

Redefining the Family in Western Politics: Political Strategies

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Introduction

There are broadly two classes of arguments in the political debate about the family: those that rest on the presumption of *constructivism* – gender, not sex, is socially constructed, sex roles are thus constructed, and sex is constructed in terms of the feminine and the masculine and variations ‘in between’, more like a continuum than two categories. In turn this means that fatherhood and motherhood are socially constructed, and therefore the family can be freely defined and redefined. In fact, on this view it is pointless to seek a definition, as there is none to be found. What was the typical ‘nuclear family’ in some societies in some historical periods, changes. When the empirical manifestations of the family dissolve into many types of households, the definition of the family also changes. This argument is embedded in a view of society and politics that sees both as processes where there is no ‘Fester Punkt’ to be discovered.

The other point of view, the *natural law* argument, assumes the existence of a fixed human nature, consisting of two sexes, where the family is a natural and constant institution in human life – it makes sense to speak of something as *natural*. Motherhood and fatherhood are therefore constants, and the family cannot be redefined, but exists as a norm in all societies, albeit with many instances that differ from the norm, due to widowhood, single parents, etc. The *social* roles of the sexes are however malleable and thus, ‘socially constructed’ to a great extent. Yet motherhood and fatherhood exist as ‘archetypes’ of human existence with much more than mere biological qualities.

Corresponding to these two views on the family’s constituent units, the parents, we find *two entirely different views on the rule of law (Rechtsstaat), the status of international human rights, and the limits of politics*. To the constructivist viewpoint corresponds the view that ‘all is politics’, as one critic put it to me: there are no limits to the political process in terms of human rights, and what we call human rights today, can be changed tomorrow, as we define new human rights. Likewise, if a majority today thinks that the traditional form of the family is obsolete, how can anyone stop it from redefining it when the ultimate political decision-making belongs on the national level, to the electorate in a given nation-state?

Similarly, to the view that there is a human nature that can be discovered and defined, corresponds a view of law that we usually call ‘natural law’: international human rights are apolitical and prepolitical, resting on the discovery of human nature and its dignity. If the family is protected and privileged by human rights, they are valid in all places at all times. Given the turn of international politics after Nurnberg, whose famous trials laid down the validity of natural law above all positive law, this is a very strong argument. But as we know, to paraphrase Tip O’Neill, ‘all politics is local’: who can sanction a national parliament who passes a law that contravenes international human rights? Furthermore, to this view belongs the assumption that the public and the private are definable, that politics is limited to the issues of the common weal. Re. the family, this means that its political relevance lies in its child rearing: it needs protection from political intrusion but also political protection.

Thus, this paper deals with the *political* battle over definition of marriage and family which presently rages in the Western world. The strategic, concerted effort to redefine these institutions is the latest and most politically explicit in a long development that has weakened both. Marriage is rarer than ever before in the West, and

families are weaker also because the birth rate is at an ebb in most European states. Other well-known factors are co-habitation as a literal *modus vivendi* that increasingly replaces marriage, high divorce rates and secularisation which deducts the spiritual dimension from both marriage and family, reducing the union to the purely natural dimension.

However, it is only now that we face a campaign to actually *redefine* both marriage and family in terms of law. This is the gay movement's political strategy, but it is also the top of the ice-berg, so to speak, regarding the societal and political status of these institutions. *The family is the key one here: achieving marriage 'rights' is the detour needed to acquiring family rights, including adoption rights.* Some may object that the gay movement is too peripheral to warrant much attention in comparison with the larger societal trends that weaken the family, but I believe that the arguments used in this specific campaign are important also in a *general* sense with regard to the status of the family: They therefore merit analysis and attention.

The reason why these arguments are partially so successful is that they reflect general notions of right and wrong in European public opinion. These general notions of what is reasonable and acceptable have evolved for many reasons, and it is very important to analyse these: why does the argument that the campaign against apartheid and the campaign for gay rights are similar; carry so much weight? Or why is the 'gay right to marriage' argument so forceful when it argues from discrimination? Conversely, how can it be explained that the words and concepts of motherhood, fatherhood and family seem reactionary, conservative and 'Christian' in our public debate? In short, what gives *positive connotations* and therefore political power to some concepts and not to others?

The answer to this question is crucial, also because it reflects on an underlying reality of philosophical and anthropological premises in people's minds.

In the end this implies that if the family is to be retained in Western politics in the form we know it so far, there has to be an understanding of its *lived reality*. There is no 'recognition' of what a mother is unless one has some observation and experience of a real mother, naturally in relation to her children. The same goes for fatherhood: what it really is, can only be known through lived experience which precedes legal, philosophical and theological explanations of the phenomenon of fatherhood.

I want to insist on the crucial importance of this point: It has often struck me that these concepts are hardly fully known in my own country any more, and we often say that 'marriage' and 'family' are extremely weak institutions here. Empirically this is true; as co-habitation takes over more and more, and as there is no teaching on the Christian meaning of these institutions from the state church, which is the predominant one. This church is remarkably silent on this topic. When the traditional family structure disappears more and more from society, people no longer know what we talk about. *This is a simple, but dramatic point:* when I am in so-called 'Catholic' societies, I sometimes encounter 'strong' families and it strikes me that this is a 'real family', this is what family really means. It has everything to do with a deep naturalness that is integrated, of course, with the spiritual meaning of family, fatherhood and motherhood and their natural unity with the children. One could say that the Catholic teaching on the family is shown in practise: the *natural* unit acquires a *supernatural* dimension in those families, a quality and reality which is recognisable if not tangible.

