. According to the Court, several other relationships may fall within the meaning of family, such as that between children and their grandparents,¹⁰¹ between siblings,¹⁰² between an uncle or aunt and his/her nephew or niece¹⁰³ and between parents and children born into second relationships, or those children born as a result of an extra-marital or adulterous affair.¹⁰⁴

97. IACtHR, case of Atala Riffo and daughters v. Chile, Judgement of 24 February 2012, para 142.

98. See, e.g., European Court of Human Rights, Schalk and Kopf v. Austria, Application No. 30141/04, Judgement of 24 June 2010, para. 91; Elsholz v. Germany, Application No. 25735/94, Judgement of 13 July 2000, para. 43; Keegan v. Ireland, Series A no. 290, 26 May 1994, para. 44; and Johnston and Others v. Ireland, Series A no. 112, 18 December 1986, para. 56.

99. Johnston v. Ireland, Application No. 9697/82, Judgement of 18 December 1986

100. Schalk and Kopf v. Austria, Application No. 30141/04, Judgement of 24 June 2010, para. 94.

101. Marckx v. Belgium, *op. cit.* (note 31), para. 45.

102. See, e.g., Olsson v. Sweden, Application No. 10465/83, Judgement of 24 March 1988 and Boughanemi v. France, Application No. 2207/93, Judgement of 24 April 1996.

103. Boyle v. the United Kingdom, Application No. 16580/90, Judgement of 24 February 1994.

104. Jolie & Lebrun v. Belgium, Application No. 11418/85, Judgement of 14 May 1986, para. 243.

94. UN CESCR’s Concluding Observations at the Fourth Periodic Report of Germany, E/C.12/4/Add.3, 10 August 2000, para. 122.

95. UN CRC Committee 2001, para. 701.

96. UN Human Rights Council 2009.

Yet, despite some progress, formal acknowledgments of the diversity of families by human rights monitoring bodies are still heavily influenced by the traditional family ideal (i.e., a married couple of opposite sex with children), without giving sufficient attention to ‘LGBT families’¹⁰⁵ and leaving the latter without the equal enjoyment of family rights enshrined in international human rights treaties.

At the domestic level, courts have also recognized the diversity of families. For example, the South African Constitutional Court has noted that “families come in many shapes and sizes. The definition of the family also changes as social practices and traditions change”.¹⁰⁶ Therefore, it noted that “in recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms”.¹⁰⁷ As highlighted by a Canadian Supreme Court judge, “family means different things to different people, and the failure to adopt the traditional family form of marriage may stem from a multiplicity of reasons – all of them equally valid and all of them worthy of concern, respect, consideration and protection under the law”.¹⁰⁸

4.2

Recognizing the relevance of other norms and principles to the concept of family

As noted above, a contemporary interpretation of the family should not only recognize the changing character of the institution but also ensure that other related norms and principles are respected. In practice, when addressing family-related rights, human rights

monitoring bodies often take into account the principle of equality and non-discrimination.

The UN CEDAW Committee, for example, has emphasized the importance of the principle of equality between women and men within the family:

“The form and concept of the family can vary from State to State, and even between regions within a State. Whatever form it takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people, as article 2 of the Convention requires.”¹⁰⁹

Similarly, the UN CESCR, interpreting article 11 of the ICESCR (which refers to the right of a person to an adequate standard of living for ‘himself and his family’), has noted,

“While the reference to ‘himself and his family’ reflects assumptions as to gender roles and economic activity patterns commonly accepted in 1966 when the Covenant was adopted, the phrase cannot be read today as implying any limitations upon the applicability of the right to individuals or to female-headed households or other such groups. Thus, the concept of ‘family’ must be understood in a wide sense. Further, individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular, enjoyment of this right must, in accordance

¹⁰⁵ In line with a report from the International Lesbian and Gay Association (ILGA), the term ‘LGBT families’ is used “to indicate the close and loving relationships established by people who would define themselves as either lesbian, gay, bisexual or transgender and their children or their parents” (Hodson 2007).

¹⁰⁶ See, e.g., *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC), paras. 47–48.

¹⁰⁷ *Rahim Dawood & others v Minister of Home Affairs & others* 2000 (3) SA 936 para. 31.

¹⁰⁸ Judge Claire L’Heureux-Dubé, in *Miron v Trudel* [1995] 2 S.C.R. 418, para. 80.

¹⁰⁹ UN CEDAW Committee 1994. para. 13. Para. 18 is also relevant, in which the Committee stresses that “[m]oreover, generally a de facto union is not given legal protection at all. Women living in such relationships should have their equality of status with men both in family life and in the sharing of income and assets protected by law. Such women should share equal rights and responsibilities with men for the care and raising of dependent children or family members.”

with article 2(2) of the Covenant, not be subject to any form of discrimination.”¹¹⁰

At regional human rights courts, the concept of the family has also been examined in relation to the prohibition of discrimination. For example, in the case of *Karner v. Austria*,¹¹¹ the European Court of Human Rights found a violation of the prohibition of discrimination (art. 14 ECHR) in conjunction with the protection of family life (art. 8 ECHR) because the applicant was denied the status of ‘life companion’, preventing him from succeeding in the tenancy of his former same-sex partner. Several years later, noting that a rapid evolution of social attitudes towards same-sex couples had occurred in many member States, the European Court directly recognized that same-sex couples enjoyed ‘family life’ as protected by art. 8 ECHR.¹¹²

At the domestic level, courts have also looked at critical human rights principles when interpreting the States’ duties regarding the family. When the South African Constitutional Court decided that the absence in the 1996 draft Constitution of a clause protecting the right to marry or to family life did not invalidate the Constitution, it noted that the draft Constitution enshrined the values of “human dignity, equality and freedom” as well as “that everyone has the right to have their dignity respected and protected”. According to the Court, the interpretation of these concepts in the future would be important to define the constitutionality of laws or executive actions related to the right to raise a family.¹¹³ Over the years, it is evident from the case law of the Court that the primary right implicated when dealing with the constitutional protection of marriage and family life is the right to dignity (section 10 of the Constitution).¹¹⁴ Applying the

respect for dignity coupled with the right to equality, the Court has decided, for example, that legislation that denies the right to form a marriage relationship to same-sex couples is unconstitutional.¹¹⁵

