

AMICUS CURIAE
CASE FILE NUMBER 2023DU36800

SUBMITTED BY AMNESTY INTERNATIONAL
BEFORE THE SUPREME COURT OF
THE REPUBLIC OF KOREA

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INTRODUCTION

1. Amnesty International hereby submits an amicus curiae brief to the Supreme Court of the Republic of Korea in case file number 2023Du36800.
2. As explained in the papers before this Court, So Seong-wook successfully registered as his same-sex partner Kim Yong-min's dependent with the National Health Insurance Service (NHIS) in February 2020. The NHIS cancelled his dependent status in October 2020 citing the registration as a 'mistake'. When So's dependent status was cancelled, he became a local subscriber and was asked to pay back NHIS premiums for the period he was exempt from paying health insurance as Kim's spouse. So subsequently filed an administrative lawsuit against the NHIS. Aggrieved by this cancellation of his dependent status, So sought relief from the Seoul Administrative Court. The Seoul Administrative Court ruled in favour of the NHIS on 7 January 2022, reasoning that same-sex unions cannot be deemed the same as heterosexual unions (2021GuHab55456). So appealed and won in the High Court on 21 February 2023. The High Court reversed the decision and ruled that spousal coverage under the state health insurance scheme was not limited to legally defined families, and that denying the right to same-sex couples was discriminatory and violated the principle of equality on 21 February 2023 (2022Nu32797). The NHIS now appeals the High Court's decision to the Supreme Court of the Republic of Korea.
3. This amicus curiae brief intends to provide the Supreme Court with applicable international and regional law and standards that Amnesty International considers to be relevant for the Court's determination to the question whether denying a dependent status to a member of a same sex couple solely based on their sexual orientation violates the principle of equality.

THE INTEREST OF AMNESTY INTERNATIONAL IN THE CURRENT CASE

4. Amnesty International is a global movement of more than 10 million members, activists and supporters in more than 150 countries and territories, including the Republic of Korea. Amnesty International campaigns for a world in which all human rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments are enjoyed by all. Amnesty International works independently and impartially to promote respect for human rights. The organization is independent of any government, political group, ideology, economic interest or religion, and it is funded mainly by its members, as well as by public donations. Amnesty International monitors legal practices in countries throughout the world for compliance with international human rights law, and it works to end grave abuses of human rights and to demand justice for those whose rights have been violated.
5. Amnesty International has extensive experience in submitting amicus curiae briefs and other third-party submissions in international and national courts to assist them in resolving fundamental questions of international human rights law. Over the course of its existence, Amnesty International has been granted permission to make such submissions to the Supreme Court of Canada, the United States Supreme Court, the National Supreme Court of Justice of Mexico, the Constitutional Court of South Africa (CCSA), the Special Court for Sierra Leone, the Economic Community of West African States Court of Justice, the African Court of Justice and Human Rights, the European Court of Human Rights (ECTHR), the Inter-American Court of Human Rights (IACtHR) and the International Criminal Court (ICC).
6. In August 2018, Amnesty International submitted an amicus curiae brief to this Court on the right to conscientious objection to military service, after this Court formally requested a submission from Amnesty International Korea (2016Do10912). In addition, Amnesty International submitted an amicus curiae brief in 2022 on legal gender recognition of transgender people who have minor children

(2020Seu616). Amnesty International also submitted amicus curiae briefs to the Constitutional Court on the death penalty in 2019, on the right to conscientious objection to military service in 2013, and on the employment permit system and its enforcement decree in 2007.

7. Generally, as part of its human rights campaigning, Amnesty International works against discrimination, harassment and violence against individuals with, or perceived, diverse sexual orientation, gender identity, expression or sex characteristics (SOGIESC), such as lesbian, gay, bisexual, transgender or intersex (LGBTI) persons. Amnesty International is committed to defending and promoting the human rights of LGBTI persons. This work has included:
 - a. International advocacy at the United Nations (UN) Human Rights Council and various country submissions such as at UN treaty bodies (such as the Committee on Economic, Social and Cultural rights (CESCR), Committee against Torture (CAT), Committee on the Elimination of Discrimination against Women (CEDAW) and the Committee on the Rights of the Child (CRC)).
 - b. Amnesty International was one of the organizations which contributed to the 2006 drafting of the Yogyakarta Principles, a set of international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity.
 - c. Regionally, in 2017, Amnesty International became a member of ILGA-Asia, the Asian chapter of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) World. ILGA World is a worldwide federation of 1837 member organizations from 169 countries campaigned for lesbian, gay, bisexual, trans and intersex rights. ILGA World has campaigned for these rights since 1978.
 - d. Amnesty international has campaigned for marriage equality and the rights to social security and health for everyone without discrimination across the world, including in Ireland, Germany, Japan, Hong Kong, Australia, Thailand, United States of America (USA) and Taiwan. Amnesty has also campaigned for procedures for legal gender recognition which comply with, and do not violate the rights of transgender people, for example in Finland, Scotland and Hong Kong.
8. In sum, Amnesty International has a strong and continuing interest in the promotion and protection of human rights, particularly in the context of LGBTI people.
9. This amicus brief will draw on decisions of the UN Human Rights Committee, regional case law, including from the Inter-American Court of Human Rights, the European Court of Human Rights as well as national jurisprudence by courts in South Africa and other domestic developments applicable to the rights and legal issues to be determined by Court.
10. Based on the extensive experience and work detailed above, Amnesty International respectfully submits that it is well-placed to assist this Court in its determination of the legal issues that arise in this matter. In submitting this brief, Amnesty International respectfully requests the Court to consider the submissions made in its determination of the present case.

