American University International Law Review

Volume 35 | Issue 4 Article 1

2020

Marriage Equality Under the ICCPR: How the Human Rights Committee Got It Wrong and Why It's Time to Get It Right

Kristie A. Bluett

Follow this and additional works at: https://digitalcommons.wcl.american.edu/auilr

 Part of the International Law Commons

Recommended Citation
Bluett, Kristie A. (2020) "Marriage Equality Under the ICCPR: How the Human Rights Committee Got It Wrong and Why It's Time to Get It Right," *American University International Law Review*: Vol. 35 : Iss. 4 , Article 1.
Available at: https://digitalcommons.wcl.american.edu/auilr/vol35/iss4/1

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University International Law Review by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

MARRIAGE EQUALITY UNDER THE ICCPR: HOW THE HUMAN RIGHTS COMMITTEE GOT IT WRONG AND WHY IT'S TIME TO GET IT RIGHT

KRISTIE A. BLUETT*

* The author is a human rights advocate and former Visiting Associate Professor at the Georgetown University Law Center in Washington, D.C. where she served as Acting Director of the International Women's Human Rights Clinic (IWHRC) from 2016-2017. She currently works as an international law consultant/researcher, specializing in the United Nations human rights treaty system. She would like to thank Professor of Law Susan Deller Ross and Brian Tronic for their thoughtful and detailed feedback on this article. Thanks also goes to Gillian Chadwick for her support and feedback at various stages of this article.

I. INTRODUCTION

> "[R]ights by their nature will atrophy if they are frozen. As the conditions of humanity alter and as ideas of justice and equity evolve, so do concepts of rights take on new texture and meaning. . . . What was regarded by the law as just yesterday is condemned as unjust today."[1]

In 2002, the United Nations Human Rights Committee decided the case of *Juliet Joslin, et al. v. New Zealand*,[2] a case in which two lesbian couples challenged New Zealand's refusal to issue them marriage licenses under New Zealand law. The Human Rights Committee ("HRC" or "Committee") held that States parties have no obligation under the International Covenant on Civil and Political Rights (ICCPR) to provide same-sex couples the ability to marry.[3] However, the Committee failed to engage in proper analysis under ICCPR Article 26's right to equal protection and freedom from discrimination,

1. Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at 64 para. 102 (S. Afr.).

2. U.N. Human Rights Comm., Joslin v. New Zealand, Communication No. 902/1999, U.N. Doc. CCPR/C/75/D/902/1999 (July 30, 2002).

3. *Id.* ¶ 8.3.

and instead focused solely on the scope of the right to marry under ICCPR Article 23(2).[4] The Committee based its decision on its view that the right to marry in Article 23(2) served as *lex specialis* and obligated States parties only to provide that right to men and women wishing to marry each other.[5] No challenge to a State party's ban on same-sex marriage has been brought before the Human Rights Committee in the nearly two decades that have passed since the *Joslin* decision. This article suggests that the time has come to bring a new challenge and explores the way forward for individuals wishing to do so under the ICCPR. To that end, it identifies flaws in the Committee's reasoning, examines applicable Article 26 jurisprudence that should have been applied by the Committee in *Joslin*, and sets forth key arguments that should be asserted in any future complaint against a State party's refusal to recognize within its marriage law(s) unions of same-sex partners.[6]

The complainants[7] in *Joslin* were four women (two couples) who had attempted to enter into marriage in New Zealand but were denied a marriage license by government authorities under New Zealand's Marriage Act of 1955.[8] The women then "applied to the High Court

4. *Id.* ¶¶ 8.2–8.3.

5. *Id.*

6. This article critiques the UN Human Rights Committee's decision in *Joslin v. New Zealand* and deliberately focuses on discrimination in marriage laws on the basis of sexual orientation under ICCPR Article 26. The right to non-discrimination and equal treatment on the basis of gender identity under the ICCPR is a related but distinct concept outside the scope of this article. Nonetheless, the focus of the article should not be viewed as promoting any limitation of the rights discussed herein on the basis of gender identity or binary notions of sex, gender, or sexual orientation.

7. The terminology used by the Human Rights Committee in its role as a quasi-judicial body refers to the complainants as "authors," and the equivalent of their complaint is called "the communication." The Committee's decision is called "Views adopted by the Committee."

8. The first couple—Ms. Juliet Joslin and Ms. Jennifer Rowan—applied to the local Registrar of Births, Deaths and Marriages for a marriage license on December 4, 1995; that application was rejected by the Deputy Registrar-General on December 14, 1995. The second couple—Ms. Margaret Pearl and Ms. Lindsay Zelf—lodged a notice of intended marriage, which was denied by their local Registry Office on January 22, 1996. They then lodged the notice at another Registry Office. On February 12, 1996, "the Registrar-General informed them that the notice could not be processed. The Registrar-General indicated that the Registrar was acting lawfully in interpreting the Marriage Act as confined to marriage between a man and a woman." *See* Joslin, *supra* note 2, ¶¶ 1–2.2.

for a declaration that, as lesbian couples, they were lawfully entitled to obtain a marriage license and to marry pursuant to the Marriage Act of 1955."[9] The High Court rejected their application.[10] According to the Human Rights Committee's discussion of the facts, the New Zealand High Court supported its decision with reference to ICCPR Article 23(2), which the court asserted, "'does not point to same-sex marriages.'"[11] On this premise, the High Court "held that the statutory language of the Marriage Act was clear in applying to marriage between a man and a woman only."[12]

The two couples appealed the decision of the High Court to the Court of Appeal. But on December 17, 1997, "a Full Bench of the Court of Appeal . . . held unanimously that [New Zealand's] Marriage Act, in its terms, clearly applied to marriage between a man and a woman only."[13] In reaching this decision, the appellate court – like the High Court – considered international law, including the ICCPR and the Human Rights Committee's jurisprudence. But it reportedly "found no support in the scheme and text of the Covenant, the Committee's jurisprudence, the *travaux préparatoires* nor scholarly writing for the proposition that a limitation of marriage to a man and a woman violated the Covenant."[14]

In their communication to the Human Rights Committee,[15] the complainants claimed that the failure of New Zealand's Marriage Act to provide for marriage between persons of the same sex directly discriminated against them on the basis of sex, and indirectly on the

9. *Id.* ¶ 2.3.
10. *Id.*
11. *Id.* (quoting language from the High Court decision).
12. *Id.*
13. *Id.* ¶ 2.4.
14. *Id.*
15. Though the authors had not exhausted domestic remedies before lodging their complaint with the Human Rights Committee, having one further stage of appeal—to the Privy Council, the authors argued that appealing to the Privy Council "would be futile, as the courts cannot refuse to apply primary legislation such as the Marriage Act." The Committee did not address the author's futility argument; however, it deemed the communication admissible in light of the State party's declaration that "it was making 'no submission as to the admissibility of the communication under article 5(2)(b) of the Optional Protocol'" and in the "absence of any other objections to admissibility of the communication." *Id.* ¶ 3.9.

basis of sexual orientation,[16] in violation of ICCPR Article 26.[17] They also claimed violations of ICCPR Article 16 (the right to recognition as a person before the law),[18] Article 17 (the right to privacy and family) on its own and in conjunction with Article 2(1) (non-discrimination in treaty rights),[19] and Articles 23(1) (protection of the family) and 23(2) (the right to marry) in conjunction with Article 2(1).[20]

The Committee did not find any violation under the ICCPR of the women's rights from the State party's refusal to recognize marriage

16. Although the complainants in Joslin asserted their claim of sexual orientation-based discrimination as *indirect* discrimination, it is this author's view that following the Committee's decision in Toonen, a state law permitting the marriage of opposite-sex couples while prohibiting the marriage of same-sex couples is direct discrimination on the basis of sexual orientation.

