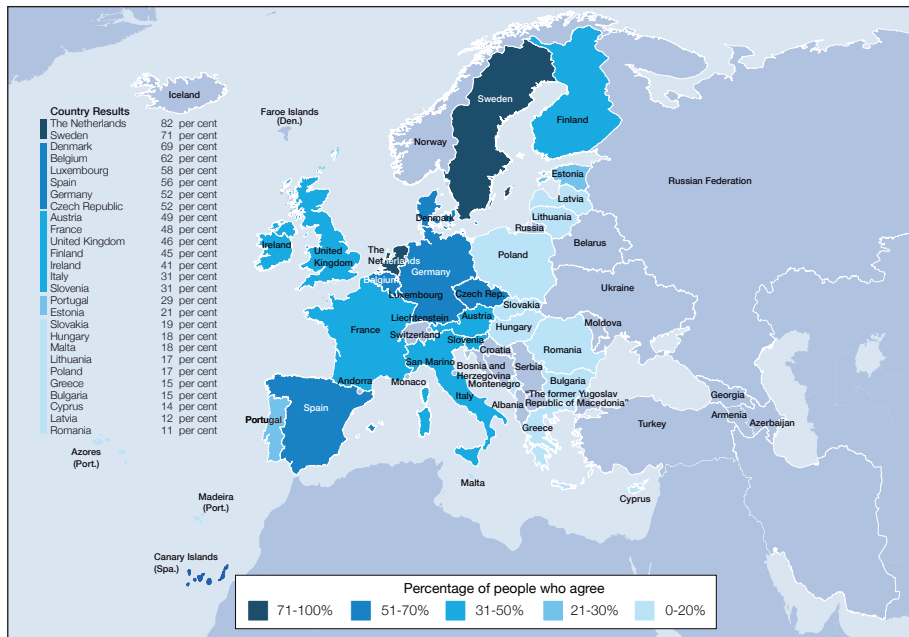


Attitudes and public debate

Access to marriage or other legal recognition to couples of the same sex has been hotly debated across member states in the last few decades. Attitudes towards the legal recognition of same-sex partnerships are most positive in states where LGBT people already receive some level of legal recognition. The Ombudsman in Spain observed a significant increase in the understanding and acceptance of LGBT people in the wake of the political debate surrounding the introduction of marriage for same-sex couples in Spain.³¹⁵ A survey carried out in European Union member states in 2006 found the following results (see Map 5.4).³¹⁶

Map 5.4: “Homosexual marriages should be allowed throughout Europe”



In other national surveys results have been mixed. In Montenegro 16% of the population believed that same-sex couples should have the right to marry and 21% that they should be able to register their partnership.³¹⁷ In Ukraine 34% of respondents thought that same-sex couples should have rights equal to the rest of the population, and 53% that they never should.³¹⁸

315. European Union Agency for Fundamental Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part II – The Social Situation”, 2009, p. 31.

316. European Commission, Special Eurobarometer 66, “Public Opinion in the European Union”, 2006, pp. 43-44.

317. Human Rights Action, “Homophobia in Montenegro”, Ipsos Strategic Marketing, October 2009, p. 5.

318. Our World, “Ukrainian Homosexuals and Society: A Reciprocation – Review of the Situation: Society, Authorities and Politicians, Mass Media, Legal Issues, Gay Community”, Kiev, 2007, p. 65.

In Denmark, 82% of the population favoured giving same-sex couples access to marriage.³¹⁹

Impact of non-recognition

LGBT families can face unique challenges when their partnerships are not recognised. Institutions usually assume a different-sex couple or a mother and a father when devising services, benefits and procedures.³²⁰ LGBT families may suffer from stigma in society. Research also identified that lack of legal recognition may lead them to receive inferior tax, employment and insurance benefits, public housing allocations and non-recognition as a second parent from day-care or education services. In cases of serious illness, it is possible too that life partners are unable to get recognition as next of kin and so are excluded from their partner's bedside and hospital decisions about their care. At a day-to-day level, LGBT families may have a poor experience of services – such as schools, day-care centres and health services – that are designed with heterosexual families in mind. This was the experience of 19% of LGBT respondents to a survey in Finland. In response to similar complaints in Sweden, the then Ombudsman for Sexual Orientation Discrimination initiated a revision of all municipal application forms for social security and child-care to remove their heterosexual bias.

