



Not ‘The Norm’: Families, Individuals and Human Rights

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EDITORIAL



ABSTRACT

This special issue examines the intersection between human rights, family law and the law of persons in situations where the individuals or families involved fall outside ‘the norm’. The contributions specifically address adults with declining cognitive abilities and children versus competent adults, intersex and transgender persons and sex workers versus people with ‘normal’ bodies, and families in conflict (regarding either contact rights for grandparents or child protection orders) versus ‘happy families’. The range of topics shares a focus on human rights and states’ obligations in maintaining a balance between autonomy and protection. The contributions show how the interpretation and implementation of human rights law can evolve to encompass, protect and empower individuals and families who previously fell outside ‘the norm’.

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KEYWORDS:

family law; human rights

TO CITE THIS ARTICLE:

Charlotte Mol, ‘Not ‘The Norm’:
Families, Individuals and
Human Rights’ (2024) 20(2)
Utrecht Law Review 1–5. DOI:
[https://doi.org/10.36633/
ulr.1130](https://doi.org/10.36633/ulr.1130)

This special issue examines the intersection between human rights, family law and the law of persons. These three fields of law are inextricably intertwined, forming an increasingly multifaceted tapestry of legal principles that govern the structure, dynamics and protection of families and the individuals within these families. Human rights have contributed to the development of family law and the law of persons through rights addressing the position of individuals – think of children’s rights, the rights of persons with disabilities or the rights of intersex and transgender persons – as well as the rights addressing the position of the family and the relationships which form families, such as the broad right to respect for private and family life. Family law and the law of persons, as classically understood, reflect mainstream social ideals of a nuclear harmonious family through marriage and parentage law. These ideals are also embedded – to a certain extent – in human rights law. However, human rights have also provided avenues to challenge and change the interpretation of these social ideals by addressing situations falling outside ‘the norm’, by which I mean the accepted standard situation. This special issue specifically addresses these situations where individuals or families deviate from ‘the norm’.

What is ‘the norm’? Typically, one thinks of a rational competent adult man or *homo economicus*, but in this special issue it is also the ‘happy family’, ‘normal’ bodies, or the focus on the parent-child relationship. Individuals or families deviating from these norms are, in the contributions to this special issue, adults with declining cognitive abilities and children versus competent adults, intersex and transgender persons and sex workers versus people with ‘normal’ bodies, and families in conflict (regarding either contact rights for grandparents or child protection orders) versus ‘happy families’. Deviating from ‘the norm’ brings a need to shift perspectives: what does it mean to deviate from the norm? Does deviating from the norm require new rights or rules, additional protection or empowerment? Is there even ‘a norm’ to depart from?

In this special issue a recurring question is what role human rights have in empowering and protecting those who deviate from ‘the norm’. In the contributions of Tigchelaar & Oude Breuil and Mol & Schuthof the question is posed as to whether human rights themselves – in general or in the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and the United Nations Convention on the Rights of Children (CRC) respectively – provide for sufficient empowerment and protection of those deviating from ‘the norm’. In the contributions of Huijjer & Reinders and Jonker & Jeppesen de Boer a similar question is posed focusing on the translation and application of human rights – specifically Article 8 of the European Convention on Human Rights (ECHR) – for those deviating from ‘the norm’ in legal practice on the state level.

In the contributions to this special issue the balance is made between the rights of individuals and the interests of the state. The human rights discussed in this special issue address both sides of the coin: human rights provisions which provide individuals with autonomy versus human rights obligations which require states to protect individuals in vulnerable positions or to protect public order. This reflects the central research question of the Utrecht Centre for European Research into Family Law (UCERF): how should states balance legal autonomy and protection regarding families, children and individuals in a globalised and changing world?¹ This special issue bears the fruit of valuable collaboration within the UCERF. Deviations from ‘the norm’, human rights law and changing social norms all come together in the various thought-provoking contributions.

Individuals deviating from ‘the norm’ are not strangers to human rights law. In fact, one of the most important principles in human rights law, namely equality,² and the right to non-discrimination both recognise the diversity of human beings. In addition, the need to provide protection and rights to certain groups falling outside ‘the norm’ is also the *raison d’être* for four of the nine core international human rights instruments. These groups, i.e., children, women,

¹ For more information see, <https://www.uu.nl/en/research/ucerf-utrecht-centre-for-european-research-into-family-law> (last visited 13 august 2024).

² See e.g., W Vandenhole, *Non-discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia, 2005) 1.

migrant workers and persons with disabilities,³ are afforded specific rights to, inter alia, non-discrimination, protection and empowerment as minorities and in the light of their specific vulnerabilities.