17. Joslin, *supra* note 2, ¶ 3.1; International Covenant on Civil and Political Rights art. 26, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR] (ICCPR Article 26 guarantees that "[a]ll 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.").

18. *See* Joslin, *supra* note 2, ¶ 3.5 (claiming that "[t]he Marriage Act, in preventing [them] from acquiring the legal attributes and advantages flowing from marriage, including advantages in the law of adoption, succession, matrimonial property, family protection and evidence, deprives the authors of access to a significant institution through which individuals acquire and exercise legal personality.").

19. Joslin, *supra* note 2, ¶ 3.6; ICCPR, *supra* note 17, art. 2(1) (ICCPR Article 2(1) states: "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.").

20. *See* Joslin, *supra* note 2, ¶¶ 3.7-3.8. (providing that the Joslin complainants contended that their relationships exhibited "all the criteria by reference to which a heterosexual family is said to exist, with the only criteria missing being legal recognition." They further submit that Article 2(1) "requires recognition of families to take place in a non-discriminatory manner, which the Marriage Act fails to do." According to the complainants in Joslin, the right of men and women to marry set forth in ICCPR Article 23(2) "must be interpreted in light of article 2, paragraph 1, which forbids discrimination of any kind." They argued that because "the Marriage Act distinguishe[d] on the prohibited ground of sex, which includes within its ambit sexual orientation," their rights had been violated).

between persons of the same sex.[21] However, in reaching its conclusion that no rights had been violated, the Committee did not properly analyze the authors' claims under Article 26.[22] Rather, the decision was based solely on the Committee's analysis of the specific substantive right to marry found in Article 23(2).[23] The Committee concluded that because Article 23(2)'s right to marry only obligates States parties to recognize marriage between a man and a woman,[24] there is no violation of Article 26 where the State party refuses to permit same-sex partners to marry:

> 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 Covenant.[25]

In so holding, the Committee appears to have applied—unnecessarily—the legal maxim *lex specialis derogate legi generali* (referred to herein as simply "*lex specialis"*).[26] It also departed from its own consistent position that Article 26 is a stand-alone right to equality before the law and equal protection of the law without

---

21. *See* Joslin, *supra* note 2, ¶ 8.3.

22. Nor did it analyze the authors' discrimination claims resulting from the assertion of violations of Articles 17 and 23 in conjunction with Article 2(1).

23. *See* Joslin, *supra* note 2, ¶¶ 8.2–8.3.

24. *See id.* ¶ 8.2 ("Use of the term 'men and women,' rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.").

25. *See id.* ¶ 8.3. The Committee made no reference to the authors' allegations with respect to Article 2(1) in conjunction with other substantive rights, including Article 23(2).

26. *Lex specialis derogat (legi) generali*, ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW (John P. Grant & J. Craig Baker eds., Oxford Univ. Press 3d ed. 2009), https://www.oxfordreference.com/view/10.1093/acref/9780195389777.001.0001/acref-9780195389777-e-1331?rskey=50LypS&result=1331 (defining *lex specialis derogat (legi) generali* to mean "that a specific legal rule prevails over a general legal rule."). *See also Lex Specialis*, ICRC: HOW DOES LAW PROTECT IN WAR? https://casebook.icrc.org/glossary/lex-specialis (last accessed June 21, 2020) (defining *lex specialis* to mean that more specific rules will prevail over more general rules).

discrimination—one that applies in every field regulated by the state and to every piece of legislation enacted by the state.[27] As a result, the Committee ignored an entire body of Article 26 jurisprudence on sex-based discrimination that was applicable to the authors' claim because of the protective status of both sex and sexual orientation.

While much commentary about the *Joslin* decision has focused on the Committee's interpretation of the right to marry in Article 23,[28] much less attention has been given to the Committee's refusal to engage in Article 26 analysis and the Committee's departure from relevant sex-discrimination jurisprudence on the matter.[29] This article refutes the Committee's application of *lex specialis* to the *Joslin* allegations and seeks to illustrate why and how *Joslin* should have been decided on Article 26 grounds.

---

27. *See* U.N. Human Rights Comm., *General Comment No. 18: Non-Discrimination*, ¶ 12 (1989), *in* COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, at 146, U.N. Doc. HRI/GEN/1/Rev.6 (2003) [hereinafter *General Comment No. 18*] ("In the view of the Committee, article 26. . . . prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its contents should not be discriminatory."); U.N. Human Rights Comm., *General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, ¶ 31, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) [hereinafter *General Comment No. 28*] ("The right to equality before the law and freedom from discrimination, protected by article 26, requires States to act against discrimination by public and private agencies *in all fields*.") (emphasis added).

28. *See, e.g.*, Malcolm Langford, *Same-Sex Marriage in Polarised Times: Revisiting Joslin v. New Zealand (HRC)*, *in* INTEGRATED HUMAN RIGHTS IN PRACTICE: REWRITING HUMAN RIGHTS DECISIONS (Eva Brems and Ellen Desmet eds., 2017); Paula Gerber et al., *Marriage: A Human Right for All?*, 36 SYDNEY L. REV. 643, 643 (2014); Oscar Roos & Anita Mackay, *The Evolutionary Interpretation of Treaties and the Right to Marry: Why Article 23(2) of the ICCPR Should Be Reinterpreted to Encompass Same Sex Marriage*, 49 GEO. WASH. INT'L L. REV. 879, 879 (2017).

29. *See, e.g.*, Langford, *supra* note 28, at n. 19 (asserting that an argument based upon the "free-standing provision on non-discrimination, Article 26, . . . does not seem particularly fruitful. . . ."); *id.* at 119 (contending that "[j]urisprudentially, the Committee had scant legal practice upon which to build an affirmative answer" to the question of whether marriage equality could be grounded in the ICCPR.) Professor Langford did not address in his chapter the Committee's jurisprudence on sex-based discrimination considered in this Article.

