

**AN ANALYSIS OF THE DISPOSITION ESPOUSED BY INTERNATIONAL LAW
WITH REGARD TO SAME SEX MARRIAGE**

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By

ANZABWA OMUTIMU IAN

078072


Prepared under the supervision of
PROFESSOR JOHN OSOGO AMBANI

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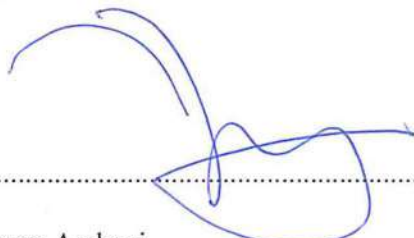
DECLARATION

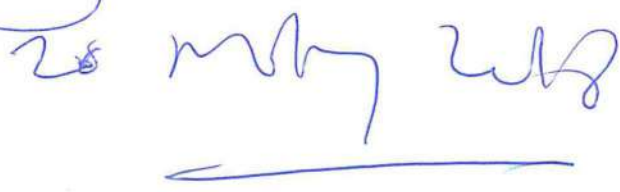
I, ANZABWA OMUTIMU IAN, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 

Date: 23rd May 2018

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: 

John Osogo Ambani 

DEDICATION

To all sexual minorities across the globe who find themselves victims of discrimination and indignity. To all who aspire for a world where marriage equality and the right to family are rights accorded to all without discrimination.

ACKNOWLEDGEMENT

I wish to thank my dissertation supervisor, Prof. Osogo Ambani for his encouragement, guidance, patience, availability, time and effort during the entire study period. My gratitude and appreciation also goes to the entire faculty of Strathmore Law School for their guidance in this study.

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ABBREVIATIONS AND ACRONYMS

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
Coalition	National Coalition for Gay and Lesbian Equality
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ECHR	European Convention on Human Rights
EU	European Union
HRC	Human Rights Commission
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LGBTQI	Lesbian, Gay, Bisexual, Transgender, Queer, Questioning, Intersex and Allies
UDHR	Universal Declaration of Human Rights

UN United Nations

UK United Kingdom

US United States of America

UNHRC UN Human Rights Committee

WWII World War Two

ABSTRACT

The purpose of this study is to establish the disposition espoused by international law with regard to same sex unions. Article 23 of the International Covenant on Civil and Political Rights contains an express right to marry. This dissertation analyses this provision, other United Nations human rights treaties, and relevant jurisprudence to determine whether art 23 applies to same-sex couples. In the only authoritative interpretation of art 23, *Joslin v New Zealand*, the United Nations Human Rights Committee found that it does not apply to same-sex couples. However, that decision is more than 12 years old and arguably would not be decided in the same way should a similar case come before the Human Rights Committee in the future. Using the principles of treaty interpretation, this dissertation asserts that *Joslin v New Zealand* is no longer good law, and concludes that the right to marry should be interpreted in a non-discriminatory manner and should not be restricted exclusively to opposite-sex couples. Moreover, this dissertation juxtaposes the United Nations framework to the European one in so far as the LGBTQI agenda is concerned.

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CHAPTER 1

INTRODUCTION

1.1 Background of Problem

The recent ruling in *Obergefell v Hodges*, saw the legalization of same sex marriages in the United States of America.¹ Naturally, the ruling had repercussions that resonated across the globe. These repercussions present valid, somewhat blatant questions not only within the jurisdiction within which the ruling was made but also in other jurisdictions. The ripples caused by the *Obergefell* ruling indicate that matrimonial union is a matter of great consequence to many. Why is this so? Is it possible that marriage is a concept rooted in man by virtue of existence thus indicating a primal need to form such unions? Or is it because marriage serves a range of functional purposes that have been brought about by social constructivism such as the expression of individual autonomy, the safeguarding of proprietary rights through succession and so on. The Universal Declaration of Human Rights states that men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.² Moreover, article 23(2) of the International Covenant on Civil and Political Rights states the right of men and women of marriageable age to marry and to found a family shall be recognized.³ What are the true implications of these provisions? Answering this question would certainly aid in demystifying questions that have plagued the concept of marriage such as a justification for or against marriage equality. So to speak is the right to marriage gender specific? And is disallowing marriage equality in international law tantamount to discrimination? These represent a portion of the primary concerns that will be addressed in this dissertation.

In *Joslin v New Zealand*, the Human Rights Committee interpreted the ICCPR provision on the right to marriage contemplating if the right to marry included same sex couples. It was concluded that the article only protects heterosexual couples.⁴ Domestic courts, treaty committees, charter-based bodies such as the United Nations Human Rights Council, and civil

¹ James Obergefell, et al, *Petitioners v Richard Hodges, Director, Ohio Department of Health, et al*

² Art 16, Universal Declaration of Human Rights, 10 December 1948

³ Article 23(2), International Covenant on Civil and Political Rights, 23 March 1976, 999 UNTS 171

⁴ *Joslin v New Zealand*, UN Doc CCPR/C/75/D/902/1999

society have all proffered various interpretations of Article 23. Moreover, the recent years have seen an increase in the number of states that recognise the right of same-sex couples to marry within their national legal systems starting with Netherlands in 2001. Thereafter, states such as Canada, South Africa, the United States, Denmark, Brazil and France followed suit. Therefore, it would be precise to conclude that the right to marry is protected under art 23(2) of the International Covenant on Civil and Political Rights, but the question of whether this right includes same-sex couples remains open to interpretation.

Lastly, the subject of discrimination is broached by scrutinizing general comment No 20. of the UN Committee on Economic, Social and Cultural Rights. It espouses that non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights.⁵ When read with article 2 of the International Covenant on Economic, Social and Cultural Rights which obliges each state party to guarantee that the rights enunciated in the present Covenant without discrimination on sex; themes of discrimination against same sex couples become apparent.

1.2 Hypothesis

The UN human rights system has interpreted the right to marriage narrowly to exclude same sex marriage, leading to the discrimination of same sex couples

The progressive interpretation of international human rights provisions along the lines of what is embodied in European jurisprudence will lead to the attainment of marriage equality.

1.3 Research Questions

This dissertation will investigate two principle questions. The first regards the disposition that International law upholds regarding the right to marriage with specific regard to same-sex couples both in its transcribed form and in its applied form (interpretation). What rationale informs this disposition? Is there a more progressive way of applying the provisions? The second regards the concept of discrimination. So to speak, is the non-recognition of same sex marriage tantamount to discrimination?