The seriousness of this point cannot be overstated: The implication is that *if family life as we have known it historically disappears, we cannot sustain the concepts much longer after that.* This is the situation in which we find ourselves in Scandinavia: when family life *de facto* means all sorts of combinations of households, who can argue that there is a norm? Today more than 50% of Norwegian children are born out of wedlock, and this then, statistically, has become the norm. Given a positivist view of law, the law must reflect the reality of social practise and majority will. Family based on marriage is no longer the norm in that sense, but family based on co-habitation.

The national level: Redefining Marriage in Norway

This paper offers an analysis of the arguments and political strategies used in this latest political and legal campaign, viz. the legal redefinition of the family and marriage; drawing heavily on one case study, viz. Norway. The Norwegian case is like a bridge-head into the theatres that unfold also in other states in some time, if you permit the military terminology.

In Norway and Sweden, where gay partnerships have been a legal right for many years (in Norway since 1996), the struggle to gain marriage rights seem at first paradoxical. Why cherish this old-fashioned, bourgeois institution which one has abandoned for co-habitation a long time ago? In Norway, co-habitation is by now the most common form of heterosexual union, and couples usually marry – but not always – when they have

children. State church weddings (more than 90% of the population are members of the Lutheran state church, but very few practise) were at 97% in 1960 but are at 52 % in 2002 (Aftenposten, 16.3.04). A poll shows that the majority do not believe in God despite state church membership (Aftenposten, 3.4.04). More than 50 % of children in Norway are born out of wedlock, and for those who do marry, about 50% of marriages in urban areas end in divorce. I must hasten to add that co-habiting couples break up 3 times more often than do married couples. By contrast, in Switzerland, 94% of children are born in wedlock, and the number for Germany is 85% and for the UK, 80%.¹

The picture in Norway that clearly emerges is one where marriage soon belongs to the exception, to the rather conservative and often Christian couples. Why, then, do gays want to leave their juridically safe partnership law and gain marriage rights?

There are two reasons for this: One has to do with the ‘respect’ that the ‘symbolism of marriage extends’, as one proponent puts it; adding that there is no reason why heterosexuals should have a right that is denied to homosexuals. The other reason is that marriage rights entails the full spectrum of family rights, including adoption rights. Also, textbooks in schools and public norms about family would have to be fully inclusive of the gay family dimension. Further, with the state church system that still exists in Norway, marriage rights entail the right to a church wedding and to full acceptance by the theology preached by state church pastors. This latter point would of course clash with religious freedom, but one can easily see that a right to a church wedding would imply much theological change as a matter of logical course. The issue of gay practise has been the most contentious one in the Norwegian state church for years; where some bishops already ordain homosexual pastors who live in partnerships.

Redefining partnership into marriage therefore brings extremely important societal changes, and would entail a major change, indeed a revolution, away from traditional Western politics. The key issue among these changes relates to family and most of all, to children.

I recently wrote the article below in my column in the Norwegian daily paper Vårt Land:

“Why is the family politically relevant?”

The family consists of mother, father, and children. It is a natural institution in all societies and society is obliged to support it because it uniquely brings forth and rears children. Mother and children have a rights to special political support because a pregnant or nursing mother is vulnerable yet provides the most important work in any society. – The family is politically relevant because it is here humans are born and raised: parents do the key work for society, and noone can replace them. It is in fact the basic cell of society.

These are not my words. They are the contents of the UN Declaration of Human Rights of 1948, the authoritative document in international law about human rights; source of all subsequent such documents.

These human rights are not a political construct, but have human dignity as their basis. They cannot be changed by political will or majorities; they are so-called natural law, pre-political and apolitical. The supercede national laws.

In modern times it was the Nurnberg process against the Nazis that stated the natural law principle as the basis of human rights: there are laws above the positive law of states, and one is in fact bound to disobey this positive law if it contradicts natural law. The Nazis in Nurnberg were sentenced to death because they did not follow natural law, but German positive law in the genocide on Jews. After Nurnberg it was decided that human rights must be stated in a solemn declaration binding on all states so that it is clear that a higher law stands above political processes in individual states.

The definition and rights of the family are such natural laws. Should Norway enact laws that change this, Norway would be in material breach of international human rights; an extremely serious matter.

Children have a right to know and live with their biological parents

Children have the right to know and live with their biological parents, and is this is not possible; they have a right to adoptive parents who resemble the natural parents to the extent possible; i.e. are a mother and father. Further, the best interest of the child shall govern all issues relating to childrens’ rights; and never the interest of adults. All children have a mother and a father, even if the sexual act is replaced by some insemination technique.

¹ Rafael Navarro-Valls, ”Parejas de hecho y parejas de siempre”, newspaperparticle (where?)

Again, these are not my words, but the contents of the UN Convention on the Rights of the Child from 1989. This legally binding convention leaves no doubt about the right of the child to his or her parents; not only to know them but also to be raised by them. This is what is meant by the 'best interest of the child'. This implies that it is an injustice, contravening international law; to conceive a child with the intention of raising it alone or in a homosexual relationship. Even if adults desire children, this natural inclination goes against the best interest of the child in such cases.

The newly published Vatican document on homosexuality and the family warns against political pressure groups that seek to redefine the family and thus weaken it. If the family loses its privileged political support; society will be eroded from within. There must be no confusion about what a family is, and about children's right. The document is extremely clear and realistic, necessary now because several Western states have started to redefine the family and dilute its importance in the process. Catholic voters and politicians are obliged to fight against this and to make a strong effort to support the family in the public debate and political decision-making.