In fact, the principle of equality and non-discrimination has been a central consideration in numerous national court decisions affirming the right to same-sex marriage, including in Canada, Colombia, Mexico and the United States.¹¹⁶ For example, the Colombian Constitutional Court expressly noted that a systemic interpretation of art. 42 of the Constitution (which states that marriage arises from the bond between a man and a woman) requires that it be read in light of the principles of human dignity, individual freedom and equality. By doing so, the Court concluded that the Constitution did not exclude the possibility of same-sex marriages. In fact, the Court noted that not allowing same-sex marriages would entail discrimination. Moreover, it noted that fundamental rights should be effectively protected even against the will of the majority.¹¹⁷

4.3

Concluding observations

The work of human rights monitoring bodies has confirmed the need to interpret the concept of family in line with present day conditions (e.g., by incorporating changes in perceptions and reality) and taking due account of the evolution of other norms and principles.

These bodies have not only responded to changes in the concept of family, they have also actively promoted them. This role has been expressly assumed by several treaty bodies as evident in the following joint statement: “The Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on the Elimination of Discrimination against Women recognize their critical role in increasing the

110. UN CESCR 1991, para. 6. See also UN CESCR 1999, para. 1.

111. *Karner v. Austria*, Application No. 40016/98, Judgement of 24 July 2003.

112. *Schalk and Kopf v. Austria*, Application No. 30141/04, Judgement of 24 June 2010, para. 93.

113. See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC), para. 100.

114. *Rahim Dawood & others v Minister of Home Affairs & others* 2000 (3) SA 936 para 34-37.

115. *Minister of Home Affairs and Another v. Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005).

116. See note 45. See also Langford forthcoming.

117. Colombian Constitutional Court, SU-214/16 Judgement of 28 April 2016.

understanding of gender factors in the enjoyment of human rights. They are conscious of the need to interpret creatively the human rights norms they monitor so that they can be applied to those experiences of women which differ from those of men. The Committees underline that a broader, inclusive understanding of such rights brings with it an international legal obligation for States Parties to ensure to women the full enjoyment of all their human rights.”¹¹⁸

¹¹⁸. Joint statement adopted by the three treaty bodies at the fiftieth anniversary of the Universal Declaration on Human Rights. E/1999/22 Chapter VI, decisions adopted by the Committee at its ninth session, para. 6.

5.

STATES' OBLIGATIONS REGARDING THE FAMILY

This section reviews in more detail the spectrum of obligations pertaining to the family in human rights treaties. These obligations, interpreted in light of present day conditions in order to make the safeguards practical and effective, should guide the adoption of public policies that have an impact on the family (examined in section 6).

5.1

A proposed typology of relevant States' duties as included in human rights treaties

For analytical purposes, the obligations pertaining to the family¹¹⁹ in human rights treaties can be divided into three main categories:¹²⁰

1. Obligations not to interfere with family life. This category refers mainly to negative obligations of States to refrain from acting, such as the obligation to refrain from unlawful or arbitrary interferences with the family life (e.g., art. 17(1) ICCPR,¹²¹ art. 8(1) ECHR and art. 11 ACHR), the obligation to respect the responsibilities of parents towards their children (art. 5 CRC) and the obligation to refrain from interfering with child-family relations (art. 8 CRC).

The corresponding rights in this category are not absolute. There are situations when public authorities can interfere with these rights, such as the expulsion of a person from a country in which his/her close relatives live or a decision awarding custody of children (which by definition implies an interference with the family life of one or both parents). Yet, in all such circumstances, the authorities must comply with the specific requirements set down in the limitation clauses. Moreover, the jurisprudence of human rights monitoring bodies has further clarified these requirements.

When interference with family life is permissible, it requires a precise balancing of circumstances in a given case. For example, while interferences with family life are permissible when necessary for the best interests of the child (e.g., art. 3 CRC), the sexual orientation or gender identity of a parent may not be considered incompatible with such best interests (e.g., IACtHR, case of *Atala and daughters v. Chile*).¹²² A balancing of rights is also required between the obligation not to interfere with 'family life' and the obligation to protect family members from intimate partner violence. For example, in *Opuz v. Turkey*,¹²³ the European Court recognized that the right to respect for family life and the prohibition of arbitrary interferences with families have limits. In this case, the applicant, Mrs. Nahide Opuz, and her mother had been threatened and assaulted on several occasions by H.O., her then husband. The Court found that the authorities failed to take protective measures against domestic violence provided for under the Family Protection Act and did not issue an injunction to prevent H.O. from being in contact with the applicant and her mother. The Court dismissed the State's claims that due to lack of evidence a separation of the applicant from H.O. would have violated the right to

¹¹⁹ This category includes all rights included in human rights treaties to which all de jure or de facto families are entitled, excluding the rights related to the legal constitution of a family, such as the rights to marry and found a family (e.g., art. 23(2) ICCPR and art. 12 ECHR).

¹²⁰ In practice, there is no watertight divisions between these categories of obligations. All human rights impose a continuum or spectrum of obligations of different types. See Sepúlveda 2003, pp. 138–56.

¹²¹ See UN Human Rights Committee 1988.

¹²² See text accompanying note 69.

¹²³ European Court of Human Rights, *Opuz v Turkey*, Application No. 33401/02, Judgement of 9 September 2009.

family life (art. 8). The Court held that the protection of the right to life, the right not to be subjected to torture or ill treatment and equal enjoyment of rights of the applicant were more important rights than the protection of family life.