RELEVANT LEGAL PRINCIPLES OF INTERNATIONAL HUMAN RIGHTS LAW: THE DUTY OF STATES TO RESPECT, PROTECT AND FULFIL HUMAN RIGHTS INCLUDES AN OBLIGATION TO GIVE EFFECT TO THE RIGHTS TO EQUALITY, NON-DISCRIMINATION, AND RIGHTS TO HEALTH AND SOCIAL SECURITY

11. Under Article 6(1) of the Constitution of the Republic of Korea, international law has the same effect as domestic law. Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law have the same effect as domestic laws of the Republic of Korea.¹ This means that all authorities in the Republic of Korea are under an obligation to ensure and protect the rights enshrined by international human rights conventions. These obligations are binding on the state as a whole, including on all branches of government – the executive, the legislative and judiciary.

THE OBLIGATION TO RESPECT THE RIGHT TO HEALTH AND SOCIAL SECURITY

12. The right to social security is enshrined in a number of international human rights instruments.² It includes the right to access and maintain benefits to secure protection from a range of adverse circumstances, including unaffordable access to health care, insufficient family support, as well as the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage.³
13. The International Covenant on Economic, Social and Cultural Rights (ICESCR) prohibits any discrimination, whether in law or in fact, whether direct or indirect, on a number of grounds including sexual orientation, and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security. States have an obligation to remove de facto discrimination on prohibited grounds, where individuals are unable to access adequate social security. States parties must take effective measures, which have to be periodically revised, to ensure non-discriminatory access to social security and, at the very least, a minimum enjoyment of social security by all.⁴ Although everyone has the right to social security, States parties must pay particular attention to individuals and groups that have traditionally faced difficulties in exercising this right, specifically, among others, women.⁵ Comparative standards on the right to social security also emphasise the importance of social security systems catering for individuals belonging to vulnerable and disadvantaged groups and ensuring non-discrimination (direct or indirect) in social security schemes, including through ensuring reasonable eligibility conditions and adequate access to information.⁶

¹ Article 6(1) of the Constitution of the Republic of Korea: "Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea."

² Article 9 International Covenant on Economic, Social and Cultural Rights. The right to social security is also enshrined in Article 5 (e) (iv), Convention on the Elimination of All Forms of Racial Discrimination; Article 26, Convention on the Rights of the Child; Article 28, Convention on the Rights of Persons with Disabilities; and in several Conventions of the International Labour Organisation, in particular Convention No. 102 on Minimum Standards of Social Security.

³ CESCR, General Comment No. 19: The right to social security (Art. 9 of the Covenant), 4 February 2008, E/C.12/GC/19, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f19&Lang=en [hereinafter CESCR, General Comment 19].

⁴ CESCR, General Comment No. 19 on the right to social security (art. 9), UN Doc. E/C.12/GC/19 (4 February 2008), para. 2, 4, 23, 29-32. See also Articles 2 and 3 of the ICESCR.

⁵ General Comment No. 19, para. 31; *Rodríguez v Spain*, Communication No. 1/2013, Views of the Committee on Economic, Social and Cultural Rights under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (fifty-seventh session), E/C.12/57/D/1/2013 (20 April 2016) para 11.1.