At issue is the very core of human rights themselves: we cannot let minority interest groups undermine these. It is obvious to most that even if a majority reintroduced slavery, it would go against the natural law of human dignity – slavery is forbidden because it violates basic human rights. It should be equally obvious that no political minority or majority can change the rights of the most vulnerable in our society; viz. the children.

Children and their 'safe haven', the family, must not be manipulated in political processes – for their own sake and for the sake of safeguarding international human rights."

(translated from the Norwegian)

The publication of this and other articles led to many negative reactions. The fact that many of them were so angry, made me analyse them carefully: One set of reactions was astounded at the idea that something in politics or law could be stated as an objective fact; viz. that human rights are unpolitical. The natural law argument is clearly extremely unacceptable. Below I seek to explain this.

Another reaction was along the lines of discrimination – marriage conveys a set of rights, they said, that could not be denied to homosexuals. Human rights demand that all be treated equal. Homosexuality, a criminal act some 30 years ago, was now both legal and increasingly accorded civil union status. Why deny marriage rights?

Further, how can 'sexual orientation' be a reason for discrimination? Both marriage and having a family are two human rights denied to homosexuals – still – they argue. But 'time is on our side', wrote one, 'we are going to gain full human rights, like blacks did through the civil rights movement'.

The angriest objections were about the presumption of natural law in my human rights argument: that there is something that is objectively defined; something apolitical and pre-political. One critic thought that this was very naïve; as 'everyone knows that everything is politics'; another thought I used a domination technique in stating that human rights are objectively defined and not given by politicians.

Here we are the very core of the conceptual premises, of the meta-level of politics: The ideological assumptions of natural law and Rechtsstaatsdenken are so different from the assumptions that used to be communist/socialist, but which is now more a general theory of social construction; that there is no bridge between them. *We can therefore speak of different ideologies in a de-ideologized age – constructivism is not a specifically political ideology, but rather an extreme relativist position. Yet it has by now fundamental implications for politics.* The 'advantage' that the natural law presumptions have now – in the fact that states have accepted international human rights as legally binding and the UN Declaration as the authoritative basis for these, can easily be eroded when (Western) states decide that these rights contradict their national public opinion.

In Norway we see an interesting polarisation on this meta-political level, implicit in the political arguments used. There has been no natural law tradition in this country since the Reformation in 1536, and thus no continuation of realist philosophical thinking. The legal disciplines in Norway and Sweden are largely positivist – the famous Uppsala school founded by professor Axel Hagerström in the 1930s was premised on the dictum that 'ethics is about emotions and has nothing to do with law*', as its founder is reputed to have put it. Law is the expression of majority will at any one time. In the Nordic countries the constitution is weak, almost as national icon, but of no political importance beyond symbolism. When a Lutheran pastor, Børre Knutsen, some years ago tried to invoke the Norwegian constitution's paragraph on the state being based on the Lutheran creed in a case in the supreme court on abortion, he lost. The constitution is not relevant, the court said. No laws are tried against the constitution: they cannot be deemed 'unconstitutional' like in the US or Germany. The Rechtsstaat is weak at the national level, but rulings from international courts, especially the ECHR in Strasbourg, are accepted as supranational and have direct consequences by now.

This little intellectual history serves to underline the importance of philosophical first principles – Grundbegriffe – for the terms of political discourse. Even if the debaters are entirely ignorant of their meta-political concepts, they argue from them implicitly. In the Norwegian case this is striking, as there are so very few who argue from a natural law understanding of human rights and law in general. The Catholic heritage is one of universalism in law – derived from the Roman law tradition and from realism in philosophy, whereas the nominalist Protestant tradition has been developed in the context of the state churches of Westphalian nation-states where all law and politics emanate from below. In the Norse political tradition, laws were decided on the ‘thing’ (parlement) in Viking times where chieftains met. The Catholic church introduced canon law, but when the reformation ousted all remnants of Catholic legal life, the concept of a ‘higher law’ disappeared altogether. The institutional presence of natural law was absent while the philosophical premises of such were non-existent.

This has led to a legal development in the North where law is entirely national, i.e. where there is no connection between the law of each state and a higher set of laws, unlike the states whose jurisprudence belongs to the Roman law tradition. The historical continuity of Roman law and the Catholic natural law tradition contrast sharply with the historical development of law and politics in the North. The notion that states’ legal systems are connected in terms of higher, general norms of law is entirely absent here. Only with the advent of international human rights in 1948 do we see such a connection, for these rights are based on the experience from the Nurnberg trials and WWII. There is immediate approval of the UNHR in the Nordic states and full acceptance of the ECHR of 1950. But this is typically a political acceptance rather than a legal one. The ECHR is only incorporated into Norwegian law in 1999!

There has been, and is still, a resistance to supranational law, based on both the nominalist premise of law and on the strong Westphalian state tradition. As long as international law, especially human rights, do not contravene Nordic politics, there is no problem between the national and the international level. Indeed, the Nordic states are major proponents of international human rights in the world. In the case of a seeming contradiction – as in the family case – the ‘solution’ is the constructivist argument, as we will see below.

The national-international nexus: ‘importing’ legitimacy

The attempt to refine the family takes place at the national as well as international level. In addition, it takes place in both the legal-judicial as well as in the parliamentary arena. It also draws its power from the public debate. To the naïve bystander, this is a confused picture, and one will naturally ask: who decides what legitimately?