Finally, it is worth noting that the case law of the UN Human Rights Committee and the European Court of Human Rights suggests that respect for family life may also entail some positive obligations on States, including adopting legal frameworks to allow the dissolution of marriage (e.g., in cases of domestic violence).¹²⁴

2. Obligations to ensure equality rights within the family. This category refers to positive as well as negative obligations to ensure that all family members are treated equally and without discrimination. It includes, for example, the obligation to ensure equality of women and men in all matters relevant to family relations (e.g., art. 16 CEDAW), including their equal right to decide on the number and spacing of children; equal rights with respect to the ownership, acquisition, management, administration, enjoyment and disposition of property; and equal rights of spouses as to marriage, during marriage and at its dissolution (e.g., art. 23(4) ICCPR and art. 17(4) ACHR). This category also includes the obligations to ensure that children are not discriminated against within their family on the basis of gender, disability, family status or any other ground (e.g., art. 2 CRC) and the obligation to ensure equal rights for children born in and out of wedlock (e.g., art. 17(5) ACHR).

While human rights monitoring bodies have given further attention to the entitlement of women to equality within the family,¹²⁵ all members of a family (e.g., older family members or those with a diverse sexual identity or orientation) are entitled to be treated without discrimination in all spheres of family relations. As discussed in section 3, this implies not only a negative obligation to not discriminate (i.e., differential treatment on prohibited grounds) but also

an obligation to recognize differences between individuals and to take ‘affirmative actions’ to diminish or eliminate the factors that give rise to discrimination or tend to perpetuate it, with the aim of achieving substantive equality among all members of the family.

This is clear, for example, in the CRPD, which further stresses the obligation of States to eliminate discrimination against persons with disabilities, including children, in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others (art. 23 CRPD).

Under this category (obligations to achieve equality rights within the family), one should also include the obligation of States to prevent, investigate and punish acts of violence committed against family members, in particular against women.¹²⁶

In addition to the provisions that expressly refer to the principle of equality within the family, the general principles of equality and non-discrimination included in human rights instruments (e.g., arts. 2 and 26 ICCPR, art. 2 ICESCR) also apply to family relations.¹²⁷ Thus, discrimination in any family-related laws, practices and policies that are not expressly covered by the former provisions are still protected by the general prohibition of non-discrimination. For example, requiring husbands’ authorization to allow their wives to work would entail a differentiated treatment on the basis of a prohibited ground of discrimination under these general norms.

Under the general clauses of equality and non-discrimination in human rights treaties, States are obliged not only to ensure equality among family members

124. See Nowak 2005, pp. 530–31 and van Dijk and van Hoof 1998, pp. 508–10.

125. See, e.g., UN CEDAW Committee 1994, 2010a and 2013. See also UN Human Rights Committee 2000, in particular paras. 23–27, and 1990. Additionally, see UN CESCR Committee 2005, in particular para. 27, and 2009.

126. Under CEDAW there is no doubt that violence against women constitutes a form of discrimination (UN CEDAW Committee 1989).

127. This principle is guaranteed in most human rights treaties, including the ICCPR (arts. 2, 3 and 26); ICESCR (arts. 2(2) and 3); and CRC (arts. 2 and 28). In addition, there are specialized treaties that are explicitly established to prohibit discrimination on the grounds of sex, race and disability such as CEDAW, CERD and the Convention on the Rights of Persons with Disabilities (CRPD). At the regional level, the right to equality and non-discrimination is also guaranteed by, for example, the African Charter on Human and People’s Rights (arts. 2, 3, 18 and 28) and the Arab Charter on Human Rights (arts. 2, 9, and 35).

(e.g., in the administration of assets, custody, pensions, guardianships, property and inheritance rights) but also within families. This means that States must take all necessary legislative, administrative and other measures to ensure that no family may be subject to discrimination on any ground. Any right, benefit, privilege or obligation to one 'family' (e.g., in social or welfare benefits, inheritance, social security and pensions) must be accorded to all of them. Otherwise, it must be justified on the basis of objective, reasonable and proportional criteria (see section 3).

The equal enjoyment of rights in family relations has an enormous economic impact for their members and is critical for ensuring women's economic empowerment. Lack of equality in the enjoyment of family-related rights means that some members do not equally enjoy their family's economic wealth, gains and social benefits. The negative impact on women is well established. For example, due to the gendered division of labour within the family, women dedicate more time to unpaid care and domestic work, often with a negative impact on their earnings and work opportunities.¹²⁸ If they do not have equal access to the wealth and gains of the family, they bear a greater cost in the event of a breakdown of the family.¹²⁹ For low-income women, this might entail making a difficult choice between remaining with their partner or being left destitute.¹³⁰

3. Obligations to protect and assist the family. This category refers to the obligations to take positive measures to ensure the well-being of the family and its members. These are the obligations to provide 'protection and assistance' (art. 10(1) ICESCR and preamble CRC) and 'protection by society and the State' (art. 23(1) ICCPR and art. 17(1) ACHR). Some regional human rights instruments have further specified the content of the obligations to protect and assist the family.¹³¹

The duty to provide 'protection' and 'assistance' imposes on States a great variety of obligations ranging from the adoption of appropriate laws (e.g., to contribute to the maintenance of family relations, alleviate the negative impact of dissolution or ensure equality among family members) to ensuring social protection, including, the provision of financial assistance, care policies and tax privileges.

While economic, social and cultural rights, including the right to social protection (social security) can be implemented progressively – in line with the State's level of resources – the obligation to guarantee that the right is exercised without discrimination of any kind is an immediate obligation not subject to the availability of resources.¹³² As explained above (section 3), compliance with this principle does not mean that States cannot make any difference among the entitlements or social benefits offered to families. However, distinctions on prohibited grounds must be objective, reasonable and proportional. According to the UN CESCR, "a failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority".¹³³

To ensure that a social protection programme aimed at supporting families (e.g., cash transfers) does not discriminate against certain families or family members, attention should be paid to the final outcome of an action, rule or requirement. As noted above, discriminatory treatment is determined by the effect of the measure and not by its intention. For example, requiring a marriage certificate of all families registering in a social protection programme may discriminate against those families that are not formed by marriage.