Both family law and the law of persons often deal with individuals, families or situations deviating from ‘the norm’. Think about women versus men, LGBTQ+ persons versus cisgender heterosexual individuals, divorced families versus intact families, nuclear families versus single-parent families, surrogacy versus traditional conception, etc. Human rights have had and continue to have a paramount influence in the development of family law and the law of persons. This is visible both through the vertical effect of human rights through states’ obligations to individuals and families, and in the horizontal effect of human rights in the private conflicts between family members. Changing societal views and norms have in turn pushed forward the development of human rights applicable to individuals, families or situations deviating from ‘the norm’. Consider for example the landmark case of *Marckx v Belgium*,⁴ in which the ECtHR found Article 8 ECHR to equally protect ‘illegitimate’ families and traditional families and that the distinction between the two was a violation of Article 14 in conjunction with Article 8. This is but one example where ‘others’ excluded from the dominant legal framework have been drawn into the protective scope of human rights. At the same time, human rights law has also furthered the rights of certain groups within family law, granting these groups extra protection or support in exercising their autonomy and rights. Consider the rights of children and the rights of persons with disabilities to both of which the equality principle is fundamental: comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified. There may be objective and justified reasons in the state affording extra protection to certain individuals, groups or families, but in turn the autonomy of these individuals, groups and families must not be forgotten.

The contributions to this special issue take different approaches in posing and tackling questions related to human rights, family law and the law of persons in relation to individuals or families deviating from ‘the norm’. Despite the breadth in topics and human rights considered, they share a focus on human rights and states’ obligations in the (un)equal treatment of those deviating from ‘the norm’.

The special issue starts with a conceptual exploration, where Jet Tigchelaar and Brenda Oude Breuil take the reader on a journey away from ‘the norm’ of the ‘human’ in human rights to thinking about human rights from the aspect of ‘the body’. Their contribution commences with a legal theoretical discussion on how an abstract and ‘generalised’ body appears in human rights instruments and which arguments there are for more emphasis on the physical body to recognise the diverse vulnerabilities which bodies may have. The conceptual reflection is supplemented with empirical findings – addressing changing insights on the body – and two case studies of ‘non-conforming’ bodies – those of intersex and transgender persons and sex workers. Tigchelaar & Oude Breuil challenge the reader to think about human rights from an embodied perspective: addressing core human rights notions of autonomy, self-determination, dignity and liberty.

The authors emphasise the importance of the state not having too strong a say in which bodies and sexual practices are considered ‘normal’. Instead, for all individuals and especially for ‘non-conforming’ bodies, human rights are paramount, especially the right to non-discrimination, the right to self-determination, the right to physical integrity and the right not to be tortured. These rights provide bodies with the protection against being ‘normalised’. The paternalistic blindfold of ‘normalcy’ has to be taken off; the wishes of individuals who may deviate from ‘the norm’ ought to be viewed and respected. In reflecting on conceptualisations of the human body in human rights, Tigchelaar & Oude Breuil argue for embodied (in)equality where rights must be afforded to all bodies.

Turning from human rights broadly to the United Nations human rights framework, Charlotte Mol and Fiore Schuthof focus their attention on two specific groups: adults with declining

³ Convention on the Right of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC); Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW); Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3; and Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) UNGA A/Res/61/106 (CRPD).

⁴ *Marckx v Belgium*, App. No. 6833/74 [1979] ECtHR.

cognitive abilities and children. Both groups deviate from ‘the norm’ of a (legally) competent adult who is considered capable of making their own (rational) decisions. Whereas children grow towards capability and competence, adults with declining cognitive abilities gradually lose their capability and competence. The contribution compares the decision-making rights and principles granted by the CRC and CRPD to these two groups. Both groups face the same challenge: how do states and the human rights instruments balance protection and autonomy of these individuals? Prevailing societal norms regarding the abilities of adults with disabilities or children to make decisions themselves and the wish to protect these groups play a central role here although the norms are changing, in part due to the UN Conventions and the diligent efforts of the respective UN Committees. Mol & Schuthof compare the contexts and rights between these groups, considering who is the main decision-maker, which types of decisions are considered, which rights are granted and how best interests principles play a role. The result is an exploration of what the groups may learn from each other: would children benefit from supported decision-making and does the right to participate and the concept of evolving capacities assist current thinking around adults with declining cognitive abilities?