Same-sex couples and LGBT families may be restricted in their freedom of movement within Europe as they may not be able to reside with their family members as their family ties are not recognised. Same-sex couples – with or without children – face particular problems if they want to emigrate, work abroad or move for reasons of family reunification. The destination country may not recognise the marriage certificate of a same-sex couple, which is relevant for same-sex couples married in the seven member states who opened civil marriage for same-sex couples. An evaluation of Dutch legislation on registered partnerships and marriage commissioned by the Dutch Ministry of Justice³²¹ concluded that even though freedom of movement of persons is guaranteed within the European Union, the legal recognition abroad of marriages between same-sex partners is problematic. The situation for same-sex couples under registered partnerships or for those with no access to any form of registered partnership is even more complex. A comparative legal analysis by the European Agency for Fundamental Rights in 2010 notes Europe's "uneven landscape with respect to freedom of movement and family reunification for same-sex couples".³²² It says that the meaning of the term "family member" in the context of free movement, family reunification and

319. Westerlund J., "Regnbågsfamiljers ställning i Norden. Politik, rättigheter och villkor", Oslo: Nordiskt institut för kunskap om kön, 2009, p. 131.

320. See, for example, "The Equality Authority for a Diverse Ireland. Implementing Equality for Lesbians, Gays and Bisexuals", 2002.

321. Boele-Woelki K. et al., *Huwelijk of geregistreerd partnerschap?, Evaluatie van de wet openstelling huwelijk en de wet geregistreerd partnerschap*, Kluwer, Deventer, 2007.

322. European Agency for Fundamental Rights, "Homophobia, Transphobia, Discrimination on Grounds of Sexual Orientation and Gender Identity: 2010 Update – A Comparative Legal Analysis", 2010, p. 8.

asylum “often remains vague” although it has been or will be expanded to include same-sex couples to different degrees and in different areas in Austria, France, Ireland, Luxembourg, Portugal and Spain.

5.4. Parenting and children

Many LGBT persons in Council of Europe member states raise children, whether alone or with their partners. They may bring children from previous relationships to their partnership, or they may have adopted children or acquired legal custody over a child. LGBT persons may also have accessed services for medically assisted reproduction. Regardless of the specific form, rights of custody, inheritance and next-of-kin status need to be assured in the best interests of the child. Transgender persons who are parents face particular problems. They may have to divorce in the process of their legal gender recognition and lose custody rights that arose from their married status.

An expert report produced for the Council of Europe focused on the rights and legal status of children brought up in various forms of marital or non-marital partnership or cohabitation. It found that the well-being of children in families of same-sex partners depends not only on the families themselves, but on the legal framework that ensures or limits the stable protection they receive from their carers. It notes:

Children do not live in a vacuum, but within a family, and an important part of their protection is that the family unit, no matter what form it takes, enjoys adequate and equal legal recognition and protection. In other words, it is as discriminating to the child to limit legal parenthood, or to deny significant carers legal rights and responsibilities, as it is to accord the child a different status and legal rights according to the circumstances of their birth or upbringing.³²³

The Committee of Ministers has recommended to member states in its Recommendation CM/Rec(2010)5 that member states make the child's best interests the primary concern when they decide on parental responsibility for or custody over a child, and that any such decisions are taken without discrimination based on sexual orientation or gender identity.³²⁴

Adoption

The UN Convention on the Rights of the Child sets the legally binding, international standards for adoption. Inter-country adoptions are further regulated by the 1993 Hague Convention. In the European context, the 2008 European Convention on the Adoption of Children (revised) addresses the scope for

323. Lowe N., “A study into the Rights and Legal Status of Children Being Brought Up in Various Forms of Marital or Non-Marital Partnerships and Cohabitation”, Directorate General of Human Rights and Legal Affairs, Council of Europe Secretariat, 2010, p. 3.

324. Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010, paragraph 26.

considering same-sex couples as adoptive parents.³²⁵ It finds that states may permit a child to be adopted by couples of the same sex who are married to each other, or who have entered into a registered partnership. States can also extend the scope of this convention to different-sex couples and to same-sex couples who are living together in a stable relationship.³²⁶ The European Court of Human Rights has held that adoption means “providing a child with a family, not a family with a child” and where the interests of the child compete with those who want to adopt, the best interests of the child shall be decisive.³²⁷ The Court has found that distinctions drawn on the basis of sexual orientation are unacceptable under the convention in (single-parent) adoption cases³²⁸ as it had also already done in a case regarding child custody.³²⁹ The Committee of Ministers has recommended states that if they permit single individuals to adopt, they should be sure to apply the law without discrimination on grounds of sexual orientation or gender identity.³³⁰

LGBT persons can adopt a child by one of three procedures. A single lesbian woman or gay man may apply to become an adoptive parent (single-parent adoption). Alternatively, a same-sex couple can adopt their partner's biological or adopted children without terminating the first parent's legal rights. These are called “second-parent adoptions” and give the child two legal guardians. Second-parent adoptions also protect the parents by giving both of them legally recognised parental status. The lack of second-parent adoption deprives the child and the non-biological parent of rights if the biological parent dies or in the case of divorce, separation, or other circumstances that would bar the parent from carrying out parental responsibilities. The child also has no right to inherit from the non-biological parent. Moreover, at an everyday level, the lack of second-parent adoption rules out parental leave, which can be harmful financially for LGBT families. The third procedure is joint adoption of a child by a same-sex couple.