Part II discusses the Committee's recognition of sexual orientation as a protected ground within the Covenant's reference to "sex" in Articles 2 and 26 and how the Committee's decision to include sexual orientation within the protected ground of sex triggered the applicability of the Committee's past jurisprudence on sex-based discrimination. Part III explores the legal maxim *lex specialis* and the misplaced use of it in *Joslin* as well as the free-standing nature of Article 26 and its applicability to all legislation enacted by a State party. Part IV examines the relevant case law and legal principles established by the Committee's jurisprudence on sex-based discrimination. The HRC jurisprudence identified in this Part not only refutes the legitimacy of State party contentions that social norms and traditions may constitute a "legitimate aim" to justify a distinction in the law but also underscores the discussion in Part III regarding Article 26's applicability beyond Covenant rights. Part V identifies and refutes each of the justifications offered by the State party in *Joslin* for the differential treatment in its marriage law and shows why New Zealand's justifications should not have survived the Committee's scrutiny in 2002 and why they cannot survive scrutiny by the Committee today. Finally, Part VI discusses recent HRC Concluding Observations that reveal a decisive change in the Committee's position with respect to same-sex marriage and suggests that the time has come to bring a new complaint before the Committee.

II. SEXUAL ORIENTATION AS A PROTECTED GROUND

The Human Rights Committee recognizes sexual orientation as a protected ground on the basis of which one cannot be discriminated. Although sexual orientation is not explicitly mentioned in the ICCPR, decisions issued by the Committee in its quasi-judicial function and in Concluding Observations issued through the State party reporting process have firmly established its protected status as an example of sex-based discrimination.[30] The Human Rights Committee first

30. The Human Rights Committee has two types of monitoring/enforcement mechanisms: (1) through treaty body reporting, where State parties report to the Committee on their compliance with the treaty (the Human Rights Committee later in the process issues "Concluding Observations" that address the State party's compliance or lack of compliance with the ICCPR and set forth specific

recognized sexual orientation as within the protected ground of sex in the case of *Toonen v. Australia*.[31] In *Toonen*, the State party "sought the Committee's guidance as to whether sexual orientation may be considered an 'other status' for the purposes of [ICCPR] article 26."[32] While both Article 2(1) and Article 26 include a reference to "other status" as a basis for protection from discrimination, the Human Rights Committee instead recognized sexual orientation as a protected ground through an expansive reading of "sex," noting "that in its view the reference to 'sex' in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation."[33]

Article 26 prohibits discrimination on the basis of sex/sexual orientation without any need to connect its protection to another Covenant right. Article 26 reads:

> 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.[34]

---

recommendations for what the State party needs to do to bring its laws and practices in line with the treaty), and (2) the Committee serves as a quasi-judicial body that considers complaints brought to it by individuals or states regarding a State party's failure to comply with its treaty obligations (after the individual has exhausted state judicial remedies for the violation without success). For individual complaints, the implicated State party must also have ratified the First Optional Protocol. *See* Optional Protocol to the International Covenant on Civil and Political Rights art.1, Mar. 23, 1976, 999 U.N.T.S. 171 ("A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.").

31. U.N. Human Rights Comm., Toonen v. Australia, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/448/1992 (Mar. 31, 1994).

32. *Id.* ¶ 8.7.

33. *Id.*

34. ICCPR, *supra* note 17, art. 26. By contrast, Article 2(1)'s prohibition against discrimination on the basis of sex/sexual-orientation is limited to the rights recognized in the Covenant. Article 2(1) provides that each State Party "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

The Committee has continued to recognize the treaty's protection against discrimination on the basis of sexual orientation in more recent decisions, including *Young v. Australia*, *X v. Columbia*, and *C v. Australia*, discussed *infra* in Part VI.[35]

Furthermore, the Human Rights Committee has underscored the protected status of sexual orientation in numerous Concluding Observations issued to States parties and has increasingly emphasized

---

kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." ICCPR, *supra* note 17, art. 2(1) (emphasis added); *see also General Comment No. 18*, *supra* note 27, ¶ 7 ("[A]ny distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, 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.") (emphasis added).

35. *See* U.N. Human Rights Comm., Young v. Australia, Communication No. 941/2000, ¶ 10.4, U.N. Doc. CCPR/C/78/D/941/2000 (2003) (citing Toonen v. Australia, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/448/1992 (Mar. 31, 1994)) ("The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation."); U.N. Human Rights Comm., X v. Colombia, Communication No. 1361/2005, ¶ 7.2, U.N. Doc. CCPR/C/89/D/1361/2005 (2007) (citing Young v. Australia, Communication No. 941/2000, ¶ 10.4, U.N. Doc. CCPR/C/78/D/941/2000 (2003)) ("The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation."); U.N. Human Rights Comm., Joslin v. New Zealand, Communication No. 902/1999, app. Individual Opinion of Committee Members Mr. Rajsoomer Lallah and Mr. Martin Scheinin (concurring), U.N. Doc. CCPR/C/75/D/902/1999 (July 30, 2002) (concurring) (noting that "it is the established view of the Committee that the prohibition against discrimination on grounds of 'sex' in article 26 comprises also discrimination based on sexual orientation."). Although the concurrence acknowledged the protected status of sexual orientation and noted that differential treatment of same-sex couples and married couples may violate Article 26, the concurring members nonetheless joined the Committee's unanimous view that it could not find a violation of Article 26. *See id.* ("This conclusion [that there is no violation of article 26 in the present case] should not be read as a general statement that differential treatment between married couples and same-sex couples not allowed under the law to marry would *never* amount to a violation of article 26. On the contrary, the Committee's jurisprudence supports the position that such differentiation may very well, depending on the circumstances of a concrete case, amount to prohibited discrimination. . . . However, in the current case we find that the authors failed . . . to demonstrate that they were personally affected in relation to certain rights . . . by any such distinction between married and unmarried persons that would amount to discrimination under article 26.") (emphasis added).

the need for States parties to enact anti-discrimination legislation that specifically protects against discrimination on the basis of sexual orientation. For example, in 2006 the Committee stated that the government of the United States "should acknowledge its legal obligation under articles 2 and 26 to ensure to everyone the rights recognized by the Covenant, as well as equality before the law and equal protection of the law, without discrimination on the basis of sexual orientation."[36] In 2006, this was still a rare inclusion in Concluding Observations issued by the Committee to a State party. However, more instances of the Committee condemning States parties for not addressing discrimination on the basis of sexual orientation appeared in the 2009 reporting cycle.[37] And by 2015, the Committee's focus on States parties' obligation to protect against discrimination based upon sexual orientation became commonplace, with recommendations tailored to address such discrimination.[38] In fact, the

