Kirsten Sandberg – Abstract

Session title: Children’s right to self-determination and the right to protection against unnecessary medical intervention: comparative perspectives

Children with LGBTI parents and LGBTI children, under the Convention on the Rights of the Child

The ‘general principles’ of the Convention on the Rights of the Child are all relevant to the situation of children with LGBTI parents and LGBTI children. They are the right to non-discrimination under Article 2, the right to have his or best interests taken into account as a primary consideration under Article 3, the right to life and development under article 6 and the right to be heard under Article 12. Unnecessary medical intervention may also run counter to the right to freedom from all forms of violence under Article 19.

Over the last year the Committee on the Rights of the Child has mentioned the two groups of children in its concluding observations to a few countries, normally under non-discrimination. For example, to Hungary in 2014 the Committee expressed concern about the still prevalent discriminatory attitude of the public against children living in family forms other than heterosexual marriage and children with different sexual identities. The Committee urged the State to implement its laws that prohibit discrimination against categories of children in marginalized and disadvantaged situations, among others children living with same-sex parents, lesbian, gay, bisexual, transgender or intersex children, and to take measures to educate the public about equality and non-discrimination and to expand its programmes in schools.

The Convention does not give children a right to self-determination, but an explicit right to be heard in matters affecting them and to have their views given due weight according to their age and maturity, which applies to issues of gender identity and sexual orientation. One might argue that due to the very personal character of these issues and their importance for the identity of the child, his or her views ought to be given more weight than in many other questions. The complexity of the issues weighs in the opposite direction. Wherever possible the decisions should be postponed until the child is mature enough to make an informed choice. To Venezuela in 2014 the Committee recommended that the State develop a comprehensive strategy to promote the participation of children in all spheres of life, adding that the strategy should be directed to different groups of children, in particular “children with disabilities, indigenous, Afro-descendants and LGBTI”.

All decisions have to be made with the best interests of the child as a primary consideration. In these cases there should be no room for other considerations. Unnecessary medical intervention can hardly ever be considered to be in the best interests of the child, and the child must be protected against such intervention. It may violate the right to development and may amount to violence, as an infringement of the physical or mental integrity. There have, however, been varying views on what is necessary and thus would be in the child’s best interests. The child’s own view should have great weight in the best interests determination, and unless it is clearly necessary parents or doctors should not make irreversible decisions when the child is small and unable to voice an informed view. On the other hand, when the child is approaching adolescence and wants a change, postponing the decision and thus retaining status quo in reality may imply a decision which complicates the possibility of having a change at all.