⁶ For example, see African Commission on Human and Peoples' Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, adopted 24 October 2011 para. 82(i) and (j), available at <https://achpr.au.int/index.php/en/node/871>

14. General Comment 14 of Committee on Economic, Social and Cultural Rights (CESCR), the body of 18 independent experts that monitors implementation of the ICESCR by its State parties, has explained that the right to health is closely linked to other rights including the rights including non-discrimination and equality.⁷ The right to health entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.⁸ It also includes equal access to health services.⁹ States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons.¹⁰
15. The ICESCR proscribes any discrimination in access to healthcare and underlying determinants of health, as well as to means and entitlements for their procurement, on grounds including sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health.¹¹

THE PROHIBITION OF DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

16. Under international human rights law, parties to human rights treaties have the duty to respect, protect and fulfil the rights guaranteed by those instruments. Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR), for example, provides that state parties are to respect and ensure the rights recognised in the ICCPR, "...without distinction of any kind... [or] status".¹²
17. The human right to non-discrimination is enshrined in all core universal and regional human rights treaties.¹³ In addition, several treaties include specific provisions to protect equality under the law¹⁴ and the right to equal enjoyment of rights by all people.¹⁵ International human rights law establishes obligations to take all necessary steps to give effect to the rights enshrined therein, including the rights to equality and non-discrimination.¹⁶ This includes the general obligation to take all necessary steps to eliminate discrimination, whatever its origin or form. States cannot subordinate or condition the observance of the principles of equality and non-discrimination to the achievement of their public policies, whatever those may be. Under international human rights law, the principle of non-discrimination goes beyond simply prohibiting deliberately discriminatory policies and practices; it also prohibits those whose impact is discriminatory against certain categories of people, even when the discriminatory intention cannot be proven.¹⁷

⁷ UN Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health, para. 3.

⁸ *Id.*, para. 8.

⁹ *Id.*, para. 17.

¹⁰ *Id.*, para. 34.

¹¹ *Id.*, para. 30.

¹² Article 2(1) of the ICCPR: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

¹³ See, for example, Article 2(1) of the ICCPR; Article 2(2) of the ICESCR; Article 2 of the Convention on the Rights of the Child; Article 2 of the African Charter on Human and Peoples' Rights; Article 1 of the American Convention on Human Rights ("ACHR"); Article 14 of the European Convention on Human Rights ("ECHR"). The principle of equal rights and treatment of all persons is also enshrined in the UN Charter.

¹⁴ See, for example, Articles 14 and 26 of the ICCPR.

¹⁵ See Article 3 of the ICCPR; Article 3 of the ICESCR.

¹⁶ See, for example, Article 2(2) and 26 of the ICCPR; Article 2(1) of the ICESCR; Article 2 CEDAW; Article 2(1) of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 2 and 4 of the Convention on the Rights of the Child.

¹⁷ As such, the prohibition of discrimination applies both to direct discrimination (where a group is treated less favourably on grounds of a protected characteristic) and to indirect discrimination (where a policy or practice has an indirect disproportionate impact on a particular group). See, for example, CESCR, General Comment 20, Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/20, paras 7, 10. See also UN Human Rights Committee: CCPR General Comment 18, Non-discrimination, UN Doc. HRI/GEN/1/Rev.1, para. 7 ("purposes or effect"); *Derksen & Bakker v. The Netherlands*, Communication No. 976/2001, UN Doc. CCPR/C/80/D/976/2001 (2004) para. 9.3.

18. The UN Human Rights Committee, the body of independent experts that monitors implementation of the ICCPR by its States parties, has described the prohibition of discrimination as a “basic and general principle” of the protection of human rights and re-emphasized that any derogations in terms of public emergencies in themselves must not be discriminatory.¹⁸ The UN Human Rights Committee has further clarified that:

“...One of the conditions for the justifiability of any derogation from the Covenant is that the measures taken do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”¹⁹

19. UN treaty bodies have repeatedly urged states to tackle both direct and indirect discrimination against all persons, including LGBTI persons.²⁰ They have called on states to ensure that laws, policies and programmes executed by state authorities do not discriminate against these individuals, to address discriminatory practices and to take action to end conditions and attitudes that contribute to discrimination.²¹

20. The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles)²² state that:

“Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. ... States shall: ... c) Adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity.”²³

21. Over the past decades, opinions worldwide have evolved socially, politically and legally to recognize and protect the right of LGBTI individuals to “live freely and openly.”²⁴ In terms of anti-discrimination protections under international human rights law, sexual orientation has in recent times been accorded a similarly protected status as sex, race and gender.²⁵

22. While sexual orientation has not been specifically enumerated as a prohibited ground of discrimination in many national and international human rights instruments, human rights bodies have over the years interpreted the relevant provision in the ICCPR and in particular the “other status” clause in the ICESCR

¹⁸ UN Human Rights Committee, General Comment 18, Non-discrimination, paras. 1 (“Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.”) and 2.