Ten member states allow second-parent adoption to same-sex couples (Belgium, Denmark, Finland, Germany, Iceland, the Netherlands, Norway, Spain, Sweden and the United Kingdom). Apart from Finland and Germany these member states also give access to joint adoptions for same-sex couples. In Austria and France there is no access to second-parent adoption but same-sex couples in registered partnerships are allowed some parental authority or responsibilities. No access to joint adoption or second-parent adoption is a reality in 35 member

325. European Convention on the Adoption of Children (revised), Strasbourg, 27 November 2008 (CETS No. 202), opened for signature in November 2008.

326. *Ibid.*, Article 7.

327. European Court of Human Rights, *Pini and others v. Romania*, Applications Nos. 78028/01 and 78030/01, judgment of 22 June 2004, paragraphs 155-56.

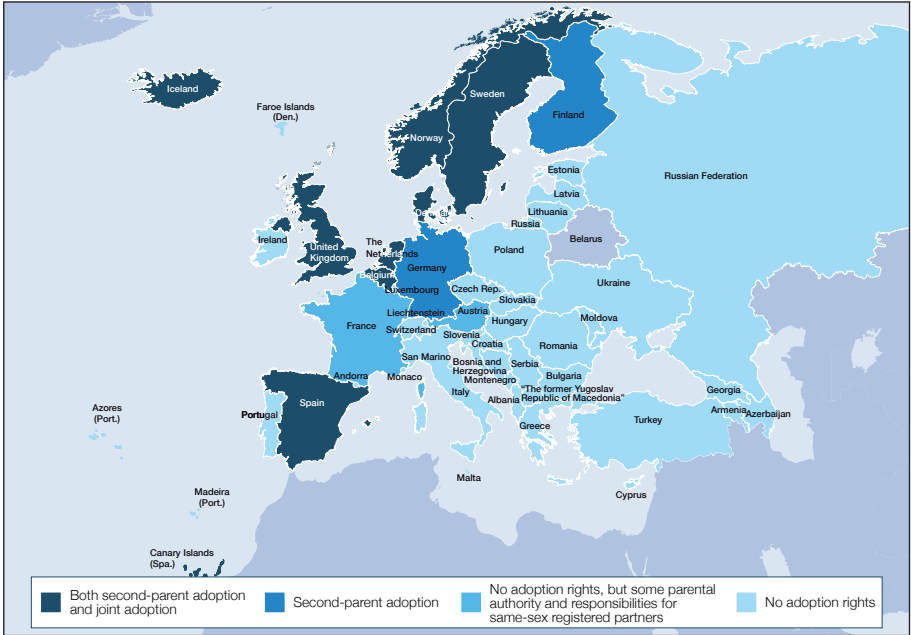
328. See, for example, European Court of Human Rights, *E. B. v. France*, Application No. 43546/02, paragraphs 91 and 93, judgment of 22 January 2000.

329. European Court of Human Rights, *Salgueiro Da Silva Mouta v. Portugal*, Application No. 33290/96, judgment of 21 December 1999, paragraph 34.

330. Committee of Ministers Recommendation CM/Rec(2010)5 on measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity, adopted on 31 March 2010, paragraph 27.

states: Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Georgia, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Poland, Portugal, Romania, the Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Switzerland, “the former Yugoslav Republic of Macedonia”, Turkey and Ukraine (see Map 5.5).

Map 5.5: Legislation regarding adoption by same-sex couples



Assisted reproduction

Some same-sex couples become parents by using available techniques of assisted reproduction, which are also accessible for different-sex couples. Access to assisted reproduction is not explicitly mentioned in any legally binding human rights instrument. In its case law, the European Court of Human Rights has not identified a positive obligation for states to ensure a right to assisted reproduction. In the case of *Marckx v. Belgium* the Court held that “by guaranteeing the right to respect for family life, Article 8 presupposes the existence of a family”.³³¹ The Court added that Article 8 of the Convention did not cover the aspiration to become a parent.³³²

331. European Court of Human Rights, *Marckx v. Belgium*, Application No. 6833/74, judgment of 13 June 1979, paragraph 31.