The battle is over this very question: what belongs to politics and what belongs to inalienable human rights? Can a parliament change the family definition? Can an American state legislature do it? Can a judge in an American court do it?

Legitimacy here refers to *social* legitimacy – that something is seen as right and just, as *justified*, by the general. Social legitimacy does not necessarily have anything to do with *legal* legitimacy, but as we shall see below; invoking human rights for a cause creates very much social legitimacy today (Hurd, 1999).

The European and US debates are very different, and I will leave the US side to prof. Glendon, who is an expert in this field. I note that the American debate runs within distinctly American horizons, based on their premises, while the European debate runs in the nexus of international human rights obligations and what they entail, contrasted with majority politics on the national level. Yet even here there is a referral to human rights.

In the following I will refer to the European debate only.

The constructivist arguments runs like this: *Homosexuals were discriminated and even incriminated in Western politics until recently, just like blacks before them. Now they have gained their civil rights, and cannot be denied the rights of other citizens. Equality demands this. Marriage is ‘more than just a legal contract’, and therefore full equality implies that all adults have a right to marry, argues the Economist’s editorial.² Marriage bestows legitimacy more than a civil union or partnership. Since gender is socially constructed, fatherhood and motherhood cannot be defined in an ‘essentialist’ manner. What matters, is the ability to take care of children. Parenting is about ‘caring ability’. Human rights must be what is seen as generally legitimate in a given society, and this is an evolving and progressive process, the evidence for which is how we think about human rights in new ways.*

² Leader, 28.2.04, ”Economist”

The natural law argument differs on all major points: *Human rights are not made, but discovered, as written in the preamble to the UN Declaration; this declaration is the fount of all human rights documents, and protects the natural family based on biology. There is a right to marry for adult men and women, and to form a family. The family is the fundamental unit of society and is therefore entitled to privilege and political protection. The formulations on the family and childrens' rights are repeated in legally binding conventions such as the ECHR (1950), the International Covenant on economic, social, and cultural rights (1966), and the American Convention on Human Rights (1969). Moreover, political majorities cannot change human rights, they are inalienable and inherent, belonging to the human being because of its dignity; not because some political body has granted them. The family cannot arise from anything but a biological union that results in offspring: only males and females can conceive, and a child necessarily has a mother and a father. This is a fact and the experience in all societies, always.*

Both arguments need legitimacy. They both seek this in three sources: *international norms, science, and democratic* (bottom-up) mobilisation. This happens in an interaction between the national and the international level which is intensifying and which carries major importance for the outcome of this (and other) political processes.

Throughout the 90s there has been an intense effort at various UN conferences to get a new wording in an international UN document on 'various forms of family', 'sexual orientation', or simply to change 'the family' to 'families'. This is so vital because it would give strength to the argument that human rights are not fixed, but evolving; and it would also lend authority to national-level arguments from the UN, which is the world's 'legitimiser' – and thus extremely important.

The *interaction* between the national and the international levels that now typifies 'value politics' must be understood before we can assess the weight of the two arguments in this debate and what makes them politically legitimate:

Human Rights gives optimal Legitimacy

Today's international politics increasingly deals with value questions. Human rights discourse is becoming the major form of political argumentation, nationally as well as internationally. Human rights instruments have proliferated, both as hard as well as soft law (Goldstein, 2000; Gourevitch, 1978). Legalization as hard law, where there is a clear definition of states' obligations, is usually difficult to achieve in the human rights area, normally requiring consensus. For this reason those who want to change existing human rights norms mostly opt for soft law strategies, where one uses "soft law to cast the normative net more widely, building as broad a coalition as possible. Strengthening the normative consensus and possibly the hardening of legal commitments is left to a more gradual process of learning" (Kahler, 2000:679; Slaughter, 1995).

We also notice that the political agenda often is set by professional interest groups that invoke more or less well established international human rights norms as their basis of legitimacy. These actors we call 'norm entrepreneurs'. They are highly specialised, highly committed, and work exclusively for their cause. They are thus eminently equipped to succeed. Once an issue has been defined in human rights terms, it acquires a special legitimacy that is difficult to counter.

There are especially two areas of concern where human rights discourse is used by strategic actors today: the family and the right to life. I recall that that I noticed that Norwegian politicians on the left started to problematise the notion of the family in 1994, occasioned by the UN's Year of the Family. These politicians started to talk about the 'various forms of the family' every time there was some event related to the UN Family Year. I remember that I was very disturbed by this, but I did not at the time realise that this was part of an international action movement on this issue. Likewise, when I negotiated for the Holy See at the Beijing conference in 1995, my Scandinavian and Dutch colleagues were especially eager to high-light the number of maternal deaths resulting from illegal abortions. This was a very high number indeed, and I wondered how they could arrive at it, given the secrecy surrounding illegal abortions. But it was the key way in which they tried to set the agenda. This was of course a way to make legal abortion a medical solution to a perceived problem of immense proportions - making safe what was already unsafe.

As we shall see later, both these issues have been defined in human rights terms: abortion as a human rights for women; and the right to form a family as an individual right, regardless of sex.