1.4 Justification of the study

The justification of this study is apparent in themes concerning justice and equality. So to speak, equality is pegged on the premise that all human beings are equal in the eyes of the law and that they are entitled to the enjoyment of those rights. Therefore, the findings of this

⁵ General comment No 20. of the UN Committee on Economic, Social and Cultural Rights

dissertation would be very crucial to establishing whether there are indeed some people particularly same sex couples whose enjoyment of the right to marriage is being curtailed.

Moreover, the importance of marriage is blatant in society. So to speak, depending on the jurisdiction, the institution of marriage affords the population certain privileges beyond mutual romantic interest. It is also a legal contract that confers special rights and responsibilities to the parties involved. For instance in some jurisdictions, married partners are not bound by hospital visitation restrictions and are eligible for certain survivor benefits when the other one dies.

It is also apparent that marriage bears a connection to property law and also affords certain benefits to the parties. In some jurisdictions marriage affords tax benefits such as marital tax deductions and the allowance for married couples to file taxes jointly. Moreover, it also has health insurance and employment benefits such as allowing spouses to use each other's health insurance and allowing leave benefits such as family leave. Lastly there is also the matter of inheritance. So to speak, even in the absence of a will a spouse will still have inheritance rights in case one of them passes on. However, it is also important to take into considerations that certain jurisdictions provide for the concept of civil unions which are quite similar to marital unions.

Therefore, the right to marriage is a crucial to humanity and it is important that all men and women are able to enjoy it equally. A limitation based on gender would be tantamount to discrimination.

1.5 Theoretical Framework

According to Paula Gerber, the incorporation of the right to same-sex marriage is rising trend particularly among western states. However, this progression towards marriage equality that is apparent in multiple domestic jurisdictions is not being mimicked within international human rights law. This fact is evidenced by the fact that the ruling in *Joslin v New Zealand* is the only United Nations authority that addresses the application of Article 23 of the ICCPR. Regarding the adoption of marriage equality laws by multiple western states and a few other states situated across the globe, it is crucial to consider also that the number of countries that have marriage equality is relatively lower compared to the number of countries that still criminalise homosexual conduct.⁶ 10 percent of the globe's population is estimated to reside in states that

⁶ <https://antigaylaws.org/> on 28 November 2017, Paula Gerber: An overview of Countries That Still Criminalise Homosexuality

have legalised same sex marriage.⁷ In her article, Paul Gerber opines that the growing international climate of support for LGBTI human rights generally, and same-sex marriage in particular, suggest that there exists a high possibility of the question of the legitimacy of same-sex marriage coming before a UN treaty body again in the future. Moreover, since the Human Rights Commission's decision in *Joslin v New Zealand*, the UN treaty body system has increasingly defended the rights of LGBTQI people in its General Comments, Concluding Observations and Views on individual communications.

The subject of marriage equality broaches the issue of social inclusion which ties into the bigger conversation of discrimination. M. V. Lee Badget conducts a study that contemplates social inclusion and the value of marriage equality in Massachusetts and the Netherlands. It attempts to delineate what social inclusion entails with specific regard to marriage equality and also the potential impact of non-inclusion on societies with LGBTQI communities. The journal suggests that policy frameworks should take into account other factors that might affect the actual degree of inclusion felt by individuals, such as attitudes toward LGBT people or the larger context of social inequality related to race and class. In other words, public policies that allow more individuals access to important institutions, such as marriage, are important and necessary first steps but are not sufficient actions for full inclusion.⁸ Therefore, even within the conversation of marriage equality it is important to consider what the repercussions of non-inclusion are and whether it is tantamount to discrimination.

The European Court for Human Rights has ruled that same-sex marriages are not considered a human right, making it clear that homosexual partnerships do not in fact equal marriages between a man and a woman in European Human Rights Law. This was apparent in *Schalk and Kopf v Austria*, where the court found no violation of the applicant's human rights, although there was dissention on the issue of discrimination.⁹ In the case the applicants alleged that the legal impossibility for them to get married constituted a violation of their constitutional right to respect for private and family life and of the principle of non-discrimination. An analysis of European Human Rights law and the rationale employed in arriving at a conclusion

⁷<https://www.gaystarnews.com/article/10-world%E2%80%99s-population-now-lives-under-marriage-equality030714/> on 28 November 2017, Andrew Potts: '10% of the World's Population Now Lives under Marriage Equality', *Gay Star News*

⁸ M. V. Lee Badget, 'Social Inclusion and the Value of Marriage Equality in Massachusetts and the Netherlands' *Journal of Social Issues* (2011), 316-334

⁹ *Schalk and Kopf v Austria* ECtHR Application no. 30141/04

that would limit marriage to heterosexual couples would certainly aid in the objective of this dissertation.

1.6 Research Methodology and Approach

In order to conclusively determine the status of the right to marriage for same sex couples on the international platform, this study will employ an array of primary, secondary and tertiary sources of literature. These aforementioned sources will include international treaties/convention, case law, journals, dissertations that have handled the subject of marriage equality, general comments by treaty bodies, books, concluding observations by treaty bodies and views on individual communications also by treaty bodies. Additionally a comparative study delineating the disposition adhered to in European Human Rights Law with regard to the subject of marriage equality will also be employed. The rationale behind this disposition will also be examined.

The approach that will be employed will be a comparative study and a case study. The case study approach will be exceedingly apparent in Chapter 2 while the comparative study will for the most part be employed in Chapter 3. This approach is necessary in that particular order because a case study would inform the comparative study. So to speak, it would be important to first establish a general idea of how the system works before comparing it to another system.

1.7 Assumptions

Naturally the major assumption is that international law does indeed provide for the right to marriage. However, international law might also possess a bias in its interpretation by limiting the application of this right to heterosexual unions. Certainly, this could also not be the case. On the contrary International law could be an avid proponent of marriage equality. Lastly it could also likely be a matter of legal ambivalence. So to speak the ideas, ideologies and rationale that inform the right to marriage on the international platform could be riddled with contradiction and indecision. This legal shall attempt to establish the true disposition espoused by international law regarding marriage equality.