Notably, Mol & Schuthof conclude that both groups can learn from each other without arguing for absolute equality in decision-making rights between children, adults with disabilities and adults generally. The diversity between and within these groups must be kept in mind. Different treatment in the form of additional rights has great value for adults with declining cognitive abilities and children, not only in protecting them but also in empowering them and recognizing their rights in decision-making.

Joost Huijter and Iris Reinders delve into the case law of the ECtHR concerning the out-of-home placement of children into care and assess whether Dutch law and practice comply with the human rights standards. The topic of this contribution is a quintessential example of the intersection of family law and human rights. The topic touches upon the very core of family life: whether children grow up in the care of their parents or in the care of others and the role of the state in these decisions. The contribution examines both substantive and procedural rights of children and parents, and negative and positive obligations of the state under the right to family life of Article 8 ECHR. In doing so, Huijter & Reinders touch upon the interaction and intersections between these rights and obligations. How should states balance the protection of children with the right to respect for family life of parents? In short, when is the placement into care in line with Article 8 ECHR? Although Huijter & Reinders conclude that it is difficult to test whether a state party’s law and policy on out-of-home placements complies with Article 8 ECHR due to the wide margin of appreciation, a key conclusion is the relevance of the initial removal decision.

The families central to this contribution (are perceived to) deviate from ‘the norm’, resulting in state interference in their family life. This also leads to their vulnerability in relation to the state. Huijter & Reinders address this vulnerability by studying whether these parents and children (should) receive additional support in the form of legal representation or participation rights. Although the ECtHR has provided preliminary indications of a need for legal representation, their research shows that this question is not easily answered. Notably, they conclude that changing social norms may explain the development of human rights norms in the case law of the ECtHR towards more legal protection for parents and children facing out-of-home placement.

Turning from public care proceedings to private family law proceedings, the contribution of Merel Jonker and Christina Jeppesen de Boer addresses the contact rights of grandparents and the possibilities to give effect to this right. With the right to family life of grandparents under Article 8 ECHR as the framework, this contribution discusses the implementation of grandparents’ contact rights in the Netherlands, Belgium, England & Wales and Norway. The contribution provides a comparative overview of the admissibility requirements for grandparents requesting contact and the subsequent assessment of merits conducted by courts in the four jurisdictions. Building on previous commissioned research for the Dutch government, Jonker & Jeppesen de Boer critically appraise the new Dutch legislative proposal on grandparents’ contact rights in the light of developments in Dutch case law.

It is worth noting that the position of grandparents increasingly appears to edge closer to that of parents. This also appears to mirror a changing social norm towards the role of grandparents in providing care for children. Where, in contact cases, disputes regarding contact between a parent and their child are ‘the norm’, more and more grandparents are resorting to courts

to claim contact with their grandchildren. Jonker & Jeppesen de Boer conclude that the case law of the ECtHR maintains a distinction between parents and grandparents – the obligation to ensure parents’ right to contact is stronger than the obligation for grandparents’ right to contact. The current Belgian approach and proposed Dutch approach in giving grandparents the same favourable position as parents who do not exercise parental responsibilities are assessed critically. Are these equal situations deserving of equal treatment? No, argue Jonker & Jeppesen de Boer, especially when other near relatives such as siblings are not afforded similar contact rights. Additionally, they emphasise the risk that this presents in limiting parental autonomy and disregarding children’s views or wishes.

In closing, this special issue contributes to the multifaceted tapestry of human rights law, the law of persons and family law in considering situations, individuals or families which do not live up to ‘the norm’. In doing so, the contributions have shown that whilst deviating situations may contribute to changes in the understanding of human rights standards, this need not always be the case. The interpretation and implementation of human rights law can also evolve to encompass, protect and empower individuals and families who previously fell outside ‘the norm’. Throughout, the principle of equality remains the mantra: are similar situations treated similarly and different situations differently in an objectively justified manner? Whilst sometimes there can be a danger in ‘othering’, allowing space for diversity provides opportunities to strengthen the position of those deviating from ‘the norm’. This may be achieved through negative obligations of states not to interfere or positive obligations in facilitating and empowering individuals and families.

ACKNOWLEDGEMENTS

The author would like to thank Dr. Marjolein van den Brink for her assistance with this special issue.

COMPETING INTERESTS

The author has no competing interests to declare.

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TO CITE THIS ARTICLE:

Charlotte Mol, ‘Not ‘The Norm’: Families, Individuals and Human Rights’ (2024) 20(2) Utrecht Law Review 1–5. DOI: <https://doi.org/10.36633/ulr.1130>

Published: 08 October 2024

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