36. U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America*,
¶ 25, U.N. Doc. CCPR/C/USA/CO/3 (Sept. 15, 2006).

37. *See, e.g.*, U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: Republic of Moldova*, ¶ 14, U.N. Doc. CCPR/C/MDA/CO/2 (Nov. 4, 2009) ("The Committee notes with concern reports that discrimination based on sexual orientation appears to be widespread at all levels of society (arts. 2 and 26). *The State party should take measures to combat discrimination based on sexual orientation*[.]") (emphasis in original); *U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee: Rwanda*, ¶ 19, U.N. Doc. CCPR/C/RWA/CO/3 (May 7, 2009) ("While taking note that sexual relations between consenting adults of the same sex are not an offence under criminal law, the Committee is concerned that the draft legislation would alter that situation (arts. 17 and 26 of the Covenant). *The State party should ensure that any reform of its criminal law is in full conformity with articles 17 and 26 of the Covenant.*") (emphasis in original); U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: United Republic of Tanzania*, ¶ 22, U.N. Doc. CCPR/C/TZA/CO/4 (Aug. 6, 2009) [hereinafter HRC Concluding Observations: Tanzania] ("The Committee reiterates its concern at the criminalization of same-sex sexual relations of consenting adults, and regrets the lack of measures taken to prevent discrimination against them (arts. 2, 17 and 26). **The State party should decriminalize same-sex relations of consenting adults and take all necessary actions to protect them from discrimination and harassment**.") (emphasis in original).

38. *See, e.g.*, U.N. Human Rights Comm., *Concluding Observations on the Second Periodic Report of Cambodia*, ¶ 9, U.N. Doc. CCPR/C/KHM/CO/2 (Apr. 27, 2015) ("The Committee is also concerned about reports of discrimination against lesbian, gay, bisexual and transgender persons, in particular in employment and

health-care settings. It notes with concern the lack of legislations expressly prohibiting discrimination on the grounds of sexual orientation or gender identity (arts. 2 and 26). *The State party should review its legislation to ensure that discrimination on grounds of sexual orientation and gender identity are prohibited.*") (emphasis in original); U.N. Human Rights Comm., *Concluding Observations on the Initial Report of Côte d'Ivoire*, ¶ 8, U.N. Doc. CCPR/C/CIV/CO/1 (Apr. 28, 2015) ("The Committee is concerned about reports that lesbians, gays, bisexuals and transgender persons are subjected to discrimination, harassment, threats of physical violence and intimidation and about the impunity enjoyed by the perpetrators of such acts. The Committee is concerned, in particular, about the provisions of article 360 of the Criminal Code, which provides for an aggravation of the minimum penalty prescribed for 'gross indecency' when such conduct 'consists of an indecent or unnatural act with an individual of the same sex.' (arts. 2 and 26). *The State party should enact a general law against discrimination with a view to incorporating the prohibition of discrimination included in the Covenant and enshrined in the Constitution. The State party should also take the necessary steps to protect lesbians, gays, bisexuals and transgender persons against all forms of discrimination, intimidation and violence. The State party should amend the provisions of Article 360 of the Criminal Code and any other provision of its criminal legislation that discriminates against persons because of their sexual orientation.*"); U.N. Human Rights Comm., *Concluding Observations on the Second Periodic Report of Greece*, ¶¶ 11–12, U.N. Doc. CCPR/C/GRC/CO/2 (Dec. 3, 2015) ("The Committee remains concerned about the prevalence in society of stereotypes and prejudice against lesbian, gay, bisexual and transgender persons. . . . in particular, it is concerned about the lack of an adequate official response to complaints relating to discrimination on the grounds of sexual orientation and gender identity (arts. 2 and 26) . . . *the State party should intensify its efforts to combat stereotypes and prejudice against lesbian, gay, bisexual and transgender persons* . . . ") (emphasis in original); U.N. Human Rights Comm., *Concluding Observations on the Fourth Periodic Report of the Republic of Korea*, ¶¶ 12–13, U.N. Doc. CCPR/C/KOR/CO/4 (Dec. 3, 2015) ("[T]he Committee is concerned that comprehensive anti-discrimination is lacking. It is particularly concerned about the current lack of legislation defining and prohibiting . . . discrimination on the grounds of sexual orientation or gender identity (arts. 2 and 26). *The State party should adopt comprehensive anti-discrimination legislation, explicitly addressing all spheres of life and defining and prohibiting discrimination on any ground, including . . . sexual orientation and gender identity*. . . ."); and ¶¶ 14-15 ("The Committee is concerned about: (a) The widespread discrimination against lesbian, gay, bisexual, transgender and intersex persons, including violence and hate speech; . . . **the State party should clearly and officially state that it does not tolerate any form of . . . discrimination against, persons based on their sexual orientation or gender identity**. . . ."); U.N. Human Rights Comm., *Concluding Observations on the Third Periodic Report of the Former Yugoslav Republic of Macedonia*, ¶ 7, U.N. Doc. CCPR/C/MKD/CO/3 (Aug. 17, 2015) ("The Committee is concerned that the law on the Prevention of and Protection against Discrimination does not explicitly prohibit discrimination on the basis of sexual orientation and gender identity. . . .*the State party should amend its Law on the*

Committee's Concluding Observations now typically discuss discrimination on the basis of sexual orientation in a specific section (separate from discussions of equality between men and women) within the discussion of the State party's fulfillment of obligations under Articles 2 and 26.[39] As discussed in more detail in Part VI, *infra*, some recent recommendations specifically call on States parties to eliminate discrimination on the basis of sexual orientation in their marriage laws.[40]

The Human Rights Committee's decision to provide protected status to one's sexual orientation within Article 26's reference to "sex" is relevant for proper consideration of the Committee's *Joslin* decision because it undermines the Committee's decision to apply *lex specialis* to a blatantly discriminatory law, and it brings to the foray decades of relevant Article 26 jurisprudence on sex-based discrimination. This jurisprudence provides insight into how the Committee analyzes discrimination on the basis of sex and what factors must therefore be considered for sexual orientation-based discrimination. As discussed *infra* in Part IV, it also provides a basis for finding a violation of Article 26 even where the substantive right at issue is not protected by

---

Prevention of and Protection against Discrimination with a view to explicitly prohibiting discrimination on the basis of sexual orientation and gender identity. The State party should intensify its efforts to combat stereotypes and prejudice against lesbian, gay, bisexual, transgender and intersex persons. . . .") (emphasis in original); U.N. Human Rights Comm., *Concluding Observations on the Seventh Periodic Report of the Russian Federation*, ¶ 10, U.N. Doc. CCPR/C/RUS/CO/7 (Apr. 28, 2015) ("The Committee is concerned: (a) About reports of discrimination, hate speech, violence against lesbian, gay, bisexual and transgender (LGBT) individuals and activists and violations of their rights to freedom of expression and assembly; (b) About the absence of explicit protection against discrimination on the grounds of sexual orientation and gender identity in the anti-discrimination legislation; . . . *the State party should clearly and officially state that it does not tolerate any form of social stigmatization of homosexuality, bisexuality or transexuality, or hate speech, discrimination or violence against persons based on their sexual orientation or gender identity. It should also . . . (a) take all the steps necessary to strengthen the legal framework protecting LGBT individuals from discrimination and violence. . . .*") (emphasis in original).