1.8 Chapter Breakdown

The objectives of this dissertation shall be met within four distinct chapters with each comprising a particular dimension of marriage equality. Chapter 1 will be the introductory chapter. It will delineate the background to the problem, the research problem, the theoretical framework, the hypothesis, the research questions, the methodology and approach and the chapter layout. Chapter 2 will identify the discriminatory interpretation that is abided by in the

UN Treaty system and outline the provisions concerning the right to marriage in International Human Rights law. So to speak, it will identify the provisions that regard marriage in the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights and any other relevant international human rights instruments. Moreover, this chapter shall contemplate the notion of interpretation of these international provisions. So to speak, it shall identify the current discriminatory interpretation that is abided with regard to same-sex marriage. It shall also examine the rationale behind this interpretation that is currently in use. In essence, it shall highlight the theme of discrimination that is apparent in not granting same sex couples the right to marriage. Chapter 3 will concern a comparative study with the European Human Rights Jurisdiction, which does not consider same sex marriage to be an enforceable right. However, in examining the rationale behind this position in European Human Rights Law, new elements are certain to emerge. Moreover the environment surrounding same sex marriage in Kenya shall be examined just to discern the disposition born by the Kenyan law with regard to the subject and gauge any progress that has been made in the field. Chapter 4 will conclude the dissertation by answering the research questions, confirming the hypothesis and proffering recommendations. It shall also highlight other potential modes of interpretation that would achieve a progressive outcome

CHAPTER 2

DISCRIMINATION AGAINST SAME SEX COUPLES IN INTERNATIONAL LAW

2.1 Introduction

Equality is certainly a core tenet of the human rights agenda. It is the proclamation of the fact that all human beings are equal and have equal rights in the eyes of the law. Equality is pegged on rights or entitlements that all human beings and sovereign states have. Legal rights comprise a cluster of claims, powers and immunities. The fact that a person has a right imposes a duty on another to refrain from interfering with that right. It also entails duties on the state for instance to ensure the enjoyment of those rights by its citizens. In this case if same sex marriage is indeed an inherent right, then it ought to be protected by the state and all other persons and entities to refrain from interfering with other individual's enjoyment of this right. This broaches the subject of justice. So to speak, in a society of equal persons what are the guiding or regulatory principles to ensure fairness for all and more importantly is the lack of recognition of same sex unions as legitimate marriages a violation of human rights?

Therefore, as stated by Ban-Ki Moon in a video to the Human Rights Council Meeting on violence and discrimination, it is crucial to understand that people's lives are at stake and therefore there exists a dire need to have a dialogue around these issues. Naturally sexual orientation and gender identity are very sensitive issues and most do not grow up talking about these issues.¹⁰ However by virtue of the United Nations Charter and the Universal Declaration of Human Rights it is every human being's duty to get involved and engage in the discussion.

In this chapter, this dissertation shall both posit and prove that the interpretation employed by the UN human rights system with regard to the right to marriage is discriminatory to same sex couples. It shall do this by first, looking into the historical development of sexual minority rights within the international law framework in order to contextualize the discussion. Secondly, it shall conduct an analysis of the ICCPR, UDHR and look into the matter of treaty interpretation. Thereafter, it shall address the matter of treaty interpretation in light of the judgment proffered in the *Joslin v New Zealand* case. Lastly it shall discuss the notion of

¹⁰<https://www.un.org/sg/en/content/sg/statement/2012-03-07/secretary-generals-video-message-human-rights-council-meeting> on 8th January 2018 , Ban-Ki Moon: Secretary-General's video message to Human Rights Council meeting on Violence and Discrimination based on Sexual Orientation or Gender Identity

discrimination apparent not only in disallowing same sex marriage but also in proffering civil unions as an alternative to marriage for same sex couples.

2.2 Historical development of sexual minority rights in International Law

The beginnings of international human rights law can be traced to World War II. So to speak, the need for an international human rights regime became apparent following the atrocities of the World War. Discrimination based on myriad of grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property and birth or other status found a place in international law. However, it would seem that sexual orientation did not. This lack of acknowledgment of matters regarding sexual orientation is evidenced by the fact that none of the human rights instruments explicitly prohibits discrimination based on sexual orientation. Moreover, it is evidenced by the fact that the right to marry and found a family is reserved for only 'men and women' of marriageable age.¹¹

Within the UN Human Rights system the concept of rights were finally given new meaning. So to speak, concepts such as 'faith in fundamental human rights, in the dignity and worth of the human person' and 'in the equal rights of men and women' are reaffirmed.¹² The UN Charter further assigns the UN the task of maintaining international peace and security, achieving international co-operation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.¹³

2.3 The International Covenant on Civil and Political Rights

Article 23 of the International Covenant on Civil and Political Rights states that:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.¹⁴

¹¹ Article 23(2), International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171

¹² Preamble, para 2 UN Charter

¹³ Art 1(3) UN Charter

¹⁴ Article 23, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171

In interpreting the right to marry, and whether its scope could extend to same-sex couples, it is important to take note of the preamble of the ICCPR and the maxim of non-discrimination which is enunciated both as a stand-alone human right and as part of the right to marry.¹⁵ The preamble provides that the purpose of the ICCPR is to recognize ‘the inherent dignity and the equal and inalienable rights of all members of the human family’. The right to marry received its most prominent and frequently cited interpretation in the Human Rights Committee’s decision in *Joslin v New Zealand*. The key question in that case was whether the right to marry in article 23 included same-sex couples. The HRC determined that the article protects only heterosexual couples. The rationale behind the decision has been criticized for its brevity and its inconsistency with both the doctrine of interpretation established by the Vienna Convention on the Law of Treaties¹⁶ and norms of human rights treaty interpretation previously employed by the HRC itself.¹⁷ However, the *Joslin v New Zealand* interpretation of the right to marry remains authoritative opinion, and is commonly cited in documents on international human rights norms with regards to sexual orientation and gender identity. As such, a detailed analysis of the opinion in the case is required in order to determine whether this is a decision made on solid foundations or one that should not be relied upon in the future.

2.4 Joslin v New Zealand

The case concerned two lesbian couples; Ms. Joslin and Ms. Rowan who commenced a lesbian relationship in January 1988 and Ms. Zelf and Ms. Pearl who had commenced a lesbian relationship in April 1993. In their relationships, both couples had jointly assumed responsibility for their children out of previous marriages. Also they had resided together, pooled their finances and jointly owned a home. Moreover, both couples had maintained sexual relations until the point at which they made their applications. On 4 December 1995, the former couple applied under the Marriage Act 1955 to the local Registrar of Births, Deaths and Marriages for a marriage licence, by lodging a notice of intended marriage at the local Registry Office. However, the application was rejected by the Deputy Registrar-General on 14 December 1995. Similarly, the latter couple, Ms Zelf and Ms Pearl, lodged a notice of intention

¹⁵ Preamble, ICCPR

¹⁶ Vienna Convention, 27 January 1980/1155 UNTS 331

¹⁷ Sarah Joseph, ‘Human Rights Committee: Recent Cases’ *Human Rights Law Review* (2003), 91, Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters 2013) 199–202

to marry at another Registry Office. On 12 February 1996, the Registrar-General informed them that the notice could not be processed stating that the Registrar was acting lawfully in interpreting the Marriage Act as confined to marriage between a man and a woman.