How Legitimacy is 'Imported'

New actors that are transnationally organised use whatever is convenient for their cause. The NGOs that promote alternative family forms or abortion will use the Beijing Final Document instead of the Universal Declaration, although the former has no legal or authoritative status whatsoever. What matters, is simply to find some UN document that can be invoked because UN documents carry legitimacy in most states around the world. The legal scholars Abbott and Snidal notice that 'soft law' - non-binding international documents - often carry much weight and are in fact treated by interested actors as if they were hard law: this applies directly to the UN conferences in the last decade (Abbott and Snidal, 2000). In fact, aiming for soft law bases for new norms is a preferred strategy because its status in the international political system is so ambiguous. Also, international bureaucracies play political roles, as Hopkins' study of the WHO exemplifies (Hopkins, 1976).

Further, the growth of transnational advocacy networks is very important to the understanding of value politics today (Risse-Kappen, 1995). The growth of national NGOs is to be found in single-issue areas, and these groups easily network in horizontal ways. Modern communications help this organizational form (Kamarck and Nye, 1999). NGOs typically seek out causes where it is easy to present the issue as a singularly good thing; as an improvement or progress, and use human rights language as mode of argumentation and as justification. First, something is defined as a human right, e.g. abortion. Then abortion is justified because it is a human right.

Keck and Sikkink (1998) have done extensive analysis of such transnational advocacy networks. They describe the strategies of these actors as a pincer movement: First, the new or redefined norm is sought established at the international level. Here UN conferences are the best arenas because they carry most legitimacy, but also other arenas may be attractive in specific regions. The norm change sought is typically that of soft law, which does not require member state consensus.

Once a text change has been established, it can be invoked at the national level as authoritative. The national NGOs work at this level all the time, seeking to prepare the public debate and public opinion. The invoking of the norm from the international onto the national level is successful only if there is some preparedness for its reception (Cortrell and Davis, 1996). This can be created by the elite policy level, where civil servants incorporate SOPs (standard operating procedures) in bureaucratic routines that have political significance, such as defining the abortion pill as 'emergency contraception', as has been done by the WHO and then, by national bureaucracies.

In order to succeed in doing this, one preferably needs both some scientific basis (which can be had for any argument today), as well as some text in an international document. The important role of scientific evidence has been studied especially under the aegis of the environment, in the case of climate change, which has been essentially contested for a long time. Haas has shown how 'epistemic communities' - important groups of experts who agree on what the 'state of the art' in their field concludes - form to support a scientific view-point, and that such communities exert major influence on both policy-makers and public opinion (Haas, 1992 and 1993). There are no systematic studies of medical science in this regard: are there epistemic communities regarding homosexuality and gender issues? Do psychiatrists basically agree on whether homosexuality is learned behaviour or innate? Do they agree on whether children need both male and female roles models in the upbringing? From Soviet history we know that all science can be manipulated, but the *interesting question is to what extent political actors in Western democracies try to create such epistemic communities in these areas today*. It is clear that any position can find its scientific 'evidence' in the global marketplace, but *it is politically significant if some actors, such as NGOs, actively seek to create scientific strongholds for their views*.

Thus, there are essentially three sources of authority for political arguments about norms and values: international approval, popular, domestic approval; and scientific evidence. Thus, new norms can also be seemingly generated from below, through agenda setting of the public debate. NGOs are of course expert at this. Finnemore and Sikkink lay out how the invocation of the international norm happens while the same norm is being supported from below, so that one arrives at both democratic legitimacy as well as being 'told' by the UN or some other international body to follow the norm (Finnemore and Sikkink, 1998)

In the period after the norm has received some international recognition in some text, the advocacy networks work intensely to create a 'cascade': the norm should be seen and debated everywhere. Thus, one overcomes resistance to the norm by becoming familiar with it, and one thinks after a while that the norm is both just, the result of progress, and natural. *The present process toward creating 'homosexual families' is in the 'cascade' phase: there are many initiatives for debate in every Western country, and those who are against this concept are seen as being against progress, tolerance, and human rights for homosexuals*. There is a very agile and competent transnational advocacy network at work here: in UN conferences we have seen efforts to insert 'sexual orientation' and 'various forms of the family' for about a decade now, carried out especially by feminist groups

who have access to the UN conferences. At the same time there has been a very systematic work on the national level by homosexual groups, arguing in human rights language. The first step was the legal recognition of partnership, the second step is legal recognition of family rights on a par with the normal family. The EU charter on human rights – part of the new Constitutional Treaty which will make it legally binding - has a wording on the family that simply leaves the matter to the national level and its legislation – because one could not agree to repeat the familiar standard definition of the family as a unit based on marriage.³

Thus, *the interaction between the international and national level is an important one where the two levels consolidate each other*: A norm invoked from the international level confers legitimacy (Hurd, 1999) - a key variable in modern transparent politics - and a norm seen to emerge from below likewise confers the most important source of legitimacy of all, viz. democratic legitimacy. In the case of 'homosexual families', we can record how polls are taken at regular intervals, showing gradual increases in acceptance for this concept. Once the numbers approach 50%, the norm is well grounded. Politicians will then follow suit, based on their respect for popular opinion (or fear thereof!). The campaign is successfully completed when the new norm is embedded in national legislation and practise. At this point it is part of national practise and perhaps law, and that makes it almost unassailable. The right to abortion has been on Norwegian law books for 30 years now, and public opinion is almost totally in favour of this. It takes exceptional skill and courage as well as independent thinking to advocate deviation from the law of one's own state. The status of international law, especially soft law, is much more tenuous: it can be applied or invoked, it can also be totally ignored in most cases. Few international instruments have enforcement and even monitoring mechanisms, and in the case of soft law, it is obvious that its role depends entirely on whether 'norm entrepreneurs' decide to use it.