39. These sections are typically identified with titles using similar language such as: "Discrimination on the grounds of sexual orientation and gender identity," "Discrimination based on sexual orientation or gender identity," or "Discrimination based on sexual orientation."

40. *See* discussion *infra* Part VI.2.

the Covenant and rejects State party justifications for sex-based distinctions stemming from social norms and traditions.

III. *LEX SPECIALIS* AND THE FREE-STANDING NATURE OF ICCPR ARTICLE 26

Article 26 of the ICCPR is unique in that it is not limited to equal protection and equal treatment with respect to those rights afforded in the Covenant. Rather, Article 26 is a stand-alone, substantive provision that guarantees the right to equal protection free from discrimination in *any* law proscribed by the State party.[41] Nonetheless, in *Joslin*, the Human Rights Committee ignored all applicable Article 26 jurisprudence and chose instead to hide behind its finding with respect to the right to marry in Article 23(2).[42] The Committee's basis for rejecting the *Joslin* authors' claim that New Zealand's Marriage Act violated their right to equal protection under Article 26 was "the scope of the right to marry" in Article 23(2).[43] Article 23(2) states, "[t]he right of men and women of marriageable age to marry and to found a family shall be recognized."[44] Because the Committee limited Article 23(2)'s right to marry as a guarantee only for men wishing to marry women and women wishing to marry men,[45] the Committee

41. *See General Comment No. 18*, *supra* note 27, ¶ 12.
42. Joslin, *supra* note 2, ¶ 8.3.
43. *Id.* ¶¶ 8.2–8.3.
44. ICCPR, *supra* note 17, art. 24.
45. *See* Joslin, *supra* note 2, ¶ 8.2 ("Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term 'men and women,' rather than 'every human being,' 'everyone,' and 'all persons.' Use of the term 'men and women,' rather than the general terms used elsewhere in Part III of the Covenant has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other."). Note that in recent years the Committee has contradicted its stated position in Joslin on whether State parties' obligations under ICCPR Articles 2(1) and 26 includes the elimination of discrimination in a state's marriage laws in the form of same-sex marriage bans. *See, e.g.*, U.N. Human Rights Comm., *Concluding Observations on the Fourth Periodic Report of Bulgaria*, ¶¶ 11–12, U.N. Doc. CCPR/C/BGR/CO/4 (Nov. 15, 2018) [hereinafter *HRC Concluding Observations: Bulgaria*]; U.N. Human Rights Comm., *Concluding Observations on the Sixth Periodic Report of Hungary*, ¶¶ 19–20, U.N. Doc. CCPR/C/HUN/CO/6 (May 9, 2018) [hereinafter *HRC Concluding Observations: Hungary*]; U.N. Human Rights Comm., *Concluding Observations on*

stated that it therefore could not find a violation of the authors' right to equal protection free from discrimination under Article 26.[46]

This approach by the Committee was misguided for two reasons. First, *lex specialis* should not have been used to override Article 26's prohibition of sex-/sexual orientation-based discrimination. Second, Article 26 is an autonomous right to equal protection and freedom from discrimination that applies to every piece of legislation enacted by the State party and in any field regulated by public authorities.[47] It therefore necessarily applies to a State party's marriage laws and should not be skirted by the very body responsible for interpreting a human rights treaty, which itself was born from the "recognition of the inherent dignity and of the *equal and inalienable rights of all members of the human family*[.]"[48]

A. ARTICLE 26 APPLICABILITY NOT PRECLUDED BY *LEX SPECIALIS*

Although the Committee does not refer in explicit terms to the legal maxim *lex specialis* in its consideration of the merits, it is clear from the wording of the *Joslin* decision that the Committee relied on this principle to conclude that there was no violation of Article 26 without actually applying Article 26 analysis to the facts of the case. The principle was raised—albeit in other terms—by the State party in its submissions to the Committee:

> The State party emphasize[d] that the *specific terms of article 23, paragraph 2*, in clearly referring to couples of different sex, must influence the interpretation of the other Covenant rights invoked. Following the interpretive maxim *generalia specialibus non derogant*, the effect that *general provisions should not detract from the meaning of specific*

the Fifth Periodic Report of Mauritius, ¶¶ 9–10, U.N. Doc. CCPR/C/MUS/CO/5 (Dec. 11, 2017) [hereinafter *HRC Concluding Observations: Mauritius*]; U.N. Human Rights Comm., *Concluding Observations on the Sixth Periodic Report of Australia*, ¶¶ 25–26, U.N. Doc. CCPR/C/AUS/CO/6 (Dec. 1, 2017) [hereinafter *HRC Concluding Observations: Australia*].

46. *See* Joslin, *supra* note 2, ¶ 8.3 ("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 Covenant.").

47. *General Comment No. 18*, *supra* note 27.

48. *See* ICCPR, *supra* note 17, pmbl. (emphasis added).

> *provisions*, the specific meaning of article 23, paragraph 2, excludes a contrary interpretation being derived from other more general provisions of the Covenant.[49]

Then in the only two paragraphs of the decision in which the Committee reveals any analysis, it states that: "*given the existence of a specific provision in the Covenant on the right to marriage*, any claim that this right has been violated must be considered in the light of this provision."[50] The Committee further concluded that "[i]n light of the scope of the [specific] right to marry under article 23, paragraph 2," it could not find that the State party violated the authors' rights under any of the articles relied upon in the complaint, including Article 26.[51]

Lex specialis derogate legi generali, sometimes expressed simply as *lex specialis* or as *generalia specialibus non derogant*, is a generally accepted principle of interpretation in international law.[52] *Lex specialis* is a Latin term meaning "law governing a specific subject matter;"[53] the legal maxim "suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific."[54] This means that *lex specialis*, or the "special law," "may be used to apply, clarify, update or modify as well as set aside the general law."[55] However, "[t]he application of the special law does not normally extinguish the relevant general law."[56] Rather, the general law "will remain valid and applicable and will in accordance

49. Joslin, *supra* note 2, ¶ 4.5.

50. *Id.* ¶ 8.2.

51. *See id.* ¶ 8.3 ("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 Covenant.").