332. European Commission of Human Rights, *Di Lazzaro v. Italy*, Application No. 31924/96, decision of 10 July 1997; *X & Y v. UK*, Application No. 7229/75, decision of 15 December 1977. In the second case the Court stated that “Article 12 does not guarantee a right to adopt or otherwise integrate into a family a child which is not the natural child of the couple concerned”.

States, however, need very weighty reasons for denying assisted reproduction facilities on the ground of the sexual orientation of a single lesbian woman, where such facilities are provided to single heterosexual women. This follows from the Court's argumentation in *E. B. v. France*, in which it concluded that the refusal of adoption to a single lesbian woman – which would not have applied had she been heterosexual – led to a distinction drawn from her sexual orientation that violated the principle of non-discrimination.³³³ The Committee of Ministers has recommended that member states which permit single women assisted reproductive treatment ensure access to such treatment “without any discrimination on the grounds of sexual orientation”.³³⁴ Some Council of Europe member states, including Belgium, Denmark, Finland, Iceland, the Netherlands, Norway, Spain, Sweden and the United Kingdom³³⁵ give lesbian couples access to assisted reproduction. Other states make these services available only to married different-sex couples. Denmark banned assisted insemination for women in same-sex couples and for single women in 1997, but reinstated the right in 2007. In Italy, donor insemination was made illegal in 2004 for single women and women living in long-term de facto relationships, among them lesbians.³³⁶

Attitudes towards parenting of LGBT persons

Research and attitudinal surveys on parenting and adoption have generally centred on whether same-sex couples can make “suitable” parents and whether an LGBT family background has a negative impact on children. Opinion has polarised on both scores. In 2006 the Eurobarometer found an extreme range of views across countries about adoption by same-sex couples (see Map 5.6). It ranged from 7% acceptance in Poland and Malta to over 50% in Sweden and 69% in the Netherlands.³³⁷ Among those most receptive to adoption by same-sex couples were people under 55 years of age, those with the longest formal education, and those who placed themselves on the left of the political spectrum.³³⁸

333. European Court of Human Rights, *E.B. v. France*, Application No. 43546/02, paragraphs 91 and 93, judgment of 22 January 2008.

334. Committee of Ministers Recommendation CM/Rec(2010)5 on measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity, adopted on 31 March 2010, paragraph 28.

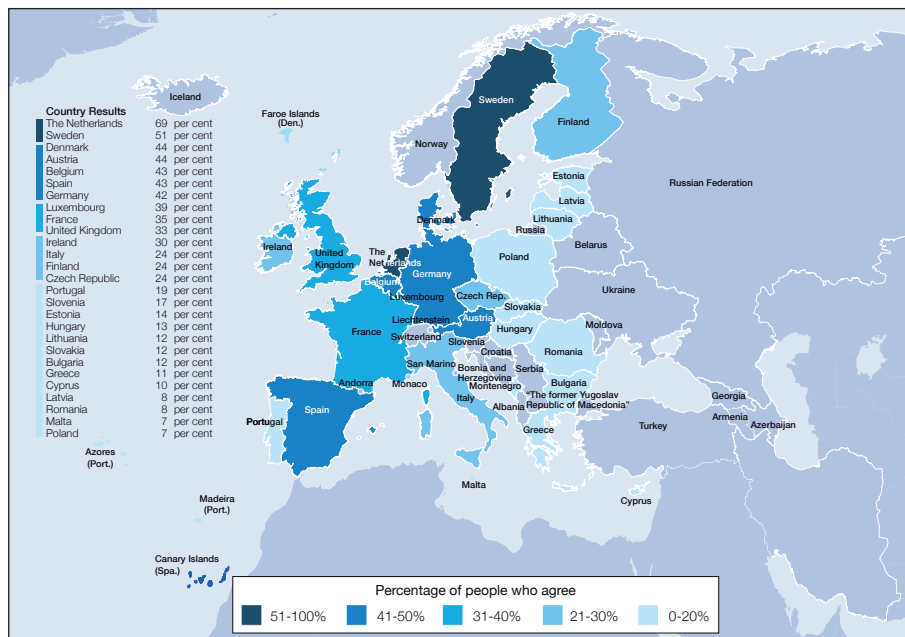
335. Overview based on national contributions (legal reports). Also ILGA-Europe, Rainbow Europe Map and Country Index, 2010.

336. FRA national contribution (sociological report) on Italy, p. 8.

337. European Union Agency for Fundamental Rights, “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation”, 2009, pp. 31-32.