Both national and international organisations and bureaucracies may be actors in norm change - they are 'norm entrepreneurs', as Sikkink calls them, and I am tempted to recall that modern war lords are called 'conflict entrepreneurs'. These strategic actors are often operators between the national and international levels, and we know that they wield important influence on negotiations in international conferences, working in networks of transnational civil servants.

There are several success stories of how transnational advocacy networks have achieved their goals: For instance, the international campaign to ban land-mines (ICBL) managed to get a core set of states to support its cause, and the convention on the use and stock-piling of land-mines actually achieved hard law status - it is a legally binding convention. In this process the NGOs were the major actors in setting the agenda and launching a process, against the persistent opposition of the US (Price, 1998). One can also mention the anti-apartheid movement in South Africa, where again the US was opposed to the claims for abolition, but was gradually forced to change its national position (Klodz, 1995). It is obvious that in order to succeed in such norm change, one has to have a 'good cause' in the sense that it can be easily put in terms of a human right, and preferably in terms of good vs. bad. In the two cases mentioned above, this was easy. But in addition to a 'good cause' that easily persuades, one has to have a number of other political resources: A well-functioning transnational network, access to press and media, access to the relevant international arenas, access to favourable scientific knowledge when necessary; and ability to stay the course during the period of international norm establishment and its domestic diffusion and embedding.. In the two cases mentioned above, it was critical to the transnational NGO to get a core set of states on board. States are still the main actors of international politics. Once a 'coalition of the willing' has been established, this tends to attract also other states which do not want to be seen as laggards. If band-waggoning really gets started - as it was in the land-mine case - then no state apart from those that really have a vital national interest at stake - wants to be left behind.

New international arenas for norm-creation

The number of international arenas for norm-creation has increased significantly in the latest decade. A plethora of UN conferences on normative issues have been held: on the environment, on population and development, on women, on social policy, and to come next year, inter alia on small arms and light weapons, and on racism. In addition, there are very many others fora where international norms are debated and developed: in the whole UN 'family' of organisations, in the OSCE, the Council of Europe, the WTO, OECD, etc.

Who are interested parties here? The states, but only the states with a particular interest in an issue. States have far too much to do to invest major energy in such conferences apart from the states which take a particular interest in the issue area. Thus, the most interesting actors here often are the NGOs which drive single-issue causes, such as feminism or the environment. In an international organization, some states are leaders, others are followers, and the rest are often passive. At the UN, there are two Western leaders: The US and the EU, and one

³ Art II-14,3 of the charter reads: "The right to marry and to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights

non-Western leader, the G-77 (which now has 144 members). The US is the only superpower in the world, which used the UN when it needs legitimacy; otherwise not. Being a superpower, it can afford to refuse to pay its UN dues. Everyone knows that the UN would amount to nothing without the US. – The EU has become a major power as well: it has 15 members, but is usually supported by all the candidate states (ten), by the aspiring states beyond this, and by the EEA states like Norway and Iceland.

G-77 is an amorphous actor which is important because it gathers such a large number of states.

At the UN, the positions of these three actors basically determines an outcome. But also the UN 'family' organizations and their bureaucracies play a major part. Often these actors have the expert knowledge that states lack, and influence the draft texts because they write these. State power depends on staying power, engagement, and discernment. An international organization will seek to enhance its own power, and state control is often very slack indeed. Also, at the UN one estimates that about 60 ambassadors never ask for instructions from the capitals. Democratic control from national legislatures is largely an illusion.

There is no logic that is agreed upon regarding the relationship between the UN and other international bodies and the nation state. Often there is deliberate ambiguity: I was going to address the UN commission on the status of women when I was Norwegian state secretary, and had made my own text. One delegation member – a civil servant sympathetic to abortion – said: "What will happen if you speak about the right to life in your intervention? If Parliament in Norway sees that, what about our abortion law? You represent a minority government". This rather direct threat made me call the Foreign Office, asking what to do: after all, Norway hails the Universal Declaration which speaks about exactly the right to life. The answer was 'go ahead' – we support the right to life abroad'. Noone has ever reflected on the total discrepancy between the national and the international level in Norwegian politics here.

Sovereignty is changing

International norms acquire more legitimacy, power, and status. There is a large literature that documents this development, ranging from legal supremacy of human rights law (Rosas, 1993 and 1995) to studies of the radically changing nature of sovereignty (Chayes and Chayes, 1995; Koh, 1997; Matlary, 2002). Krasner has aptly called his book: Sovereignty: Organized Hypocrisy (1999), because there is a great deal of absolute hypocrisy in the actual practise of sovereignty. Those who look for clear rules of who is sovereign in which issue area - the national or the international level - has to look elsewhere - international law and international politics are often deliberately ambiguous here. What is legally codified may of course be defined clearly, but that is only the first step: is there any application, and if so, is it, consistent? In the sphere of soft law it is even worse: here it is very much up to the 'norm entrepreneurs' to design a political strategy. Do the Beijing conclusions bind anyone? Not legally, but they may nonetheless be politically important to the extent of ending up in national law books. How? Through a carefully designed political strategy. In a state where noone is interested in these conclusions and where there are no actors to drive the issue, not a soul will take an interest. And had the conclusions been legally binding, noone would ever know or feel any impact, for who would enforce them?