52. *See Lex specialis derogat (legi) generali*, *supra* note 26; *see also* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Eighth Session, U.N. Doc. A/61/10, at 408 (2006) [hereinafter Rep. on Fifty-Eighth Session] ("The maxim *lex specialis derogat legi generali* is a generally accepted technique of interpretation and conflict resolution in international law.").

53. *Lex Specialis Law and Legal Definition*, U.S. LEGAL, https://definitions.uslegal.com/l/lex-specialis/ (last accessed June 21, 2020).

54. Rep. on Fifty-Eighth Session, *supra* note 52, at 408.

55. *Id.* at 409.

56. *Id.*

with the principle of harmonization . . . continue to give direction for the interpretation and application of the relevant special law. . . ."[57] Moreover, the generally accepted principle of harmonization suggests that "when several norms bear on a single issue they should, to the extent possible, be interpreted as to give rise to a single set of compatible obligations."[58]

Contrary to these principles regarding the application of *lex specialis*, the Committee's interpretation and application of Article 23(2) in *Joslin* rendered invalid and inapplicable Article 26's prohibition against discrimination based on sex/sexual orientation. The Committee interpreted Article 23(2)'s reference to "men and women" in a manner wholly inconsistent with the Article 26 right to equal protection and freedom from discrimination and created an incompatible set of obligations for States parties to the Covenant. In essence, the Committee's application of the "special law" on the right to marry extinguished the *Joslin* authors' rights to freedom from discrimination based on sex/sexual orientation under Article 26.

Another aspect of *lex specialis* that undermines the Committee's decision in *Joslin* is that in some cases, the special law cannot or should not control the interpretation of conflicting provisions. For example, certain types of general law—such as *jus cogens*—may not be derogated from by special law.[59] According to the UN Report of the International Law Commission, "other rules may have a *jus cogens* character inasmuch as they are accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted."[60] A valid argument can be made that the prohibition against sex-based discrimination has been elevated to an international norm with *jus cogens* character. The ICCPR itself prohibits derogation from the treaty's prohibition on sex-based

57. *Id.*

58. *Id.* at 408.

59. *See id.* at 410 (noting the prohibition against racial discrimination has been recognized as a *jus cogens* norm); *see also id.* at 419 ("The most frequently cited examples of *jus cogens* norms are the prohibition of aggression, slavery and the slave trade, genocide, racial discrimination[,] apartheid and torture, as well as basic rules of international humanitarian law applicable in armed conflict, and the right to self-determination.").

60. *Id.* at 419–20.

discrimination in Article 4(1).[61] The Human Rights Committee's General Comment on Article 4 states that:

> Even though article 26 or the other Covenant provisions related to non-discrimination . . . have not been listed among the non-derogable provisions in Article 4, paragraph 2, *there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances*.[62]

Those non-derogable elements of the ICCPR's right to non-discrimination are when the distinctions are based on "race, colour, *sex*, language, religion or social origin."[63] Notably, these are just a few of the prohibited grounds identified in Articles 2(1) and 26. Articles 2(1) and 26 also prohibit discrimination on the basis of political or other opinion, national origin, property, birth, or other status; however, the Committee does not consider the right to non-discrimination on any of those bases non-derogable.[64]

Moreover, other considerations of treaty interpretation may support the conclusion that in the case of marriage equality under the ICCPR, the general law (Article 26's right to equal protection free from sex-/sexual orientation-based discrimination) should prevail over the special law (Article 23's right to marriage).[65] One such consideration is "[w]hether the application of the special law might frustrate the

---

61. *See* ICCPR, *supra* note 17, art. 4(1) ("In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, *provided that such measures . . . do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin*.") (emphasis added).

62. U.N. Human Rights Comm., *General Comment No. 29: Article 4: Derogations During a State of Emergency*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.11(Aug. 31, 2001) (emphasis added).

63. ICCPR, *supra* note 17, art. 4(1) (emphasis added); *see also General Comment No. 18*, *supra* note 27, ¶ 2 ("While article 4, paragraph 1, allows States parties to take measures derogating from certain obligations under the Covenant in time of public emergency, the same article requires, inter alia, that those measures should not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.").

64. ICCPR, *supra* note 17, arts. 2(1), 26.

65. Rep. on Fifty-Eighth Session, *supra* note 52, at 410.

purpose of the general law[.]"[66] The purpose of ICCPR Article 26 is clear from the Human Rights Committee's General Comment 18: to "prohibit[] discrimination in law or in fact in any field regulated and protected by public authorities."[67] As explained *supra* in Part II, this necessarily includes prohibiting sex-/sexual orientation-based discrimination in a State's marriage law(s) where marriage is a field regulated by public authorities.[68] Article 26 cannot serve its purpose to guarantee equal treatment and equal protection free from discrimination on the basis of sex/sexual orientation in all fields regulated by public authorities with the Committee's interpretation and application of Article 23(2) in *Joslin*. The application of Article 23(2) in *Joslin* not only frustrated the purpose of Article 26, it nullified completely the complainants' rights contained therein as to marriage—a field regulated and protected by public authorities.

The Human Rights Committee itself has ignored the legal principle of *lex specialis* in favor of applying more general equality provisions. In the case of *Ato del Avellanal v. Peru*,[69] the Committee determined that a Peruvian law granting husbands the right to represent matrimonial property in court but denying wives that right constituted discrimination on the basis of sex in violation of Article 26.[70] In that case, the author of the communication—Mrs. Ato del Avellanal—owned properties in Lima, Peru. When her tenants stopped paying rent on the properties, she sued them in court. However, her case was dismissed because according to Peruvian Civil Code Article 168, when a woman is married, only the husband can represent the matrimonial property in court.[71] After exhausting domestic remedies, Mrs. Ato del Avellanal brought a case before the Human Rights Committee, claiming violations of ICCPR articles 2, 3, 16, 23(4) and 26.[72] Notably, in its decision the Committee did not issue a finding with regards to the author's ICCPR Article 23(4) claim.[73] Instead, the

66. *Id.* (emphasis in original).
67. *General Comment No. 18*, *supra* note 27, ¶ 12; *id.* ¶ 31.
68. ICCPR, *supra* note 17, art. 26.
69. U.N. Human Rights Comm., Ato del Avellanal v. Peru, Communication No. 202/1986, U.N. Doc. CCPR/C/34/D/202/1986 (Oct. 28, 1988).
70. *Id.* ¶ 10.2.
71. *Id.* ¶ 2.1.
72. *Id.* ¶ 1.
73. Article 23(4) provides: "States Parties to the present Covenant shall take

Committee found a violation of an article for which the author did not assert a violation—Article 14(1), which provides that "all persons shall be equal before courts and tribunals,"[74] and the non-discrimination provisions in Articles 3 and 26.[75]