128. See, e.g., Budig 2014.

129. See, e.g., de Vaus et al. 2015.

130. UN CEDAW Committee 2013, para. 1.

131. See, e.g., art. 15(3) Protocol of San Salvador and art. 18 of the African Charter on Human and Peoples' Rights. See also the Charter of Fundamental Rights of the European Union, which establishes that the "[t]he family shall enjoy legal, economic and social protection" (art. 33).

132. See, e.g., art. 2(2) ICESCR and UN CESCR 2007, para. 30.

133. CESCR 2009, para. 13.

5.2

The indivisibility and interdependence of all rights

The indivisibility and interdependence of all human rights is evident regarding these rights. They cannot be exercised in isolation from other human rights such as the right to education, the right to the highest attainable standards of health, the right to an adequate standard of living and the right to privacy. All these rights greatly impact on the enjoyment of the rights related to the family referred to above, and vice versa.

For example, ensuring girls' right to education brings benefits not only to them but also to their families and is essential for sustainable development. As shown by empirical evidence, increased levels of education for girls dramatically reduces the incidence of infant and maternal mortality; leads to smaller and more sustainable families (as women with higher levels of education have fewer children and more often use contraceptive methods); leads to healthier and better-educated children; reduces rates of child marriage; and increases family resilience to natural disasters and climate change.¹³⁴

Similarly, ensuring equal rights within the family may be essential for ensuring the equal enjoyment of economic, social and cultural rights by all its members as well as for achieving women's economic empowerment. For example, evidence shows that more equitable property distribution within the family can have a range of benefits, such as increasing female labour force participation and boosting education for girls.¹³⁵

Moreover, assisting families in need (e.g., families living in poverty) may be critical to ensuring the full enjoyment of rights by children and gender equality. For example, when families have few resources, children might be forced to work rather than go to school and girls might be forced to marry or denied an education because their families cannot afford it.

134. Sperling and Winthrop 2016.

135. World Bank 2016.

Due to the indivisibility and interdependence of all rights, compliance with the obligations pertaining to family-related rights requires the adoption of a wide range of measures. For example, the equal right of women and men to decide freely the number and spacing of their children (e.g., art. 16(1)(c) CEDAW and art. 23(1)(a) ICCPR) requires as a minimum: a legal framework guaranteeing that women have control over their sexual and reproductive rights (e.g., legislation ensuring access to contraceptives); available, affordable and quality sexual and reproductive health services; and access to information and sex education. It also requires ensuring that women and men have equal rights to make decisions concerning reproduction free of discrimination, coercion and violence.

5.3

An evolving yet insufficient legal framework

Over the years, national legal frameworks have adapted to the new understandings of what constitutes a family. For example, several countries have adopted legislation that takes into account changes in family structure, recognizing same-sex marriages (e.g., the Netherlands,¹³⁶ Spain¹³⁷ and Uruguay¹³⁸)¹³⁹ and civic unions between same-sex partners (e.g., Argentina,¹⁴⁰ Chile¹⁴¹ and Sweden¹⁴²). Thanks to women's movements,¹⁴³ many countries have also adopted or improved legislation to prevent and respond to violence against women.¹⁴⁴

Despite the progress achieved, however, there is much room to improve domestic legal frameworks for the protection of families and their members. For example, 46 of 189 countries covered by a World Bank study in 2015 had not yet adopted legislation

136. Civil Code, article 30, Book I, reform of 2001.

137. Law 13/2005, 30 June 2005, Boletín del Estado, 2 July 2005.

138. Law 19.075, 3 May 2013.

139. For more examples, see note 45.

140. Law No. 26.618 on Egalitarian Marriage Law.

141. Law No. 20.830 (2015)

142. Swedish Cohabitees Act (2003).

143. Hunt and Weldon 2011.

144. At least 119 countries have passed legislation on domestic violence (UN Women 2015a, p. 28).

protecting women from domestic violence.¹⁴⁵ Moreover, more than half of the world's countries do not explicitly criminalize sexual assault in marriage.¹⁴⁶

In several countries around the world, there is still a wide range of laws that discriminate against specific family members, ranging from unfair inheritance laws to unequal custody rights. The same World Bank study shows, for example, that in at least 30 countries women cannot be heads of household, and in 18 countries they cannot even get a job without the husband's permission.¹⁴⁷ In at least 35 countries, female surviving spouses do not have the same inheritance rights as their male counterparts.¹⁴⁸ Similarly, little progress has been made in reforming labour laws so as to allow families to fulfil their care responsibilities. In some regions where multiple legal systems coexist, such as sub-Saharan Africa, the Middle East, North Africa and South Asia, discriminatory customary and religious provisions continue to prevent the equal enjoyment of rights in the family context.¹⁴⁹

Compliance with human rights obligation pertaining to the family requires at a minimum an adequate legal framework on a wide range of issues such as prohibiting domestic violence of any sort, ensuring equal inheritance rights by members of the family, equal access to and control of economic resources, and equal rights of spouses during marriage and its dissolution.

While laws should be accompanied by comprehensive measures to overcome discriminatory social norms, the role of legal frameworks should not be underestimated. Often, they are a precondition for ensuring the effective enjoyment of the rights related to the family as well as the well-being of its members. For example, evidence shows that legal protection against domestic violence is not only critical to protect women by reducing impunity and opening avenues for redress, but it also improves women's life spans.¹⁵⁰ Failing to legally protect women from accessing economic assets on an equal footing with men not only impacts on their financial security but also diminishes their bargaining power within the family. Women's access to property is associated with a higher likelihood of joint decision-making about employment and household expenditure and a better bargaining position at home.¹⁵¹ It is also associated with the improved well-being of children, particularly girls.¹⁵² Similarly, protecting women financially and ensuring the equal responsibility of both parents regarding childcare after the dissolution of marriage have a direct impact on the economic empowerment of women and the well-being of children.¹⁵³

145. World Bank 2015.

146. Randall and Venkatesh 2015.

147. World Bank 2016.

148. Ibid.

149. See UN Women 2015b and World Bank 2013.

150. World Bank 2016.

151. See, e.g., Allendorf 2007; Deere and León 2003; and Friedemann-Sánchez 2008.

152. Swaminathan et al. 2012.

153. UN Women forthcoming.

6.