All the parties thereupon applied to the High Court for a declaration that, as lesbian couples, they were lawfully entitled to obtain a marriage licence and to marry pursuant to the Marriage Act 1955. The High Court declined the application. Observing inter alia that the text of article 23, paragraph 2, of the Covenant "does not point to same-sex marriages", the Court held that the statutory language of the Marriage Act was clear in applying to marriage between a man and a woman only.

At the Court of Appeal, the applicant's claims were once again rejected with the Court stating unanimously that the Marriage Act, in its terms, clearly applied to marriage between a man and a woman only. A majority of the Court further went on to hold that the restriction in the Marriage Act of marriage to a man and a woman did not constitute discrimination. Justice Keith particularly expressed the majority's views at length, finding no support in the scheme and text of the Covenant, the Committee's prior jurisprudence, the travaux préparatoires nor scholarly writing for the proposition that a limitation of marriage to a man and a woman violated the covenant.

The couples then proceeded to sue New Zealand before the United Nations Human Rights Committee claiming that the country's ban on same-sex marriage violated the International Covenant on Civil and Political Rights.

The HRC concluded, in a brief three-paragraph analysis, that art 23 of the ICCPR does not protect the rights of same-sex couples to marry. It then summarily dismissed all the other alleged violations of the ICCPR, stating that:

In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant¹⁸

¹⁸ Joslin v New Zealand, UN Doc CCPR/C/75/D/902/1999

The HRC, using a semantic interpretation of the text, found that the use of the phrase ‘men and women’ in art 23(2), rather than the gender-neutral terminology used elsewhere in the ICCPR; ‘every human being’, ‘everyone’ and ‘all persons’ has been consistently and uniformly understood as indicating that marriage is only the union between a man and a woman.¹⁹ There are two criticisms of the HRC’s interpretation.

First, the assertion that ‘men and women’ has been consistently and uniformly understood as indicating that marriage is only the union between a man and woman is contrary to the intention of the drafters and is not indicative of a gender specification in article 23. Second, applying the Vienna Convention art 23 should not be interpreted as excluding same-sex couples. In addition, the years that have passed since this decision arguably lessen its relevance. This is because many more states have now legislated for same-sex marriage than at the time of the *Joslin v New Zealand* decision including New Zealand, which was the state party in the case. Moreover, the ICCPR is a living instrument that should be interpreted and applied in light of present circumstances.

2.5 Treaty Interpretation

The HRC’s interpretive methodology in *Joslin v New Zealand* follows a narrow semantic reading of article 23. This approach falls short of the comprehensive and established rules of treaty interpretation laid down in the Vienna Convention. While the interpretive maxims codified in ss 31 and 32 are routinely applied by State Parties, there are important reasons why non-state actors, such as treaty bodies, should also be guided by these rules. First, treaty body opinions are unenforceable. As such, the legitimacy of their decisions relies upon how convincingly legal communications are presented, and how readily states accept these opinions as authoritative. Utilizing an accepted method of interpretation enables states to trace the logic and consistency of treaty body output to and support such opinion based on more than pure conjecture. Treaty bodies have been criticized for a lack of ‘substantial arguments, coherence, and analytical rigor; the absence of a visible concept of interpretations; and the existence of contradictory remarks by different committee members, which are caused by the absence of a principled approach’.²⁰ Following established maxims of interpretation would mediate this critique.

¹⁹ *Joslin v New Zealand*, UN Doc CCPR/C/75/D/902/1999

²⁰ Kerstin Mechlem, ‘Treaty Bodies and their Interpretation of Human Rights’ (2009) 42 *Vanderbilt Journal of Transnational Law* 905

Second, treaty bodies administering human rights instruments have a particular responsibility to ensure the enjoyment of treaty rights by the intended beneficiaries of these instruments. Treaty bodies, comprising human rights experts, are well placed to provide alternative interpretation of human rights instruments to those that might be propounded by a state.²¹ It can also be said that the HRC's decision in *Joslin v New Zealand* is inconsistent with a good faith interpretation of the ICCPR. A good faith interpretation requires not only consideration of the words of the section, but the context, object and purpose of the article and the covenant. This requirement of a good faith interpretation is consistent with art 5(1) of the ICCPR, which prevents 'any State, group or person' from limiting the rights in the ICCPR to a 'greater extent than as stated in the Covenant'. Arguably, compliance with art 5(1) and a good faith reading make it difficult to justify discriminating against same-sex couples in an instrument that emphasizes non-discrimination.

2.6 The Use of Gendered Language

The *Joslin v New Zealand* opinion noted that art 23 details the only substantive right in the ICCPR that uses the term 'men and women', and concluded that the use of this language requires a restrictive interpretation. Making reference to the travaux préparatoires, the HRC found that references to 'husband and wife' in the original drafting process of art 23 indicated the intentionality of the gender specificity of this article.²² However, this may be a misinterpretation of the drafters' intention if it is considered outside of its historical context. The words 'men and women' in art 23 mirror the wording of art 3 of the ICCPR, which requires State Parties to 'ensure the equal right of men and women' to enjoy all Covenant rights. The travaux préparatoires of the ICCPR,²³ as cited by the HRC in *Joslin v New Zealand*, focused on the need for gender equality within a marriage, and the prevention of underage or non-consensual marriages. The reference to 'husband and wife' in the travaux préparatoires was to defend the importance of including the right to marry in the ICCPR, 'in view of great and unjust inequalities that existed as regards to the rights of husband and wife'. The travaux préparatoires suggest that the Commission on Human Rights 'should move forward boldly towards the realization of the principles of equality'. Thus, the drafting history reveals no intention to

²¹ Kerstin Mechlem, 'Treaty Bodies and their Interpretation of Human Rights' (2009) 42 *Vanderbilt Journal of Transnational Law* 22

²² *Joslin v New Zealand*, UN Doc CCPR/C/75/D/902/1999

²³ Economic and Social Council, Report of the 9th Session of the Commission on Human Rights, 7 April 1953, 16th sess, UN Doc E/CN.4/689), 78-86.

exclude same-sex couples. Rather, gendered language was adopted in order to emphasise the principle of equality between men and women.