Arguably, ICCPR Article 23(4)—which speaks to equality within the context of marriage—serves as the "special law" for Mrs. Ato del Avellanal's case compared to Article 14's general provision of equality before the courts and Article 26's general provision of equality before the law and non-discrimination. Indeed, it specifically requires the equality of spouses during marriage, and Mrs. Ato del Avallenal's claim was that she and other similarly situated women were not being treated equally with their spouses during marriage because only the married men could represent matrimonial property in court.[76] Nonetheless, the Committee found that the application of the Peruvian law "denied [the author] equality before the courts and constituted discrimination on the ground of sex" in violation of ICCPR Articles 3, 14(1) and 26.[77]

At least one women's rights advocate and legal scholar has noted that the Committee's switch in *Ato del Avellanal* suggests that a ruling on Article 23(4), which deals specifically with marriage and family, would have been more controversial than a decision regarding the more general human right regarding equal rights before the courts.[78] In contrast to the Committee's approach in *Joslin*, the Committee chose to ignore the interpretive maxim of *lex specialis* and instead applied the more general equality provisions.[79] This undermines the Committee's application of *lex specialis* in *Joslin* and suggests that when the Committee members believe that the context is appropriate for equal protection under Article 26, it will apply the more general equality provision to ensure the fundamental rights of the authors. The

---

appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution." ICCPR, *supra* note 17, art. 23(4).

74. Ato del Avellanal, *supra* note 69, ¶ 10.1.

75. *See id.* ¶ 10.2 (providing that "[a]ll persons shall be equal before the courts and tribunals").

76. *Id.* ¶ 2.1.

77. *Id.* ¶¶ 10.2, 11.

78. *See* SUSAN DELLER ROSS, WOMEN'S HUMAN RIGHTS: THE INTERNATIONAL AND COMPARATIVE LAW CASEBOOK 59–60 (2008).

79. Ato del Avellanal, *supra* note 69, ¶ 10.2.

Committee in *Joslin* could—and should—have relied on *Ato del Avellanal*, discussed further *infra* in Part IV, but chose to hide behind the ICCPR's "special law" regarding marriage to avoid issuing a controversial decision.[80]

In the recent case of *Chantelle Day and Vickie Bodden Bush v. The Governor of the Islands and Others* (2019), the Grand Court of the Cayman Islands refused to apply *lex specialis* to its decision regarding the state's ban on same-sex marriage.[81] It chose instead to analyze whether the state's law violated petitioners' rights to equal protection and freedom from discrimination.[82] Like the state party in *Joslin*, the Respondent State's argument was that the constitution's provision on the right to marry (Section 14) served as the *lex specialis* for deciding whether same-sex couples should have a right to marry under the Cayman Islands' marriage law.[83] The state argued that as *lex specialis*, Section 14(1) not only served "as an express recognition and protection of the right of opposite-sex couples to marry but also as being utterly preclusive of any such right or the development of any such right, for same-sex couples."[84] Also like the State party in *Joslin*, the Respondent State in the Cayman Islands case supported this position by looking "to the 'comprehensive negotiation process' during drafting," which according to the State, "resulted in the special wording" of the Constitution's right to marry provision.[85] The relevant

80. Joslin, *supra* note 2, ¶ 4.11.

81. Day v. Governor of the Cayman Islands (Unreported, Grand Court of the Cayman Islands, Civ. Cause Nos. 111, 184, 29 Mar. 2019) ¶ 49.

82. *See* Cayman Islands Constitution Order 2009, SI 2009/1379, art. 16(1) (UK) ("[The] Government (subject to certain exceptions specified) shall not treat any person in a discriminatory manner in respect of the rights under this Part of the Constitution." "[D]iscriminatory" is described as "affording different and unjustifiable treatment to different persons on any ground[.]"); *see also* Day, *supra* note 81, ¶ 5 (explaining sexual orientation falls under "on any ground" under the definition of discriminatory).

83. *Id.* ¶¶ 6, 45 (quoting Cayman Isl. Const., sec. 14(1)) ("[The] Government shall respect the right of every unmarried man and woman of marriageable age (as determined by law) freely to marry a person of the opposite sex and found a family.").

84. *See id.* ¶¶ 45–50 ("Thus, it is submitted by the Respondents, that the clear limitation in the clause governing marriage could not possibly be evaded, side-stepped or circumvented by more general clauses. The governing clause about marriage, realistically and practically, is section 14(1).").

85. *Id.* ¶ 46.

Section 14(1) states: "Government shall respect the right of every unmarried man and woman of marriageable age (as determined by law) freely to marry *a person of the opposite sex* and found a family."[86] The State argued that it is impermissible to provide a right that is "clearly forbidden by the intent of section 14(1) by locating that right in other more general provisions of the Constitution."[87]

Notwithstanding the Respondent State's arguments, the court in *Day* rejected the *lex specialis* doctrine of interpretation in favor of advancing the human rights of all persons, regardless of their sexual orientation. In fact, the court refused to apply the rule of *lex specialis* even though the language in the Cayman Islands' Bill of Rights on the right to marry is much more explicit than the one contained in ICCPR Article 23(2) with respect to the sex that one's intended spouse must be.[88] Despite the provision's overt reference to "a person of the opposite sex," the court pointed to "obvious problems" that come from such construction.[89] One problem with the State's requested construction, according to the court, was that "the contended meaning is plainly discriminatory."[90] The court reasoned that construction "must be grounded in justification" pursuant to the Bill of Rights' equal protection/non-discrimination provision (Section 16).[91]

In the court's opinion, "it cannot suffice for a blatantly discriminatory construction to be advanced simply on the basis that that is the clear intention of those who took part in the constitutional negotiations or on the purely technical argument of a '*lex specialis*.'"[92] The court concluded that "[n]o principle of construction allows for the preclusive and discriminatory reading of section 14(1) for which the Respondents [the State] contend."[93] Instead, the Court chose to give

86. Cayman Islands Constitution Order 2009, SI 2009/1379, art. 14(1) (UK) (restated in Day, ¶ 45) (emphasis added).

87. *See* Day, *supra* note 81, ¶ 49 ("Article 12 does not impose an obligation on Contracting States to grant same-sex couples access to marriage. Article 14 taken in conjunction with Article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either.").

88. *Id.* ¶¶ 48–49.

89. *Id.* ¶¶ 52–54.

90. *Id.* ¶ 54.

91. *Id.*

92. *Id.*

93. *Id.* ¶ 101.

the right "a generous and purposive construction"—one that is "'suitable to give to individuals the full measure of the fundamental rights and freedoms referred to [in the Constitution and the Bill of Rights in particular']."[94] The court then held that the 2008 amendment to the law, which "preclude[d] same-sex couples from the institution of marriage,"[95] violated the Petitioners' right to "freedom from discrimination in the enjoyment of their rights under the Bill of Rights."[96]

Where applying the "special law" contradicts the purpose and objective of the treaty, ignores a non-derogable right, creates inconsistency within the treaty, and results in blatantly discriminatory construction, the Human Rights Committee should set aside the legal maxim in favor of promoting the fundamental human rights of all members of the human family. It should have set it aside in *Joslin*, and it should set it aside when faced with a new challenge to a state's marriage law that refuses to recognize marriage between persons of the same sex.