¹⁹ UN Human Rights Committee, CCPR General Comment 29, Article 4: Derogations during a State of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.11, para. 8.

²⁰ See CESCR, General Comment 20, Non-discrimination in ESC Rights, paras 7-11; Concluding Observations of UN Human Rights Committee: Peru, UN Doc. CCPR/C/PER/CO/5, para. 8.

²¹ OHCHR, Discrimination and Violence, UN Doc. A/HRC/29/23, para. 41.

²² The Yogyakarta Principles were adopted in 2006 by a group of human rights experts from all regions of the world with diverse backgrounds and expertise, including academics, UN experts and senior judges, with the intention to systematically articulate relevant international human rights law as it currently stands. The CESCR has referred to the Principles as a source of guidance (General Comment 20, Non-discrimination in ESC Rights, para. 32). They have further been used by states such as Brazil, Ecuador, Germany, the Netherlands and Uruguay to help guide policy decisions, and in the Universal Periodic Review process several governments have committed to using the Principles in future policy development (OHCHR, Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity, UN Doc. A/HRC/19/41, para. 75). For the Principles and their Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (“YP+10”, 2017), see yogyakartaprinciples.org

²³ Principle 2 of the Yogyakarta Principles, see yogyakartaprinciples.org

²⁴ See *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* [2010] UKSC 31 para. 65; see also *Alekseyev v. Russia* (4916/07), ECtHR (2010) para. 84.

²⁵ See, for example, *ECtHR: S.L. v. Austria* (5330/99), ECtHR (2003), paras 37, 44; *Smith and Grady v. United Kingdom* (33985/96, 33986/96) (1999) para. 97.

to include sexual orientation.²⁶CESCR General Comments states that:

“Other status’ as recognized in article 2, paragraph 2, includes sexual orientation. States parties should ensure that a person’s sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor’s pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace.”²⁷

23. Similarly, the Inter-American Court of Human Rights (IACtHR) has determined that sexual orientation cannot be used as grounds for denying or restricting any of the rights established in the ACHR, as this is a protected category included in the words “any other social condition” of Article 1(1).²⁸ Likewise, the European Court of Human Rights (ECtHR) has expressly stated that the list of grounds in Article 14 of the ECHR is non-exhaustive and that the concept of one’s sexual orientation is included among the “other” grounds protected by Article 14.²⁹ This general understanding found explicit expression in Article 21(1) of the 2000 EU Charter of Fundamental Rights.³⁰
24. To that end, international human rights law prohibits discrimination on the basis of sexual orientation, with the understanding that sexual orientation is part of a person’s innermost character and identity.³¹ The right to identity (including to self-identify) is fundamental to the concept of human dignity.³² It is thus a well-established notion in international³³ and regional³⁴ human rights law that the general principles of non-discrimination and equality before the law, as expressed in, for example, the main

²⁶ See CESCR, General Comment 20, Non-discrimination in ESC Rights, para. 32. See also, UN Human Rights Committee: *Young v. Australia*, Communication No. 941/2000, UN Doc. CCPR/C/78/D/941/2000 (2003) para. 10.4; *X v. Colombia*, Communication No. 1361/2005, UN Doc. CCPR/C/89/D/1361/2005 (2007) para. 7.2; in *Toonen v. Australia*, Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992 (1994) para. 8.7, the UN Human Rights Committee took the view that the reference to “sex” in Articles 2(1) and 26 is to be taken as including sexual orientation; see also the individual concurring opinion of Committee members Lallah and Scheinin in *Joslin v. New Zealand*, Communication No. 902/1999, UN Doc. A/57/40 (2002).

²⁷ CESCR, General Comment 20, Non-discrimination in ESC Rights, para. 32.

²⁸ IACtHR: *Atala Riffo and Daughters v. Chile* (12.502) (2012) paras 85, 91; *Duque v. Colombia* (Series C No.310) (2016) para. 104. *Atala Riffo and Daughters v. Chile* centres on a mother, cohabiting with her same-sex partner, who lost custody of her daughters after the children’s father sued for custody due to her sexual orientation. *Duque v. Colombia* centres on Colombia’s refusal to pay a survivorship pension to the surviving partner in a same-sex partnership.

²⁹ See, for example, ECtHR: *Salgueiro da Silva Mouta v. Portugal* (33290/96) (1999) para. 28; *E.B. v. France* [GC] (43546/02) (2008) para. 50; *Kozak v. Poland* (13102/02) (2010) paras 91-92; *Alekseyev v. Russia*, (4916/07), (25924/08) and (14599/09) (2010) para. 108; *Idetoba v. Georgia* (73235/12) (2015) para. 96; *S.L. v. Austria* (45330/99) (2003) para. 37.