Recourse to the travaux préparatoires, in the absence of direct intention, reveals that the drafters did not envisage that the right to marry encompassed same sex couples. This is unsurprising, given that the drafting of the ICCPR took place in the middle of the last century, while UN recognition of sexual orientation as a characteristic protected by non-discrimination provisions did not occur until 1994. However, the fact that the drafters of art 23 did not contemplate it applying to same-sex couples does not restrict how it should be interpreted and applied today. The HRC has emphasised that the ICCPR should be regarded as a living instrument, with the rights to be ‘applied in context and in the light of present-day conditions’.²⁴ Thus, the words ‘spouse’, and ‘men and women’ in art 23 should be interpreted in a modern context, where sexual orientation is a basis for human rights protection. Moreover, a ‘living instrument’ approach ought to be applied when interpreting the instrument.

2.7 Non-discrimination: ICCPR Articles 2 and 26

Entirely absent from *Joslin v New Zealand* is a consideration of how a restrictive reading of the right to marry is compatible with the right to non-discrimination in ICCPR arts 2 and 26.²⁵ In *Joslin v New Zealand*, the HRC avoided answering this question by stating that, as no right under art 23 had been found, no examination of breaches of other articles was required.²⁶ The right to non-discrimination is both a self-contained right that demands domestic legal protection and a procedural right that applies to every other human right within the covenant. Article 2 prohibits discrimination in relation to the rights within the ICCPR, while art 26 provides for equality before the law and equal protection from discrimination by the law.²⁷ Importantly, the right to non-discrimination in art 2 is aimed at giving expression to one of the basic provisions of the Charter of the United Nations, and enshrines a founding principal of the UN: to combat discrimination in the world. More attention is devoted to non-discrimination than any other category of right in the Charter. While ‘discrimination’ is not defined in the ICCPR, the HRC has elaborated on its substance, stating that discrimination is: any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex,

²⁴ Human Rights Committee, Views: Communication No 829/1998, 78th sess, UN Doc CCPR/C/78/D/829/1998 5 August 2002

²⁵ Article 26, International Covenant on Civil and Political Rights

²⁶ *Joslin v New Zealand*, UN Doc CCPR/C/75/D/902/1999

²⁷ Article 2, International Covenant on Civil and Political Rights

language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.²⁸ It is now well established that the grounds protected by the nondiscrimination provisions of the ICCPR apply to sexual orientation. In *Toonen v Australia*, the HRC held that sexual orientation is included in the class of ‘sex’ for purposes of arts 2 and 26.²⁹ The HRC may have ‘arrived at the right conclusion via the wrong avenue’,³⁰ as ‘other status’ is the more appropriate classification, since it allows for a clear delineation between sex (as it relates to gender) and sexual orientation. The CESCR has noted that, under the ICESCR’s identical non-discrimination provision, sexual orientation is recognized under ‘other status’.³¹ In General Comment No 18 on non-discrimination, the HRC noted that equal treatment does not mean identical treatment; however, it went on to state that ‘the covenant is explicit’ about the areas where this principle applies (for example the segregation of juvenile offenders from adults in art 10(3)).³² The HRC also stated that differential treatment ‘will not constitute discrimination if the criteria for such differentiation are “reasonable and objective”’. The HRC has not applied this as a strict test, and its decision about what amounts to reasonableness and objectivity depends largely on the circumstances. If the HRC was to consider the question of non-discrimination in relation to same-sex marriage, it would first determine whether the grounds for discrimination are direct or indirect, and whether such discrimination was ‘reasonable and objective’. Direct discrimination requires an element of intention; the intended outcome of the rule or action is to discriminate. Indirect discrimination — via seemingly neutral laws that may have an effect, rather than an intention or purpose, to discriminate — is increasingly recognized by the HRC.³³ Indirect discrimination breaches the ICCPR ‘if the detrimental effects of a rule or decision exclusively or disproportionately affect persons having a particular ... sex ... or

²⁸ Human Rights Committee, General Comment No 18: Non-discrimination, 37th sess, UN Doc HRI/GEN/1/Rev.1, 10 November 1989,7

²⁹ *Toonen V Australia*

³⁰ Sarah Joseph, ‘*Toonen v Australia: Gay Rights under the ICCPR*’ (1994) *University of Tasmania Law Review* 392

³¹ Committee on Economic, Social and Cultural Rights, General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights, 42nd sess, UN Doc E/C.12/GC/20 (25 May 2009) [32]

³² General Comment No 18, UN Doc HRI/GEN/1/Rev.1, 8

³³ Human Rights Committee, Views: Communication No 208/1986, 37th sess, UN Doc CCPR/C/37/D/208/1986 9 November 1989 (‘*Karnel Singh Bhinder v Canada*’).

other status'. When domestic laws intend to explicitly prohibit the marriage of same-sex couples, or to prevent recognition of same-sex marriages solemnized in another country, the grounds for discrimination may be direct. Additionally, laws that are neutral as to the gender composition of marriage, but are implemented so as to prohibit same-sex couples from marrying, also contain grounds for direct discrimination. Laws that permit the marriage of opposite-sex couples, without revealing intent to prevent the marriage of same-sex couples, may contain indirect grounds of discrimination. Laws containing grounds of direct and indirect discrimination may not be discriminatory if such laws are based on reasonable and objective criteria. However, it is difficult to conceive of reasonable and objective criteria for such differential treatment that the HRC would find acceptable. Marriage laws based on the protection of public morals may not satisfy a reasonable and objective requirement. The HRC has noted that 'limitations ... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition'. As such, laws based on the principles of a single religious or cultural tradition may still be classed as discrimination under the ICCPR. Further, the HRC has indicated that same-sex attraction, in and of itself, is not a ground on which a state may justify the protection of the 'morals, health, rights and legitimate interests of minors', as opposed to heterosexuality or sexuality generally.³⁴ By extension, should a communication be brought to the HRC claiming discrimination on the basis of laws preventing same-sex marriage, it could be difficult for the HRC to uphold laws that justify discrimination on the basis of either the morality of sexual orientation or the purported harm that formalizing same-sex relationships might pose to a society. Restrictive marriage laws based on a criterion aimed at the protection of children will find little traction as to being 'objective and reasonable', given the irrefutable medical and psychological consensus that same-sex relationships pose no greater threat either to the individuals involved or children of those individuals than opposite-sex relationships. Thus, it seems unlikely there is a reasonable and objective criterion that would satisfy the HRC that restrictive marriage laws were not discriminatory against individuals based on their sexual orientation. The global shift of the international community, and the UN, towards recognizing LGBTI rights, discussed below, further decreases the plausibility of such an argument being accepted by the HRC.