IMPLEMENTATION OF STATE OBLIGATIONS PERTAINING TO FAMILIES AT THE DOMESTIC LEVEL

Over the years, family structures have changed and human rights standards have also evolved so as to provide better protection to family members, and policymakers should keep pace with these changes. Policies should be tailored to the diversity of families in a country and must respect human rights standards, in particular those emanating from family-related rights and critical principles (e.g., the principles of equality and non-discrimination, best interests of the child and the right to live a life free of violence).

However, policies sometimes do not take due account of the changes in the family structure of the country. For example, they are based on the existence of a male 'breadwinner' and a female 'housewife' to the detriment of other types of family structure such as a female-headed households and single-parent families. Sometimes, due to problems in their design or implementation, policies aiming at supporting and assisting families may end up obstructing the enjoyment of family rights and weakening equality among family members. Consider, for example, maternity, paternity and parental leave policies. These policies may encourage equal enjoyment of rights by partners by enabling both parents (often mothers and fathers, but also same-sex parents) to take paid or unpaid time off to care for a newborn/adopted child. When this happens, they foster a more equitable division of childrearing responsibilities in the family and give women (or the primary caregiver in a same-sex family) greater opportunities for career advancement. Conversely, these policies (or the lack thereof) might effectively prevent parents from taking time off, perpetuating unequal distribution of unpaid care work

within a family and making women (or primary care-givers in same-sex families) less competitive in the job market.¹⁵⁴

On the basis of previous analysis, this section reviews two public policies that have been given pre-eminence in the 2030 Agenda and have an enormous impact on family well-being: cash transfers and unpaid care work. While they were absent from the previous development agenda, the Millennium Development Goals (MDGs), they are included in the SDGs, mainly under SDG 1 and SDG 5, respectively.

Looking at examples of good practice, the section reviews to what extent the implementation of these two policies has been in line with human rights standards and with the SDG commitments to achieve gender equality and the empowerment of women and girls. To achieve these goals in the design and implementation of specific country programmes, policymakers should ask themselves several questions, including: Do these policies recognize the diversity of families in the country concerned? Are they tailored to the explicit needs of these diverse families or are they based on traditional roles and stereotypes? Do they recognize and ensure equal rights for all family members? Do they reduce inequalities within families or do they worsen existing ones? Do they promote cohesive families?

¹⁵⁴. World Bank 2016.

6.1

Cash transfers programmes

In recent years, many countries around the world have implemented cash transfers programmes as a component of their social protection strategies. Generally, the aims of these programmes are the reduction of poverty, improvement of food security and, over the long term, development of human capital. Under international human rights law, States are required to implement social protection measures, giving priority to the most vulnerable and disadvantaged.¹⁵⁵

While cash transfer programmes implemented in various countries differ greatly with regard to their size, coverage, administration, implementation and level of benefits, many share a common feature: they are directed to the principal caregiver of children (mainly women). As such, they benefit different types of families. For example, they might benefit single-mother families, families of unmarried couples and families composed of children and their grandmothers. Yet, depending on the formal requirements for registering, they might in practice exclude families of same-sex partners. There are very few programmes, such as the *Tarjeta Uruguay Social* (TUS), that recognize the vulnerability of trans people, giving them access to the cash transfer programme even when there are no children in the family.¹⁵⁶

In many countries in sub-Saharan Africa, cash transfers, by design, recognize the extended family and kinship systems common in the region. For example, several programmes acknowledge the fact that older people, mainly grandmothers and extended family members, are the primary caregivers of orphans¹⁵⁷ or other vulnerable children (e.g., the Orphans and Vulnerable Children (CT-OVC) programme in Kenya and the Child Support Grant in South Africa).

When cash transfers aim at providing support to families with children, they obviously have an inherent

limitation regarding the recognition and support of families without children. Nonetheless, other types of cash transfer programmes – such as non-contributory pensions (e.g., in Chile, Nepal and South Africa) and social transfers for working age adults (e.g., disability grants) – might provide support to such families.

The flagship cash transfer programmes in many countries are conditional cash transfer programmes (CCTs). These provide cash to households conditioned on their investment in their children's education, health and nutrition. In most cases, CCTs are channelled through women heads of households, who are then responsible for compliance with the conditionalities. The conditionalities (often called 'co-responsibilities') refer to activities such as taking children for vaccinations and health check-ups and/or ensuring children's attendance at school. In most cases, non-compliance with these requirements is penalized: sanctions range from warnings and temporary loss of benefits to permanent exclusion from the programme.

Considering the widespread implementation of CCTs, the analysis here will focus on these programmes. While they have been criticized from a human rights perspective,¹⁵⁸ this section deals only with the extent to which they comply with the rights and obligations related to the family included in human rights treaties.

From the point of view of assisting families and ensuring equal rights and protection for all their members, three related aspects of cash transfers programmes are particularly relevant: the gender impact, the distribution of unpaid care work and intra-household dynamics.

The gender impact

The extent to which CCTs have incorporated gender into their design and implementation varies greatly. Even though many CCTs aim at enhancing the economic inclusion of women, when it comes to gender equality these programmes have been strongly criticized on several grounds. First, due to their 'maternalistic' stance, it is considered that the focus on

155. See, e.g., Universal Declaration of Human Rights (Arts. 22 and 25); ICESCR (art. 9); CRC (art. 26) and CRPD (art. 28).