Arguing from International Human Rights on the National Level

The mechanisms of foreign policy have increasingly come to resemble those of ordinary, domestic politics: The NGOs, the media, and citizens act and launch initiatives, demanding accountability from foreign policy-makers. Thus, foreign policy-makers have to react and to act. They are no longer insulated from the domestic political process.

Thus, constructivism as the basis of modern politics is the major challenge to those who uphold natural law. In the international instruments I have mentioned, we find definitions that accord with natural law. But they are of course challenged by a philosophy, almost always only implicit, which denies the very possibility of definitions.

This brings us directly to the realm of political argumentation. The concept of law is based on the ability to define, rather permanently, what the law prescribes or forbids. This presupposes the concept of human nature, which in turn is a perennial concept: by definition human nature does not change. It is either is or is not what we attribute to it. But the modern world does not believe in human nature and in the recognition of vices as well as virtues. Rather the personal freedom of all is the basis of modern politics. *This redefines the concept of tolerance to be one of acceptance of everything that is seen as legitimate at the present moment*. When we refer to the Universal Declaration, we at the same time imply that the human experience that informed it, is consistent with human nature. But for someone who thinks that the present moment represents human progress, and that history is simply out-dated, this declaration can have no authority because the very concept of such is invalid. But on such a view all norms become expressions of mere power, and there can be no standard by which to measure there norms. The paradox here is that the 'norm entrepreneurs' always present their case as 'good', progressive'

and an improvement on what was before. But how can they know that something is good or an improvement of they have no objective standard or criterion of comparison?

Despite the logical flaws here, I think we can safely conclude that the contemporary political process around norm change is very unprincipled, but that is part of political life. What we see, however, is that such norm change is facilitated by modern communications, views of sovereignty, the pervasiveness of soft law, and by the strategic action potential of non-state groups.

This expose has tried to capture the processes behind the arguments re. the family, and why some arguments gain credence, in other words, are seen as legitimate. The constructivist line as well as the natural law line will draw on international (UN) norms in order to gain legitimacy. The natural law adherent will be surprised that the definition of basic human rights can be so contested as it is in UN conferences, but as I have argued here, this is an entirely rational strategy, both for those who explicitly want to change human rights norms; as well as for all those who think that 'all is politics' and thus malleable.

Turning to the initial issue, viz. family redefinition at national level, it seems clear that the natural law argument is very weak. The *Zeitgeist* is constructivist rather than natural law-based, and this *Zeitgeist* is a general relativism in all things, not the family in particular. What is objectionable is the idea that anything; especially moral norms, can be defined. When the concept of truth is what one objects to, then the search for truth is meaningless, as Cardinal Ratzinger so often points out.

In addition, when the object corresponding to the term, as the scholastics would have put it, does not exist as a general phenomenon any more, it is very hard to define the term: when there are fewer and fewer natural families around, it is harder and harder to demonstrate the objective definition of the term family.

The proponent of natural law has the *logically* best case, compared to that of the constructivist, however:

It is both an argument about legal consistency and an argument about the Rechtsstaat:

The *legal* argument is this: The UNHR is the authoritative basis for all subsequent HR conventions and instruments. Here the right to marry for any man and woman of a certain age is defined as a fundamental human right, and the family is defined as the basic unit of society (art 16, 1,2,3) Further, the preamble to the declaration states that these human rights are 'inherent' and 'inalienable'; thus not political decisions, but rights that stem from our human dignity.

Subsequent legally binding instruments, such as the ECHR (1950), art 12, the Convention of Civil and Political Rights (1966), art 10, and the American Convention of Human Rights (1969), art 17; all repeat the definitions from the UNHR. There are also some cases from the European Court of Human Rights in Strasbourg which reaffirm the heterosexual definition of marriage (Rees, 1986; and Cossey, 1990.⁴

The legal argument is only important if it is a natural law argument, implying that fundamental human rights cannot be changed, neither by courts nor by politics. They must be interpreted, surely; but the interpretation has to take its point of departure in the UNHR and its underlying anthropology. As has been shown, there is a coherent and consistent anthropology underlying the declaration's focal point of human dignity (Glendon, 1998).

The Rechtsstaat argument also relies on natural law premises. It is the familiar argument that democracy consists of not only the parliamentary (majority) channel of law-giving, but also of checks-and-balances on the powers of the state – the separation of powers into law-giving, judiciary, and executive. Traditionally the Rechtsstaat is conceived on the national level alone: the constitution provides a Bill of Rights against which the citizen can check the laws given by the majority parliamentary procedure. The Supreme Court of a given state is the institution charged with this.

However, in reality there is a wide variety of constitutional settings in Europe, and very weak constitutionalism in some states, like my own. But the separation of powers principle remains valid for any democracy. The internationalization of politics, especially in European integration, means that the national-international divide is like a 'line in water', as my Swedish colleague Kjell Goldmann puts it (Goldmann, 1989). The rise of supranational courts in human rights – the Strasbourg court (ECHR) and soon the EU Court in Luxembourg (ECJ) - signals the development of an international Rechtsstaat. The argument from the natural law proponent is

⁴ Rafael Navarro-Valls, op.cit. He also remarks that there are other cases not so favourable.

therefore that international human rights form the 'constitution' for all states, as these rights have a peremptory status.

The risk with this strategy is surely that case law may develop in the opposite direction of the original definitions of human rights. The inability on the part of the EU to reaffirm these definitions is a case in point. How will the supranational ECJ rule on the family and marriage once the EU constitution is adopted and ratified?