³⁰ Article 21 of the Charter of Fundamental Rights of the European Union: “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.” See also Article 10 of the Treaty on the Functioning of the European Union: “In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

³¹ For example, the Yogyakarta Principles understand the term “sexual orientation” as referring to “each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.” See yogyakartaprinciples.org/principles-en/

³² CCSA: *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* (CCT10/99) (1999), *Gory v. Kolver NO and Others* (CCT28/06) (2006). See also Concurring opinion of Judge Spano, joined by Judge Bianku in *Taddeucci and McCall v. Italy* (51362/09), ECtHR (2016) para. 4: “In conclusion, the fundamental principle of human dignity, which is one of the cornerstones of Article 8 of the Convention, guarantees to each and every individual the right to found a family with whomever they choose, irrespective of their sexual identity or sexual orientation.”

³³ See, for example, UN Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992 (1994) para. 8.7; *Young v. Australia*, Communication No. 941/2000 (2003) para. 10.4; *X v. Colombia*, Communication No. 1361/2005 (2007) para. 7.2; Concluding Observations: Maldives, UN Doc: CCPR/C/MDV/CO/1 (2012) para. 8; Concluding Observations: Philippines, UN Doc. CCPR/CO/79/PHL (2003) para. 18. See also CESCR, Concluding Observations: People’s Republic of China (including Hong Kong and Macao), UN Doc. E/C.12/1/Add.107 (2005) paras 73, 78(a); Concluding Observations of the Committee against Torture: Argentina, UN Doc. CAT/C/CR/33/1 (2004) para. 6(g); Concluding Observations of the Committee against Torture: Egypt, UN Doc. CAT/C/CR/29/4 (2002) paras 5(e), 6(k); Concluding Observations of the CRC: United Kingdom of Great Britain and Northern Ireland, UN Doc. CRC/C/GBR/CO/4 (2008) paras 24, 25(b).

³⁴ See, for example, IACtHR, *Atala Riffo and daughters v. Chile* (12.502) (2012), and case law of the ECtHR, above.

relevant clauses in the ICCPR Articles 2 and 26³⁵ and ICESCR Article 2.2³⁶, includes a prohibition of discrimination on the grounds of sexual orientation (as well as gender identity), even if not explicitly mentioned.

25. The IACtHR has pointed out that laws and policies that treat differently opposite-sex and same-sex couples can have the effect of socially identifying same-sex couples and considering them as “abnormal”, which can have a stigmatizing effect or at least be a sign of disrespect.³⁷

26. In this context, it is worthwhile to recall in full this statement by the Constitutional Court of South Africa (CCSA) in *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* [1999] ZACC 17, 2000 2 SA 1 that summed up the impact of such discrimination as follows:

“The message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity. The discrimination, based on sexual orientation, is severe because no concern, let alone anything approaching equal concern, is shown for the particular sexual orientation of gays and lesbians.”³⁸

27. In addition, in overturning the 2003 decision in *Kanane v. S*, which upheld the constitutionality of the sodomy laws, the High Court of Botswana stated:

“Any discrimination against a member of the society is a discrimination against all. Any discrimination against a minority or class of people is discrimination against the majority. Plurality, diversity, inclusivity and tolerance are quadrants of a mature and enlightened democratic society.”³⁹

THE STATE'S OBLIGATION EXTENDS TO ENSURING EQUAL ACCESS TO SOCIAL SECURITY MEASURES FOR SAME-SEX COUPLES, IRRESPECTIVE OF THE OFFICIAL RECOGNITION OF THEIR RELATIONSHIPS

28. Whether or not a jurisdiction legally recognizes same-sex unions is an issue distinct from whether or not the same jurisdiction has breached the prohibition of discrimination on grounds of sexual orientation, in relation to particular rights and benefits available to those persons. Under international law and standards, a state is always required to protect individuals from discrimination based on sexual orientation in accessing specific benefits. The lack of legal recognition for their relationships should not exempt the state from ensuring protection against discrimination.

³⁵ Article 2 must be read together with all other rights in the Covenant while Article 26 provides a stand-alone prohibition on discrimination generally. Article 26 of the ICCPR states: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

³⁶ ICESCR Article 2.2 reads: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

³⁷ IACtHR, *Advisory Opinion* OC-24/17 (2017) para. 224. This Advisory Opinion focuses on the issue that Costa Rica should ensure that trans persons can change their name and gender on identity documents; additionally, it should ensure same-sex couples enjoy full family rights, which includes marriage.