³⁴ Human Rights Committee, Views: Communication No 1932/2010, 106th sess, UN Doc CCPR/C/106/D/1932/2010, 31 October 2012, ('Fedotova v Russian Federation')

2.8 Same-sex Marriage or Civil Unions — The Legal Status of Same-sex Parents and Families

Civil unions, registered partnerships, and other forms of relationship recognition are often raised as ‘alternatives’ to marriage in marriage equality discourses. The CESCR noted in General Comment No 20 that ‘eliminating formal discrimination requires ensuring that a State’s constitution, laws and policy documents do not discriminate on prohibited grounds’ and that ‘discrimination must be eliminated both formally and substantively’.³⁵ Similarly, the HRC noted in General Comment No 18 that there is an obligation on State Parties to ‘diminish or eliminate conditions which cause or help perpetuate discrimination prohibited by the Covenant’. The distinction between marriage and civil unions delineates opposite-sex couples from same-sex couples, reinforcing prejudice against LGBTI people and maintaining the stigma historically associated with homosexuality.³⁶ While proponents of civil unions may emphasize that this ceremony holds equal status to marriage, civil unions, as a relatively new institution, are still viewed by many as not holding equal cultural significance to marriage. The level of public engagement and debate surrounding the question of whether marriage rights should include same-sex couples signifies the high value and status associated with marriage.³⁷ Proponents of an ‘equal’ but different relationship recognition for same-sex couples echo sentiments of America’s infamous ‘separate but equal’ doctrine. As a result, affording same-sex couples only civil unions may exacerbate or, worse, institutionalize discrimination.³⁸

³⁵ General Comment No 20, UN Doc E/C.12/GC/20,

³⁶) < <https://www.apa.org/about/policy/same-sex.aspx> accessed on 3rd January 2018

³⁷ Gregory M Herek, ‘Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective’ *American Psychologist*, 2006, 607

³⁸ Adiva Sifris and Paula Gerber, ‘Same-sex Marriage in Australia: A Battleground for Equality’ (2011) 25(2) *Australian Journal of Family Law* 96.

CHAPTER 3

THE EUROPEAN UNION COMPARATIVE STUDY

3.1 Introduction

The short story, *Love on Trial*, nominated for the 2012 Caine Prize for African Literature, illustrates the carrot-and-stick effects of Western countries exercising their normative power. Therein, European states restrict aid to Malawi because of the conviction and imprisonment of a gay Malawian for homosexuality. While a work of fiction, this tale exposes the contemporary realities that Lesbian, Gay, Bisexual, Transgender and Intersex rights are not only a growing concern within the European Union, but also an influence on the EU's external relations. Moreover, it depicts the EU's rising role as a global normative power, and the ensuing clash of conflicting social values. The question of the effectiveness and nature of the EU's approach to LGBTI rights in Non-EU countries invariably arises. Herein, comparisons shall be made between the EU's approach to LGBTI rights in states that are candidates (or potential candidates) for EU membership, the European Neighbourhood Policy, and other states. In addition to that, the EU's approach to LGBTI rights shall be analysed alongside that of the United Nations. Despite the problems present in the EU's approach, the EU is the most effective intergovernmental organization in supporting LGBTI rights, and its practices are most effective in regulating the application of such rights in candidate countries and countries that are deemed to be potential candidates to the EU.

*Toonen v. Australia*³⁹ was the first case to bring sexual orientation into the UN's human rights system. While later cases, such as *Young v. Australia*⁴⁰ and *Joslin et al v. New Zealand*, influenced the Human Rights Committee's attitude towards LGBTI rights and involved the interpretation of international treaty provisions as being in favour of non-discrimination against sexual minorities, they did not override the resistance of many UN

³⁹ *Toonen v. Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994, <<http://www.refworld.org/docid/48298b8d2.html>>, accessed 22 May 2013

⁴⁰ *Young v. Australia*, Comm. 941/2000, U.N. Doc. A/58/40, Vol. II, at 231 (HRC 2003), http://www.worldcourts.com/hrc/eng/decisions/2003.08.06_Young_v_Australia.htm, accessed 22 May 2013

member-states against LGBTI rights. Due to the UN's lack of the supranational authority in this area, decisions of the Human Rights Committee have accomplished little more, in terms of real rights for LGBTI persons worldwide, than act as a show of support. Homosexuality remains illegal in 76 countries worldwide, most of whom are member-states of the United Nations, and discrimination against LGBTI persons is widespread even in states that have not banned homosexuality. Opposition from religious-affiliated bodies such as the Holy See and the Organization of Islamic States curbs efforts to progress LGBTI rights within the UN, as is evident in the treatment of Brazil's draft resolution on LGBTI rights in 2003.⁴¹ In addition to that, the inclusion of sexual orientation as a source of universal rights jeopardizes a UN consensus due to the fact that it is culturally divisive.⁴²

3.2 The European Union's Approach to LGBTQI Rights

In contrast with the UN's lack of efficacy in securing LGBTI rights amongst its member-states lies the EU's policies. The European Parliament, as a whole, has demonstrated solidarity with sexual minorities, condemned discrimination, and promoted LGBTI rights in Non-EU states through resolutions such as the European Parliament resolution of 9 June 2011 on the EU-Russia summit (2012/C380 E/15), the European Parliament resolution of 17 February 2011 on Uganda: the killing of David Kato (2012/C 188 E/14), and the European Parliament resolution of 28 September 2011 on human rights, sexual orientation and gender identity at the United Nations (2013/C 56 E/12). Moreover, attempts at enshrining LGBTI rights in international law through UN General Assembly resolutions were begun by EU member states (France and the Netherlands) in 2008, and backed by the EU. Member states of the EU have been the largest bloc supporting LGBTI rights in the UN.⁴³ Moreover, the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) stated in its annual review for 2013 that the European Union has increased its support for LGBTI rights in its external policy, despite failing to harmonize its internal policy on that

⁴¹ Ignacio Saiz, 'Bracketing Sexuality: Human Rights and Sexual Orientation: A Decade of Development and Denial at the UN' (2004) 7(2)Health and Human Rights 57

⁴² Ignacio Saiz, 'Bracketing Sexuality: Human Rights and Sexual Orientation: A Decade of Development and Denial at the UN' (2004) 7(2)Health and Human Rights 57

⁴³ 'Annual Review for the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe', (ILGA-Europe, 2013) <<https://dl.dropboxusercontent.com/u/15245131/2013.pdf>> accessed 22 May 2013

matter.⁴⁴ Furthermore, the European Parliament is seeking to transform the EU's LGBT toolkit, a document adopted in 2010 which establishes guidelines for the EU's promotion of LGBTI right internationally, into binding guidelines on the basis that the EU's relationship with Africa, Caribbean, and Pacific group of states also involves non-discrimination.⁴⁵ Such solidarity in support may be attributed to Article 10 of the Treaty on the Functioning of the European Union, which establishes the EU's goal of fighting against discrimination on the basis of sexual orientation, and Article 19 TFEU, which supports efforts by Member States of the EU to combat discrimination on the ground of sexual orientation, amongst other laws.