156. Government of Uruguay 2010.

157. In Namibia, South Africa and Zimbabwe, 60 per cent of AIDS orphans live with their grandparents (UNDESA 2008, p. 24).

158. See Sepúlveda and Nyst 2012. For an analysis of the tensions between CCTs and gender equality, see UN Women 2015a, pp. 140–41.

women is not based on recognition of their rights but rather on considering them as an instrument for benefiting their children.¹⁵⁹ Second, the conditionalities have been criticized as increasing unpaid care work for women (see below). The additional demands on women's time created by these programme requirements have a discriminatory impact on women and on their enjoyment of several rights on an equal basis with men (e.g., right to education and health) and further deprive them of scarce leisure time.¹⁶⁰ Third, CCTs have been criticized for reaffirming socio-cultural norms that consider family caregiving to be women's sole or primary role, effectively relieving men of any responsibility for these tasks.¹⁶¹ Fourth, linked to the previous criticism, it is also considered that the conditionalities of CCTs hinder women's access to paid employment on an equal footing with men¹⁶² and that they do nothing to reorganize gender roles in ways that would reduce or avoid tensions between paid and unpaid work, and in some cases they increase tensions in terms of equality of time use.¹⁶³

Despite these shortcomings, some CCTs have been designed to address explicitly gender inequalities in access to education and health care (for adult women). These have included the provision of higher transfers for school-aged girls, who are more likely to drop out of school, particularly in secondary education, and the provision of free health care for pregnant adolescents and women. These features have great potential to improve gender equality within the family. However, a comparative study on the gender impact of CCTs in Brazil, Chile, India, Mexico and South Africa shows ambiguous results.¹⁶⁴ Women participants of CCTs reported acquiring greater knowledge, adopting more proactive approaches to problem solving, improved self-esteem and increased leverage in household bargaining. Yet, the issues on which women gain bargaining power at home are limited. As the study stresses, while CCTs give women greater discretion over certain purchases, they can also enable

men to share less of their earnings with their spouses, perpetuating existing imbalances.

The distribution of unpaid care work

CCTs are considered to do little to transform patriarchal power relations, attitudes and stereotypes that cast the man as the family breadwinner, while the woman is left with responsibility for children's well-being and domestic chores. In fact, by assuming that women are exclusively responsible for unpaid domestic work, CCTs may be perpetuating these stereotypes.¹⁶⁵ For example, a study shows that in Ecuador, poor women who were recipients of CCTs engaged in 37 hours of unpaid care work per week, compared to an average of 30 hours for women living in poverty who were not recipients of the programme.¹⁶⁶

Looking at the impact of cash transfers on intra-household time allocation (in activities such as market work, domestic labour, school, and leisure for children and adults) is also essential to assess the impact of these programmes on the rights related to the family and its members. A 2015 study of the Colombian CCT programme *Familias en Accion* found that it increased the leisure time of boys while reducing their paid work but reduced the leisure time of girls while increasing their domestic labour. As to the impact of the programme on adults' time use, the study found that the males in the programme increased their paid work at the expense of domestic labour and that females increased their domestic labour at the expense of leisure time.¹⁶⁷ Similarly, a study of the CCT programme *Oportunidades* in Mexico found an increase of housework and unpaid care work among women, caused by the lower contribution of children to these activities. Moreover, the study showed a statistically significant decrease in time dedicated to paid work of 2 per cent on average in the case of men and 12 per cent in the case of women.¹⁶⁸

To ensure that cash transfers in general, and CCTs in particular, contribute to gender equality within the family, they would need to go beyond merely targeting

159. ECLAC 2013, pp. 70–71.

160. United Nations Human Rights Council 2009.

161. Cecchini and Madariaga 2011.

162. Martínez Franzoni and Voorend 2008.

163. UN Women 2015a, pp. 140–41.

164. Fultz and Francis 2013.

165. ECLAC 2013, pp. 70–71.

166. Ibid., p. 62.

167. Canavire and Ospina 2015.

168. Espejo 2013, as quoted by ECLAC 2016.

women as beneficiaries. They should explicitly recognize the role that women play as caregivers, without reinforcing patterns of discrimination or negative stereotypes (art. 5 CEDAW), such as those which consider women to be primarily responsible for childcare and unpaid work in the home. Considering that women perform the lion's share of unpaid care work within the family, with negative impact on their enjoyment of rights,¹⁶⁹ cash transfers should also aim at contributing to a better redistribution of unpaid care work, while encouraging men to take a more active role in caring for family members

Intra-household dynamics

From a family perspective, another critical concern about cash transfers programmes (as well as social assistance programmes more generally) is the primary focus on the household unit without giving attention to intra-household dynamics.¹⁷⁰ This is problematic as the failure to understand intra-family allocation processes “may result in the non-adoption of beneficial policies, in policies having unintended consequences, and in the loss of policy handle”.¹⁷¹ For example, eligibility criteria that consider only the household income but not the intra-household distribution of resources may have an unintended discriminatory impact on girls and older women within the family. The specific needs and vulnerabilities experienced by some household members, such as children, women, older persons and family members with disabilities might not be addressed if complex intra-household dynamics are not considered, increasing the likelihood of the programme having an indirect discriminatory outcome.

It is important to stress that not only CCTs but all types of cash transfer programmes may impact the rights pertaining to the family in a variety of additional ways. However, little information is available on some aspects that are critical for evaluation of their impact on family-related rights. For example, there is little information on the impacts of CCTs in intra-household violence over time or on the use of contraceptives.

Other impacts of CCTs not comprehensively addressed are the impact of conditionalities on childcare options for women or time use among girls versus boys, men versus women participants or on patterns of compliance with programme conditions for girls compared to boys. All these areas require further research to better determine the impact of these programmes on the equal enjoyment of rights by family members.