³⁸ *National Coalition*, CCSA (1999) para. 54.

³⁹ *Motshidiemang v. Attorney Genera*, MAHGB-000591-16 (2019), para. 173.

29. The UN Human Rights Committee has emphasized that opposite-sex couples usually have the choice to consciously decide not to marry, whereas this choice is often not open to same-sex partners. Where that is the case, legal distinctions based on marital status can have a discriminatory impact on same-sex couples.⁴⁰ Below are examples of jurisdictions and case law where the courts have extended the same social security benefits to same-sex couples, even though these jurisdictions did not at the time recognise same-sex marriage.
30. The ECtHR in *Taddeucci* held Italy's rejection of a family-based residence permit for an Italian man's same-sex partner amounted to discrimination on the basis of sexual orientation. The court based its finding that the comparison of unmarried same-sex couples with unmarried opposite-sex couples is discriminatory, among others, on its observation:
- “that it is precisely the lack of any possibility for homosexual couples to enter into a form of legal recognition of their relationship which placed the applicants in a different situation from that of unmarried heterosexual couples.”⁴¹
31. The CJEU held in *Hay v. Credit Agricole*, regarding the rights of an employee to special leave and bonus following marriage, that:
- “The difference in treatment based on the employees’ marital status and not expressly on their sexual orientation is still direct discrimination because only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed.”⁴²
32. The IACtHR has found that laws and policies that treat differently opposite-sex couples and those of the same sex in the way in which they can form a family – whether through a de facto marital union or a civil marriage – fail to pass a “strict equality” test and contravene the right to non-discrimination as there is no legitimate purpose for this distinction that could be considered necessary or proportional.⁴³
33. The CCSA, in *Du Toit*, when it considered the provisions in the Child Care Act that precluded same-sex couples from jointly adopting because they were unmarried, held that the applicants’ status as unmarried persons was “inextricably linked to their sexual orientation”, as this status precluded them

⁴⁰ UN Human Rights Committee: *Danning v. The Netherlands*, Communication No. 180/1984, UN Doc. CCPR/C/29/D/180/1984 (1987) para. 14; *Cornelis Hoofdman v. the Netherlands*, Communication No. 602/1992, UN Doc. CCPR/64/D/602/1994 (1998); *Derksen & Bakker v. The Netherlands*, Communication No. 976/2001 (2004) paras 9.2, 9.3; *Young v. Australia*, Communication No. 941/2000 (2003) para. 10.4; *X v. Colombia*, Communication No. 1361/2005 (2007) para. 7.2; see also the individual concurring opinion of Committee members Lallah and Scheinin in *Joslin v. New Zealand*, Communication No. 902/1999 (2002): “[When] the Committee has held that certain differences in the treatment of married couples and unmarried heterosexual couples were based on reasonable and objective criteria and hence not discriminatory, the rationale of this approach was in the ability of the couples in question to choose whether to marry or not to marry, with all the entailing consequences. No such possibility of choice exists for same-sex couples in countries where the law does not allow for same-sex marriage or other type of recognized same-sex partnership with consequences similar to or identical with those of marriage. Therefore, a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26, unless otherwise justified on reasonable and objective criteria.” (References omitted).

⁴¹ *Taddeucci and McCall v. Italy* (51362/09), ECtHR (2016) para. 95.

⁴² *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux Sèvres* (C-267/12), CJEU (2013) para. 44; see also para. 43: “The fact that the PACS, unlike the registered life partnership at issue in the cases which gave rise to the judgments in *Maruko* and *Römer*, is not restricted only to homosexual couples is irrelevant and, in particular, does not change the nature of the discrimination against homosexual couples who, unlike heterosexual couples, could not, on the date of the facts in the main proceedings, legally enter into marriage.”

⁴³ IACtHR, *Advisory Opinion OC-24/17* (2017) para. 220.

from joint adoption under the impugned provisions. It further held that:

“but for their sexual orientation which precludes them from entering into a marriage, they fulfil the criteria that would otherwise make them eligible jointly to adopt children in terms of the impugned legislation.”⁴⁴