The 1993 Copenhagen criteria ensures that states attempting to join the EU implement all its human rights legislation, including those supporting LGBTI rights. This has led to considerable development in LGBTI rights in states, such as Turkey, which wish to join the EU. The criteria requires the following: the prohibition of significant discrimination of sexual minorities in the national penal codes; the transposition into national legislation of the EU's anti-discrimination acquis; and the respect, without discrimination, of fundamental rights, including the right to freedom of assembly, the right to freedom of association and the right to freedom from violence. An example of the positive effect of the EU's insistence that non-EU states, trying to join Union, can be seen in the situation of Romania, which prior of its accession provided less protection to its sexual minorities than the European Union, and since 2007 went on to ensure higher levels of protection those required by the EU, including more extensive prohibitions against discrimination of LGBTI persons outside the workplace.⁴⁶ Progress in the sphere of LGBTI rights in countries that are still currently candidates, or potential candidates, to the EU can be noted in the EU Commission's annual progress reports. The 2007 Commission Progress Reports for Turkey and Serbia showed significant attention given, by the governments of those specific states, to promoting LGBTI rights in their countries when compared to previous years. Advocacy groups note that unless the EU Commission specifically addresses discrimination on the grounds of sexual orientation in its Progress Reports, the

⁴⁴ 'Annual Review for the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe', (ILGA-Europe, 2013) <<https://dl.dropboxusercontent.com/u/15245131/2013.pdf>> accessed 22 May

⁴⁵ 'Annual Review for the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe', (ILGA-Europe, 2013) <<https://dl.dropboxusercontent.com/u/15245131/2013.pdf>> accessed 22 May

⁴⁶ Ireen Dubel and Andre Hiekelma, *Urgency Required: Gay and Lesbian Rights are Human Rights* (Humanist Institute for Cooperation with Developing Countries, 2010) 275

acceding countries tend to disregard LGBTI rights, or remain stagnant, in the following years.⁴⁷ This clearly shows the level of influence that the EU has of policies regarding LGBTI rights in such countries. A comparison between the 2013 report and 2012 report, of ILGA, reveals increases, on the level of respect for LGBTI rights, of 24% in Croatia and 8% in Montenegro, both countries in which EU pressure has been a major catalyst for progress.⁴⁸

The EU promotes LGBTI rights within its Neighbourhood Policy chiefly through its Action Plans with various members of the European Neighbourhood Policy. Although there is no system of punishments or direct sanctions to be enacted by the EU when a state does not abide by its Action Plan, the incentives for adhering to the Action Plans encourage support for LGBTI rights from members of the European Neighbourhood Policy. Moreover, continued transgressions against the Action Plan usually leads to a severing of ties between the EU and the state. Such is the current state of affairs between the EU and Belarus, whose lack of democracy and poor human rights records (in a variety of areas, including LGBTI rights) hampered its relationship with the EU. On the other hand, lies the EU-Moldova Action Plan.⁴⁹ Although it only contained a provision supporting the rights of minorities (without specifications of whether such a provision included sexual minorities), pressure from the EU has led to the Moldovan formulating anti-discrimination legislation and promising to develop laws that adhere to EU standards. More recently, the European Commission has stated that were Ukraine to adopt its Draft Law 8711, which criminalizes the 'promotion of homosexuality', the prospects of visa liberalization, entailed in the EU-Ukraine Action Plan on Visa Liberalization, would be jeopardized since Draft Law 8711 stands in contradiction to the requirements of the necessary standards of the Action Plan.⁵⁰ However, it must be, likewise, noted that LGBTI rights often are not a

⁴⁷Ireen Dubel and Andre Hiekelma, *Urgency Required: Gay and Lesbian Rights are Human Rights* (Humanist Institute for Cooperation with Developing Countries, 2010) 275

⁴⁸ <http://www.ilga-europe.org/home/publications/reports_and_other_materials/rainbow_europe> accessed 22 May 2013

⁴⁹ Ireen Dubel and Andre Hiekelma, *Urgency Required: Gay and Lesbian Rights are Human Rights* (Humanist Institute for Cooperation with Developing Countries, 2010) 279

⁵⁰ 'Annual Review for the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe', (ILGA-Europe, 2013) <<https://dl.dropboxusercontent.com/u/15245131/2013.pdf>> accessed 22 May 2013

priority within the EU's Action Plans with member of the European Neighbourhood Policy and must compete against other relevant affairs, such as economic development, democracy, political stability and regional security. Members of the European Neighbourhood Policy who still maintain positive relations with the European Union include states such as Jordan, which voted against the General Assembly declarations supporting LGBTI rights and a Human Rights Council resolution (A/HRC/17/L.9/Rev.1) that sought to offer protection against discrimination on the grounds of sexual orientation. This situation is similar to that of the European Parliament resolution of 16 December 2010 on Uganda: the so-called "Bahati bill" and discrimination against the LGBT population (2012/C 169 E/16), and the European Parliament resolution of 17 February 2011 on Uganda: the killing of David Kato (2012/C 188 E/14) wherein the EU did little else but condemn the discrimination against sexual minorities in Uganda, despite public outcry for sanctions. Such a statement issued by the European Union represents more support and solidarity for LGBTI rights than one issued by any other inter-governmental organization, chiefly because the EU's support represented all the Member-States while that of the UN would have been fragmented due to internal divisions and conflicts regarding LGBTI rights. Although it remains a much less effective form of support for LGBTI rights than that that the EU has demonstrated when interacting with candidate countries and potential candidates, this is more likely due to the nature of the EU's relationship with such states rather than unwillingness on the part of the EU to take more effective measures.