Despite this the strength of the *Rechtsstaats*-argument remains crucial: If human rights are subject to evolving interpretations, can they be termed human rights? How can Europe argue for human rights abroad if European states start to redefine these very rights at home? If 'rogue' states are left to interpret human rights as they want, the whole point of Western foreign policy disappears.

The *constructivist* argument about the family remains very strong on the ideological level in national politics. Escewing the larger logical issues involved, this argument appeals to the limitless individual freedom that is reigning today. Human rights for all, regardless of sexual 'orientation', seems appealing enough.

One possible way is to return to the classical question of politics, the 'summum bonum'; asking *why* the family is of relevance to politics and society. As prof. Glendon concludes in her paper; the question of 'why relevant' must be a common focal point for all politicians. The answer to this surely has to do with off-spring. Perhaps a 'minimal solution' to the irreconcilable positions outlined in this paper lies in the acceptance that children have rights that adults do not have, and that these rights precede the rights of adults. The focus on children does not allow for a total disregard for the organic unity of the family, as the weak child needs care and stability. Since children are so much at risk today, also from consumer pressures and early sexualisation, a focus on family policy for the sake of children seems very relevant to all. One will then immediately confront the issues of motherhood-fatherhood vs. 'caring ability'; of adoption and surrogate parenthood; but the international human rights of the child to biological parents are very strong and clear⁵. A shift in political focus away from adult 'rights' to marriage and family to children's rights to parents and stable family life would also entail that the extreme individualist focus would have to be toned down. The recent COMECE Family Strategy is a good example of such a policy proposal.⁶

References

Abbott, K.W. and Snidal, D. (2000) "Hard and Soft Law in International Governance", 54, 3, International Organization

Chayes, A., and Chayes, A. (1995) The New Sovereignty: Compliance with International Regulatory Agreements, Harvard Univ. Press

COMECE (Commission of the Bishops' Conference of the EU), A Family Strategy for the EU, March, 2004, Brussels

Cortrell, A. and Davis, J.W. (1996) "How Do International Institutions Matter? The Domestic Impact of International Norms and Rules", International Studies Quarterly, 40, pp. 451-478

Finnemore and Sikkink, K. (1998) "International Norm Dynamics and Political Change", International Organization, 52, 4, Autumn

Glendon, M. (1998) "Knowing the Universal Declaration of Human Rights", Notre Dame Law Review, 75, 5

Goldmann, K. (1989), "The Line in Water: International and Domestic Politics", Cooperation and Conflict, XXIV

Goldstein, J. (2000) "Introduction: Legalization and World Politics", International Organization, 54, 3, Summer

⁵ UN Convention on the Rights of the Child, 1989

⁶ COMECE (Commission of the Bishops' Conference of the EU), A Family Strategy for the EU, March, 2004, Brussels

- Gourevitch, P. (1978) "The second image reversed: the international sources of domestic politics", International Organization, vol. 32, No. 4
- Haas, P.M. (1992) "Introduction: Epistemic Communities and international policy coordination", International Organization, 46, 1, Winter
- Ibid., (1993) "Epistemic communities and the Dynamics of International Environmental Cooperation", in Rittberger, op.cit.
- Hopkins, R. (1976) "The International Role of 'domestic' bureaucracy", International Organization, vol. 30, no. 3
- Hurd, I. (1999) "Legitimacy and Authority in International Relations", International Organization, 53,2, Spring
- Kahler, M. (2000) "Conclusion: The Causes and Consequences of Legalization", International Organization, 54,3, Summer
- Ibid., (1998) "Rationality in International Relations", International Organization, 52, 4, Autumn
- Kamarck, E.C. and Nye, J. (1999) democracy.com? Governance in a Networked World Hollis Publishing Company, Hollis
- Keck, M. And Sikkink, K. (1998) Activists beyond Borders. Advocacy Networks in International Politics, Cornell University Press, Ithaca, N:Y.
- Keohane, R. (1990) "Empathy and International Regimes", in Mansbridge, op.cit.
- Ibid., et al. (200) "Legalized Dispute Resolution: Interstate and Transnational", International Organization, 54, 3, Summer
- Klotz, A. (1995) "Norms reconstituting Interests: global racial equality and US sanctions against South Africa", International Organization, 49, 3, Summer
- Koh, H. (1997), "Why Do Nations Obey International Law?", Yale Law Review, vol. 106, no. 8, June
- Krasner, S. (1999) Sovereignty: Organized Hypocrisy, Princeton University Press: Princeton, New Jersey
- Matlary, J.H. (2001) Soft Power, Hard Values: The Impact of Democratic Norms in Europe, Macmillan
- Risse-Kappen, T. (1995) Bringing transnational relations back in: Non-state actors, domestic structures and international institutions, Cambridge University Press, Cambridge
- Rosas, A. (1993) "The Decline of Sovereignty: Legal Perspectives", in Iivonen, J. (ed.) The Future of the Nation State in Europe, Aldershot; UK
- Ibid. (1995) "State Sovereignty and Human Rights: Towards a Global Constitutional Project", Political Studies, XLIII
- Sikkink, K. (1993) "The Power of Principles Ideas: Human Rights Policies in the US an Europe", in Goldstein, J. an Keohane, R. (eds.) Ideas and Foreign Policy: Beliefs, Institutions, and Political Change, Cornell University Press, Ithaca and London
- Slaughter, A-M (1995) "International Law in a World of Liberal States", European Journal of International Law, vol. 6, no. 4