338. European Commission, Special Eurobarometer 66, “Public Opinion in the European Union”, 2006, pp. 45-46.

Map 5.6: “Adoption of children should be authorised for homosexual couples throughout Europe”



Surveys from other member states have been patchy. In Montenegro, 12% of the population favoured giving same-sex couples access to adoption and 24% of students.³³⁹ According to an Icelandic survey in 2000, 53% of the population were in favour of giving lesbians and gay men access to adoption.³⁴⁰

One argument put forward by opponents of parenting by LGBT persons is that it is natural and in a child's best interest to have a father and a mother. This line of thinking assumes that LGBT parenting harms children and cannot ensure their well-being. According to a 2001 Swedish Government report “combined research shows that children with LGBT parents have developed psychologically and socially in a similar way to the children with which they were compared. No differences emerged either as regards the children's sexual development. Nor did any difference emerge from the research between the ability of homosexual and heterosexual parents to offer children good nurturing and care”.³⁴¹ A German research digest in 2009 found that:

- the sexual orientation of the parent does not affect the behaviour and development of the child;

339. Human Rights Action, “Homophobia in Montenegro”, October 2010. Ipsos Strategic Marketing, 2009, p. 5.

340. Westerlund, J., “Regnbågsfamiljers ställning i Norden. Politik, rättigheter och villkor”, Oslo: Nordiskt institut för kunskap om kön, 2009, p. 269.

341. The Commission on the Situation of Children in Families, “Children in Families – Summary”, official Swedish Government reports, Stockholm, 2001, pp. 6-7.

- children of same-sex parents sometimes suffer from discrimination but have the psychological strength to withstand it;
- children of same-sex parents are more tolerant of homosexuality but no more likely than the national average to become gay themselves.³⁴²

“Coming out” in the family

Aspects of parenting also come into play from the perspective of the “coming out” of a family member as lesbian, gay, bisexual or transgender. This applies especially to young people who grow up and live with their families and who may at some point discover their sexual orientation or gender identity. In an online survey 47% of Lithuanian LGB persons replied that their families do not know about their sexual orientation.³⁴³ In Georgia, NGO research demonstrates that 87% of LGB persons conceal their sexual orientation to their families.³⁴⁴ A survey in Serbia shows that 70% of the population would not want one of their relatives to be gay or lesbian.³⁴⁵ In Croatia, 14% of men surveyed and 3% of women said they would disown a gay son.³⁴⁶

The family may be experienced by LGBT persons as an institution of immediate social control. This imposes expectations on the gender roles of boys and girls alike, which can be problematic for LGBT children who do not meet them. NGO representatives in Armenia, Azerbaijan, Georgia and Turkey stressed the double discrimination facing lesbians and bisexual women in those states. As women, they are expected to marry and have children, and until they do they must come home directly from the workplace and not go out alone. Family honour is an influential concept.

In some member states, lack of acceptance by family members can lead to spells of homelessness for young LGBT persons. A study from the United Kingdom showed that 29% of lesbian respondents and 25% of gay ones had to leave their parents’ home after “coming out”.³⁴⁷ Young people forced to leave home after “coming out” in Albania and Moldova, where children often live at home until they marry, had difficulty finding accommodation. Similarly, transgender persons report problems after “coming out” to their families. In the United Kingdom a study found that 45% of respondents experienced a breakdown of their relationship with their family as a result.³⁴⁸

342. Eggen B., “Gleichgeschlechtliche Lebensgemeinschaften mit und ohne Kinder. Eine Expertise auf der Basis des Mikrozensus 2006”, Staatsinstitut für Familienforschung an der Universität Bamberg, 2009.

343. FRA national contribution (sociological report) on Lithuania, p.7.

344. Inclusive Foundation, Discrimination survey conducted among 120 LGBT in Georgia – February 2006.

345. Gay Straight Alliance, “Prejudices Exposed – Homophobia in Serbia”. Public Opinion Research report on LGBT population, 2008. February–March 2008, p. 2.

346. Lesbian Group Kontra, “Violence against Lesbians, Gays and Bisexuals in Croatia: Research Report”, Zagreb, 2006, p. 7.

347. Averill S., “How Can Young People be Empowered to Achieve Justice when they Experience Homophobic Crime?”, Middlesex University, 2004, pp. 20–21.

348. Whittle S., Turner L. and Al-Alami M., “Engendered Penalties: Transgender and Transsexual People’s Experience of Inequality and Discrimination”, Wetherby: The Equalities Review, 2007, p. 68.