3.3 Conclusion

In conclusion, the EU has demonstrated itself, through a variety of means, to be the most effective intergovernmental organization in supporting LGBTI rights in Non-EU countries, its methods being especially efficient in regulating the application of such rights in candidate countries. Though problems exist in its level of, and ability to, support LGBTI rights in non-EU countries, the EU demonstrates growing concern for the protection of sexual minorities. The way forward for the EU's support of LGBTI rights should involve greater support for local human rights defenders and activists in the intended countries. The importance of this partly arises from the increasingly prevalent discourse in many African, Asian and Latin American countries that attributes homosexuality as a negative Western import. This has been exploited by governments, politicians and religious organizations to manipulate public opinion in their favour and distract from dilemmas that would have been, otherwise, prioritized in the media,

and other mediums of public discourse. Through local human rights defenders and activists, EU support for LGBTI rights can be tailored to the particular needs and cultural sensitivities of local populations, including by highlighting indigenous traditions through which same-sex sexual activity and partnerships manifested, or monitoring changing social values amongst younger generations. Lastly, it is chiefly through supporting local activists and human rights defenders, that negative social attitudes towards sexual minorities and LGBTI rights may be changed, leading to civil society pressure in such countries on the governments, of such countries, to implement LGBTI rights, whether on national levels by decriminalizing homosexuality and banning discrimination on the grounds of sexual orientation and gender identity, or on the international scale by supporting universal LGBTI rights through the United Nations or regional organizations.

CHAPTER 4

CONCLUSION AND RECOMMENDATION

4.1 Restating the initial problem

Article 23 of the International Covenant on Civil and Political Rights contains an express right to marry. Thus far this dissertation has analyzed this provision, other United Nations human rights treaties, and relevant jurisprudence to determine whether art 23 applies to same-sex couples. Currently the only authoritative interpretation of art 23 remains *Joslin v New Zealand* where the United Nations Human Rights Committee found that the aforementioned provision does not apply to same-sex couples. However, that decision is more than 12 years old and arguably would not be decided in the same way should a similar case come before the Human Rights Committee in the future. Using the principles of treaty interpretation, this legal paper attempts to assert that *Joslin v New Zealand* is no longer good law, and proposes that the right to marry should be interpreted in a non-discriminatory manner and should not be restricted exclusively to opposite-sex couples. This dissertation also attempts to start a dialogue about the human right to marry's intersectionality with and indivisibility from other human rights. In this final section it will suggest new, progressive ways of interpreting the norms of the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child as they relate to the human right to marry.

4.2 Research Findings

*4.2.1 The interpretation abided by in *Joslin v New Zealand* is discriminatory*

"All humans are born free and equal in dignity and rights."

In 2012, the UN Human Rights Office released its first major work on LGBTI human rights, a report entitled *Born Free and Equal*, which was followed by the 2013–14 awareness-raising campaign on LGBTI rights under the same name.⁵¹ Should the HRC be confronted with another individual communication concerning the right of same-sex couples to marry, it seems likely that restricting marriage to opposite-sex couples, as in *Joslin v New Zealand*, would be far less defensible. If forced to consider the right to non-discrimination in relation to marriage, the HRC's opinion may reflect the growing consensus that marriage should be open to all couples

regardless of gender composition. Commentators suggest that a ‘global tipping point’ is rapidly approaching, and that, should a similar case to *Joslin v New Zealand* be brought before the HRC, there may well be a different outcome. Even though HRC opinions are only quasi-judicial, the jurisprudence that emerges is widely utilised as the authoritative interpretation of the ICCPR. As a result, while strong arguments can be made that art 23 should be interpreted to include same-sex couples, until an HRC opinion reflects this, it is not possible to assert that international human rights law presently provides a right for same-sex couples to marry.

4.2.2 Progress towards marriage equality that is apparent in the national laws of multiple states is not being replicated in International Law

There is a growing trend for Western states to recognize the right of same-sex couples to marry. Although the actual number of countries that have marriage equality is relatively small compared to, for example, the number of countries that still criminalize homosexual conduct,⁵² it has been estimated that 10 per cent of the world’s population now live in countries where same-sex couples can marry. Progress towards marriage equality at the domestic level is not being replicated within international human rights law, and the 2002 decision in *Joslin v New Zealand* remains the only UN authority regarding the application of art 23 of the ICCPR to same-sex couples. However, the growing international climate of support for LGBTI human rights generally, and same-sex marriage in particular, makes it likely that the question of whether same-sex couples have a right to marry will come before a UN treaty body again in the future. Since the HRC’s decision in *Joslin v New Zealand*, the UN treaty body system has increasingly defended the rights of LGBTI people in its General Comments, Concluding Observations and Views on individual communications. Further, the UN Human Rights Office’s prominent Born Free and Equal campaign, launched in 2013, further emphasizes the UN’s stance as a champion of LGBTI human rights. An individual communication concerning a prohibition on same-sex couples marrying would not necessarily have to come before the HRC.

4.3 Conclusion and Recommendations

As this dissertation has demonstrated, denying same-sex couples the right to marry may constitute a breach of the ICESCR and the CRC. Now that the committees that monitor these

two treaties have the jurisdiction to receive individual communications, a same-sex couple, a same-sex attracted youth, or a child with same-sex parents could bring a claim of discrimination arising from restrictive marriage laws. Such a communication could lead to the relevant treaty committee finding that marriage laws excluding same-sex couples breach the applicable treaty, and should therefore be amended to remove any discrimination based on sexual orientation or gender identity.

Such a decision would be consistent with the recent trend of the UN recognizing that LGBTI persons enjoy the same fundamental, equal and inalienable human rights as all people. The recognition of the rights of gender-diverse people has long been coupled with the rights of same-sex attracted people in the 'LGBTI' acronym. The rights of transgender people are recognized by the UN as human rights, despite the gender-specific wording of some human rights articles. Any moves towards recognizing marriage equality within international human rights law should extend protection to gender-diverse people as well as people of all sexual orientations. Such a non-discriminatory approach would ensure that transgender and transsexual, gender-diverse and intersex people are covered by this human right. Wording of national legislation that uses gender-neutral terms, such as 'married couple' and 'spouse', promotes such inclusion.

The global understanding of human rights and their application has developed and matured in the 70 years since their first inception. The treaties, as living instruments, should be interpreted and applied to include all people, regardless of their sexual orientation, gender identity or gender expression. States may struggle to justify their prohibition of same-sex marriage on objective and reasonable grounds in light of the UN consensus that the rights of all people are the same. Consistency in the application of the principle of non-discrimination, in light of the understanding of LGBTI rights as human rights, suggests that the right to marry should be interpreted as a human right for all.

Lastly, seeing as this dissertation has established that there exists a growing trend for Western states to recognize the right of same-sex couples to marry, the idea of whether the right to same sex marriage exists in customary international law would be a plausible area of research. It still remains that the actual number of countries that have marriage equality is relatively small compared to, for example, the number of countries that still criminalize homosexual conduct. However, the trend could certainly be employed in making an argument under customary international law.

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