34. In Hong Kong, a British plaintiff sought a dependent visa in Hong Kong based on her civil partnership with her same-sex partner, who held a work visa in the city. The Director of Immigration rejected her application, arguing that the term "spouse" in the visa policy referred exclusively to the legal concept of marriage as defined by Hong Kong law, which only recognized unions between a man and a woman. The Court of Final Appeal eventually ruled that the Immigration Department's disparate treatment of same-sex and opposite-sex couples for purposes of its dependent visa policy constituted unlawful discrimination on grounds of sexual orientation in *QT v. Director of Immigration*.⁴⁵
35. Following the *QT* decision, the Court of Final Appeal in Hong Kong unanimously upheld the right of legally married same-sex couples from other countries (given that same-sex marriage is presently not recognized in Hong Kong) to receive equivalent spousal employment and tax benefits as those enjoyed by heterosexual married couples in *Leung Chun Kwong*.⁴⁶
36. Separately, in rejecting the Hong Kong government's reliance on the prevailing views of the community on marriage as a reason for not allowing a minority's claim to fundamental rights and the proposition that heterosexual marriage would be undermined by the extension of the employment and tax benefits to same-sex married couples, the court held that there was no "rational connection" between protecting the institution of marriage (the justification relied on by the government) and denying Leung Chun Kwong's employment and tax benefits (the differential treatment).⁴⁷ The Court further found that, in deciding whether or not to enter into marriage, different-sex couples are unlikely to be influenced in their decision to marry if same-sex couples can also get married. The Court held:

“... How is it said that allowing Mr. Adams medical and dental benefits weakens the institution of marriage in Hong Kong? Similarly, how does permitting the appellant to elect for joint assessment of his income tax liability under the IRO impinge on the institution of marriage in Hong Kong? It cannot logically be argued that any person is encouraged to enter into an opposite-sex marriage in Hong Kong because a same-sex spouse is denied those benefits or to joint assessment to taxation.”⁴⁸
37. Furthermore, applying *QT* and *Leung Chun Kwong*, the Court of Appeal upheld an earlier court ruling that same-sex couples should enjoy equal rights under Hong Kong's inheritance laws in October 2023. Justices dismissed the government's argument that heterosexual and same-sex couples are treated differently under the city's inheritance laws due to their differences in legal obligations. Justice Peter Cheung wrote in the ruling:

⁴⁴ *Du Toit and Another, CCSA* (2002) para. 26.

⁴⁵ *QT v Director of Immigration* [2018] HKCFA 28.

⁴⁶ *Leung Chun Kwong v. Secretary for the Civil Service and Commissioner of Inland Revenue*, [2019], para. 65: “The line as drawn by the Secretary between those who are legally married under Hong Kong law and those who are not begs the question of whether it is legitimate or justifiable to accord differential treatment based on sexual orientation, because homosexual couples are, by definition, unable to be legally married, or recognised as legally married, under Hong Kong law... Wholly different considerations arise in respect of 'unmarried' couples which the court is not concerned with in the present case.”

⁴⁷ *Leung Chun Kwong v. Secretary for the Civil Service and Commissioner of Inland Revenue*, [2019] paras.70 - 77.

⁴⁸ *Leung Chun Kwong v. Secretary for the Civil Service and Commissioner of Inland Revenue*, [2019] para. 67.

"They are excluded wholly from taking the benefits of the provisions of the IEO (Intestates' Estates Ordinance) and IPO (Inheritance (Provision for Family and Dependants) Ordinance) because they had entered into a same-sex marriage and the difference in treatment is, in my view, based on their sexual orientation."⁴⁹

38. Finally, in the same month, the Hong Kong Court of Appeal upheld its two original verdicts⁵⁰ that ruled the Housing Authority constituted illegal discrimination in rejecting same-sex couples who married overseas under the current public rental housing and subsidized housing schemes. The verdict states:

"There is no inconsistency between the constitutional recognition and protection of heterosexual marriage in areas where it is due, and the protection of the fundamental constitutional right not to be subjected to unlawful discrimination based on sexual orientation in situations where the status of heterosexual marriage is not material or relevant. HA's argument, if accepted, would mean that the Government and other public bodies are generally at liberty to accord differential treatment in favour of opposite-sex couples vis-à-vis same-sex couples on the basis of their sexual orientation. I have no hesitation in rejecting this argument of HA as being contrary to both principles and authorities."⁵¹

DENYING SPOUSAL INSURANCE COVERAGE TO SAME-SEX COUPLES SOLELY ON THE BASIS OF THEIR SEXUAL ORIENTATION VIOLATES THE RIGHTS TO EQUALITY AND SOCIAL SECURITY

39. In the context of inheritance, international human rights standards reject the idea that certain benefits, like a surviving partner's right to the deceased's pension, should only apply to opposite-sex marriages.
40. For example, the UN Human Rights Committee has found the denial of pension benefits to the survivor of a same-sex relationship to be in violation of Article 26 of the ICCPR.⁵² The ICESCR has stated that "States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example in accessing survivor's pension rights."⁵³ This approach to pension rights is also reflected in Principle 13 of the Yogyakarta Principles.⁵⁴
41. The IACtHR also has stated that the denial of granting a survivor's pension to the partner in a same-sex relationship (where only married opposite-sex couples had such entitlements) is a violation of the rights to equal protection before the law (Article 24 ACHR) and non-discrimination (Article 1(1) ACHR).⁵⁵

⁴⁹ *Ng Hon Lam Edgar v Secretary for Justice* [2023] HKCA 1224 para. 14.