On intra-household violence for example, evidence from a 2015 evaluation of the CCT programme *Oportunidades* in Mexico suggests that in the long term (i.e., 10 years), women in beneficiary households are as likely as non-beneficiary women to experience physical or non-physical abuse. As the authors noted, the findings of this study are in stark contrast to the short-run relationship established in observational and experimental studies that women in beneficiary households are significantly less likely to be victims of physical abuse than are non-beneficiary women.¹⁷²

In regard to contraceptive use there is also little evidence. After a systemic review of evidence on the impact of conditional and unconditional cash transfers on contraception in low- and middle-income countries, researchers found evidence that cash transfers can increase contraceptive use, increase birth spacing and reduce unwanted pregnancy. Yet, the evidence of the impact of cash transfers programmes on contraception was inconclusive due to several factors, including the limited number of studies.¹⁷³

In sum, cash transfer programmes should strive to transform society's existing gender dynamics and address any patriarchal biases that negatively impact women's enjoyment of rights. They should seek to mitigate the gender-based asymmetries of power in the decision-making process, both within the household and in the community by, for example, ensuring the effective and meaningful participation of women in the administration of the programme (e.g., by establishing sex quotas in its governance structures).¹⁷⁴

169. See United Nations Human Rights Council 2013.

170. World Bank and Independent Evaluation Group (IEG) Team 2014.

171. Haddad et al. 1997 as quoted in *ibid.*, p. 2.

172. Bobonis et al. 2015.

173. Khan et al. 2016.

174. UN CEDAW Committee 2010b, para. 22.

While CCTs have the potential to contribute to protect and assist families and to mitigate inequalities within the family, if poorly designed or implemented they can also reinforce inequalities and undermine family-related rights. Moreover, CCTs are still primarily based on the paradigm of a 'traditional' family (married or unmarried heterosexual parents), without giving due consideration to other forms of family structure. Policymakers should re-think these programmes to ensure not only greater gender equality but also recognition of all families within a country. In this regard, a significant, unaddressed gap in most countries is the way in which these programmes address the needs of LGBT families.

6.2

Unpaid care work policies

Compliance with human rights obligations requires ensuring that caregiving functions within the family are recognized, reduced and distributed fairly. Under the SDGs, States have also committed to better address issues of unequal distribution of unpaid care work. Under SDG 5 ("Achieve gender equality and empower all women and girls"), target 5.4 not only recognizes and values unpaid care and domestic work but also indicates the ways in which it can be redistributed and reduced, namely, "through the provision of public services, infrastructure and social protection policies".

From policies on leave to care for children, sick relatives and the elderly, to the availability of early childhood education, there are a great variety of policies that can affect whether mothers and fathers, sisters and brothers can enjoy equal rights and duties within the family. Among the great variety of measures, effective infrastructure (e.g., adequate access to water supply, sanitation, electricity, roads and safe transport) and affordable high-quality public services are also critical in supporting families in providing care and reducing the time and drudgery that care entails.

Assisting families in providing care and ensuring that all family members enjoy equal rights and duties within the family require States to play a critical role in guaranteeing that care is effectively redistributed.

This requires redistribution of care obligations not only from women (or from the primary caregiver in same-sex couples) to men but also from households to the State.

While most CCT programmes fail to consider the unequal distribution of unpaid work within the family, increasing tensions in terms of time-use by its members, some countries – with different levels of success – have taken measures to account for women's maternal and childcare responsibilities. For example, cash transfer programmes such as the Universal Child Allowance (Argentina), the former *Chile Solidario* (Chile), Universal Basic Pension (El Salvador) and *Asignaciones Familiares-Plan Equidad* (Uruguay) address the redistribution of unpaid care work from women to men.¹⁷⁵

Of these programmes, *Chile Solidario* (now *Oportunidades y Seguridades*) stands out. It not only provides day-care facilities during training sessions for single mothers but, more importantly, provides free pre-school programmes with flexible hours to meet the needs of working mothers. Despite these features, however, some evaluations of *Chile Solidario* have shown that the preschool enrolment rate was low (4.6 per cent) because of a prevailing cultural perception that children are better cared for at home. That perception was cited in 90 per cent of the voluntarily reported reasons for non-enrolment.¹⁷⁶

Recently, new focus has been placed on men as fathers and as partners in caring for families. Several countries are implementing programmes that attempt to overcome gender stereotyping and encourage men to take greater responsibility and participate more actively within the family and the community. The effect is not only to empower women but also to enhance the overall quality of life of the family.¹⁷⁷

To better distribute the burden of unpaid care work, some countries are implementing comprehensive early childhood education and care (ECEC) programmes. By offering accessible childcare services

175. Chopra et al. 2013.

176. Galasso 2011.

177. Esquivel and Kaufmann 2017.

that meet the needs of working parents (mothers) and are of good quality, these programmes may have a positive impact not only in terms of greater protection and respect for the rights of children but also in terms of shifting the burden of unpaid care work from families to the State, as well as within the family (from the woman to the man). In Latin America, for example, this is the case with the *Hogares Comunitarios* (community nurseries) that are being implemented in several countries, including Bolivia, Colombia, Guatemala, Mexico and Peru.¹⁷⁸

Among the most comprehensive programmes with an explicit rights focus is Uruguay's National Strategy for Children and Adolescents (ENIA). This strategy specifically states that the equitable distribution of care duties between women and men and, above all, the recognition of these as a social responsibility are key to any real broadening of social assistance rights and opportunities.¹⁷⁹

Among social assistance programmes, some public work programmes are also aiming at better balancing the productive and reproductive role of women. For example, India's Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA) establishes that if women employed at one site together bring five or more children below age 6, one woman must be assigned to care for them and paid the going wage. Yet, much more needs to be done to ensure that this law is complied with, as evaluations indicate that this requirement is rarely met.¹⁸⁰ According to one survey, for example, childcare was available only at 20 per cent of work sites.¹⁸¹

In Ethiopia, the public work Productive Safety Net Programme provides flexi-work arrangements to accommodate childcare responsibilities, including breastfeeding, without loss of earnings. Pregnant women may take time off and continue receiving payment, which is de facto paid maternity leave.

Moreover, the public works offered by the programme include the building of childcare centres.¹⁸²

In South Africa, the Expanded Public Works Programme (EPWP) provides work opportunities to unemployed and unskilled people through the delivery of home- and community-based care and for early childhood development.¹⁸³ Nevertheless, the programme has not achieved the established 60 per cent quota for women's employment. In addition, it has been criticized because the project wages are extremely low and women who are beneficiaries have few prospects for labour market integration after graduating from the programme.¹⁸⁴

Moreover, social assistance programmes alone are not enough to better distribute care responsibilities. As noted above, infrastructure and services are also critical. Supporting and assisting families and ensuring equal rights and responsibilities among their members require the availability, accessibility, affordability and good quality of childcare and disability and long-term care services.

Supporting the family caregiving functions should be a critical component of the assistance that States are obliged to provide to the family. It has an enormous impact on ensuring that family members enjoy equal rights and duties. When care is not actively supported and distributed, this perpetuates unequal relations within the family and societies as care deficits tend to be filled by those with less power, mainly women and girls.

Higher quality, affordable and publicly funded care services would allow primary caregivers (mostly women) to earn an income or take part in education or training. Evidence shows that access to subsidized child and elderly care is associated with increases in the number of hours in paid work for women. In developing countries, it also boosts participation of female workers in formal employment. In contrast, where care

178. See, e.g., Ruel et al. 2016; Cueto et al. 2009; and Orazio et al. 2010.

179. Government of Uruguay 2010, p. 25.

180. Fultz and Francis 2013.

181. Ibid., p. 11.

182. Naqvi et al. 2015 and International Labour Organization 2016, p. 83.

183. Government of the Republic of South Africa 2013.

184. Plagerson and Ulriksen 2015.

options are not available, the lack of childcare pushes mothers from formal into informal employment.¹⁸⁵

Most of the promising programmes included here seek to better distribute care from women to men and the State. Yet, these benefits may not be equally available to LGBT families. When such benefits are denied to a certain group on the basis of their

sexual orientation or gender identity, they are discriminated against in their enjoyment of both family-related rights and economic rights. The recognition of the existence of various forms of families and the slow blurring of gender-defined roles should encourage policymakers to design and implement unpaid care policies that benefit equally all families within a country.

¹⁸⁵. World Bank 2012.

FINAL CONCLUSIONS

The 'family' is recognized as a fundamental institution in society and as such plays a critical role in achieving sustainable development. The recognition of this role requires the adoption of public policies to support and protect families in a manner that is compatible with international human rights standards. Agenda 2030 for sustainable development provides an opportunity to rethink the ways in which public policies with impact on the family relate to human rights obligations.

This study first shows that, consistent with accepted rules of interpretation of human rights treaties, the concept of 'family' should be interpreted in line with present day conditions (evolutive interpretation), making protection of the family practical and effective (effectiveness principle). An interpretation of family also requires considering all other human rights norms and principles such as equality and non-discrimination, best interests of the child and the right to live a life free of violence.

As reviewed in the study, in general, international human rights monitoring bodies tend to apply these rules of interpretation when dealing with the concept of family in international human rights treaties. The authoritative interpretations of these bodies have influenced the normative framework pertaining to the family at the domestic level, including by encouraging recognition of diverse forms of families and the prohibition of domestic violence. However, these 'contemporary' interpretations of the family have not been fully translated into public policies.

From the present analysis, it is possible to conclude that incorporating a contemporary interpretation of the concept of 'family' in family-oriented policies, such as cash transfer and unpaid care policies, requires compliance with certain minimum requirements in their design, implementation and evaluation. Public policies should: (a) acknowledge and incorporate the

main social transformations in the institution of the family; (b) be tailored to the explicit needs of families and to the requirements of special population groups; (c) recognize and respond to the changing needs of family members throughout life; (d) address the imbalances, risks and barriers that individual family members face in enjoying other rights, such as education, health and work, and in accessing economic resources; (e) aim to ensure substantive equality among all family members, including by providing affirmative action measures; (f) aim at redistributing and supporting the family caregiving functions; (g) protect all family members against any form of violence; (h) ensure the effective and meaningful participation of all members in family decision-making; and (i) recognize the interdependency and indivisibility of all human rights.

Compliance with these key elements would require the adoption of coherent and comprehensive policies, appropriate institutional linkages to provide complementary programmes and services to families and appropriate capacities and mechanisms for intersectoral consultation and coordination.

Moreover, to improve the effectiveness of policies and programmes to support families, States must strengthen data collection on the characteristics of families (e.g., the various forms of families and the distribution of resources and well-being within families). Comprehensive and up-to-date information about the reality of families within each country is essential to better understand the main transformations in the institution of the family as well as the differentiated risks and barriers faced by family members. Ensuring that family-oriented policies respect human rights standards also requires having appropriate legal frameworks (e.g., laws recognizing the diversity of families; non-discrimination laws that prohibit discrimination of any kind, including on the basis of sexual orientation or gender identity; and

laws preventing and punishing violence within the family), as well as institutional mechanisms to ensure their implementation.

Finally, it is essential that the voices of diverse families, expressed directly or by their representatives, are recognized by governmental and social institutions. To ensure diverse representation, governments may need to provide support for the development or strengthening of family associations, in particular of socially excluded families, at the local, regional and national levels.

As evidenced in this study, the implementation of critical family-oriented policies such as cash transfers and unpaid care, which are very prominent in Agenda 2030, have not yet fully complied with the above-mentioned requirements. This failure is not only in contravention of human rights obligations but is also inconsistent with commitments to encourage family cohesion as a way to achieve sustainable development. The achievement of the SDGs requires taking comprehensive measures for protecting and assisting families as well as ensuring substantive equality for all their members.

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