⁵⁰ *Infinger, Nick v. The Hong Kong Housing Authority*, CACV81/2020; *Ng Hon-lam Edgar v. The Hong Kong Housing Authority*, CACV362/2021.

⁵¹ CACV 81/2020 and CACV 362/2021, [2023] HKCA 1178, para. 38.

⁵² *Young v. Australia* (2003), Communication No. 941/2000 (2003), para. 10.4; *X v. Colombia* (2007), Communication No. 1361/2005, para. 7.2.

⁵³ CESCR, General Comment 20, Non-discrimination in ESC Rights, para. 32.

⁵⁴ Principle 13 of the Yogyakarta Principles: "Everyone has the right to social security and other social protection measures, without discrimination on the basis of sexual orientation or gender identity. States shall: a) Take all necessary legislative, administrative and other measures to ensure equal access, without discrimination on the basis of sexual orientation or gender identity, to social security and other social protection measures, including employment benefits, parental leave, unemployment benefits, health insurance or care or benefits (including for body modifications related to gender identity), other social insurance, family benefits, funeral benefits, pensions and benefits with regard to the loss of support for spouses or partners as the result of illness or death; ...", see yogyakartaprinciples.org/principle-13/

⁵⁵ IACtHR, *Duque v. Colombia* (2016) para. 138.

42. Furthermore, the CJEU has found that, among others, rights to pensions are not reserved solely for opposite-sex married couples. It held in *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* – in a situation where the relevant state had already legally recognized same-sex union – that the survivor in a same-sex couple who had entered into a registered partnership with the deceased was entitled to receive his deceased partner’s pension under the Council Directive 2000/78/EC of 27 November 2000.⁵⁶
43. The IACtHR recently re-affirmed that states have an obligation to guarantee that same-sex couples have the same access to all existing legal figures in domestic legislation that grant rights to opposite-sex couples and ensure equal protection to all different types of families.⁵⁷ The Court stated that states have an obligation to adopt all necessary legislative, administrative and other measures to ensure access, on equal terms and without discrimination on grounds of sexual orientation or gender identity, to social security and other protection measures, including labour benefits, maternity or paternity leave, unemployment benefits, insurance, health care, family benefits, funeral benefits, pensions and benefits related to the loss of support for spouses or partners as a result of illness or death.⁵⁸
44. The IACtHR further found that, among other measures, tax exemptions, inheritance and property rights, rules of succession, privilege of the spouse in probative procedural law, authority to make medical decisions, rights and benefits of survivors, birth and death certificates, professional ethics rules, financial restrictions on electoral issues, workers' compensation benefits, **health insurance** and custody of children must be guaranteed without discrimination to families formed by same-sex couples.⁵⁹ In short, the IACtHR held that there should be no area of law that applies to opposite- sex couples but that is, by definition and ab initio, foreclosed to same-sex couples.

CONCLUSION

45. In summary, Amnesty International emphasizes that the essence of this case lies in the principle of ensuring non-discrimination, a cornerstone obligation within international law. As articulated by the UN Human Rights Committee, non-discrimination, equality before the law, and equal protection are fundamental principles essential for safeguarding human rights.
46. Amnesty International further submits that the absence of relevant legislation, such as legislation on recognition of same-sex marriages should not take precedence over this imperative. Strong backing for these principles is evident in international and comparative case law, including decisions from the UN Human Rights Committee, IACtHR, CCSA, and recent judgments from the ECtHR.
47. In light of the concerns highlighted in this briefing, Amnesty International respectfully urges the Court to give due consideration to these principles in its deliberation on the present appeal.

⁵⁶ CJEU, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* (C-267/06) (2008); see also: *Jürgen Römer v. Freie und Hansestadt Hamburg* (C-147/08) (2011).

⁵⁷ IACtHR, *Advisory Opinion OC-24/17* (2017) para. 228.

⁵⁸ IACtHR, *Duque v. Colombia* (2016) para. 196.

⁵⁹ IACtHR: *Duque v. Colombia* (2016) para. 118; *Advisory Opinion OC-24/17* (2017) para. 197 (emphasis added).