B. NECESSARY CONSIDERATION OF ARTICLE 26 AS AN AUTONOMOUS EQUALITY PROVISION

Without applying *lex specialis*, the Human Rights Committee could not avoid direct application and analysis of Article 26 in the *Joslin* case. In its General Comment 18, the Human Rights Committee explained that:

> [A]rticle 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact *in any field regulated and protected by public authorities*. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of Article 26 that its contents should not be discriminatory. In other words, the application of the principle of non-discrimination contained in Article 26 is not limited to those rights which

94. *Id.*
95. *Id.* ¶ 103.
96. *Id.* ¶¶ 104, 105 The court found that the Respondent State "established no justification for this discriminatory treatment[.]"*Id.* ¶ 105.

are provided for in the Covenant.[97]

The Committee reiterated the autonomous nature of the right to equality and equal protection in Article 26 in its General Comment 23: "[T]here is a distinct right provided under article 26 for equality before the law, equal protection of the law, and non-discrimination in respect of rights granted and obligations imposed by the States. It governs the exercise of *all rights, whether protected under the Covenant or not*, which the State party confers by law on individuals within its territory or under its jurisdiction. . . ."[98]

By the Committee's own words in its General Comments 18 and 23 and through its "Views" adopted in numerous cases before and after its *Joslin* ruling, the absence of an affirmative right to marry someone of the same sex cannot by itself support a finding that a State's legislation regulating marriage does not violate Article 26.[99] Marriage

97. *See General Comment No. 18*, *supra* note 27, ¶ 12 ("The Committee recalls that article 26 provides an *autonomous right prohibiting discrimination* in law or in fact *in any field regulated and protected by public authorities* and that the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.") (emphasis added); *see also* U.N. Human Rights Comm., Q v. Denmark, Communication No. 2001/2010, ¶ 7.2, U.N. Doc. CCPR/C/113/D/2001/2010 (2015) ("The Committee recalls that article 26 provides an autonomous right prohibiting discrimination in law or in fact in any field regulated and protected by public authorities."); *see also General Comment No. 28*, *supra* note 27, ¶ 31 (using discrimination against women to explain that article 26 "requires States to act against discrimination by public and private agencies in all fields").

98. U.N. Human Rights Comm., *General Comment No. 23: Article 27 (Rights of Minorities)*, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994) (emphasis added).

99. *See General Comment No. 18*, *supra* note 27, ¶ 12 ("While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. . . . it prohibits discrimination in law or in fact in any field regulated and protected by public authorities."); *see also* U.N. Human Rights Comm., Aumeeruddy-Cziffra v. Mauritius, Communication No. 35/1978, ¶ 9.2(b)2(i)5, U.N. Doc. CCPR/C/12/D/35/1978 (Apr. 9, 1981) (using Article 26 as a basis for enforcing "the principle of equal treatment of the sexes."); U.N. Human Rights Comm., Broeks v. Netherlands, Communication No. 172/1984, ¶ 12.4, U.N. Doc. A/42/40 (1987) (clarifying that "Article 26 does not merely duplicate the guarantees already

typically is a field "regulated and protected by public authorities," as in *Joslin*.[100] Therefore, a State's legislation on marriage falls squarely within the realm of Article 26. Similarly, in a Fact Sheet about the ICCPR published by the Human Rights Committee in 2005, the Committee explained the scope of Article 26 as follows:

> [A]rticle 26 . . . is a fundamental provision of the Covenant. It sets out . . . a wide guarantee of non-discrimination. The Human Rights Committee has taken a broad view of this position, relating it to all provisions of the law, rather than simply the terms of the Covenant. Thus, if a State party confers a particular benefit of any kind on a person or group of persons, it must be accorded in a non-discriminatory fashion.[101]

The distinction in New Zealand's marriage law thus necessitated that the Committee assess whether the *Joslin* authors' right to equal protection and non-discrimination under Article 26 had been violated by the State's marriage law that treated them differently based solely on their sexual orientation.[102] Indeed, the only relevant considerations for the Human Rights Committee before engaging in Article 26 analysis of New Zealand's law are (i) whether legislation existed that regulated conduct (it did—the Marriage Act regulated the conduct of entering into marriage) and (ii) whether that legislation treated individuals differently on the basis of a protected ground (it did—by treating individuals differently based on their sex and sexual orientation). However, the Human Rights Committee refused to

---

provided for in article 2 . . . it derives from the principle of equal protection of the law without discrimination . . . which prohibits discrimination in law or in practice in any field regulated and protected by public authorities."); U.N. Human Rights Comm., C v. Australia, Communication No. 2216/2012, U.N. Doc. CCPR/C/119/D/2216/2012, ¶ 9.4 (2017) (adding that Article 26 "not only entitles all persons to equality before the law . . . but also prohibits any discrimination under the law.").

100. *See* Joslin, *supra* note 2, ¶ 2.1 ("On 4 December 1995, [the authors] applied under the Marriage Act 1955 to the local Registrar of Births, Deaths and Marriages for a marriage license . . . On 14 December 1995, the Deputy Registrar-General rejected the application.").

101. U.N. Human Rights Comm., *Civil and Political Rights: The Human Rights Committee Factsheet No. 15 (Rev.1)*, U.N. OHCHR, May 2005, https://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf.

102. *See* Joslin, *supra* note 2, ¶ 3.1 (outlining Joslin's claim which, in short, was that the Marriage Act that failed "to provide for homosexual marriage discriminates directly on the basis of sex and indirectly on the basis of sexual orientation.").

engage in Article 26 analysis, instead dismissing the author's Article 26 allegation because of its conclusion with respect to the right to marry under Article 23(2).[103] By refusing to analyze the distinction in New Zealand's Marriage Act under Article 26, the Human Rights Committee erred as a matter of law.

IV. HRC JURISPRUDENCE IMPLICATED BY THE COMMITTEE'S INCLUSION OF SEXUAL ORIENTATION WITHIN ARTICLE 26'S REFERENCE TO "SEX"

Because the Human Rights Committee chose to establish the protection for sexual orientation under the ICCPR's non-discrimination provisions' reference to "sex," it opened the door to decades of its past jurisprudence on sex-based discrimination. Long before the Committee recognized sexual orientation as a protected ground under the Covenant, the Committee had been considering challenges to States parties' laws that treated men and women differently.[104] Women in numerous States parties brought cases to the Human Rights Committee to challenge such laws on the ground that they discriminated against women on the basis of sex in violation of Article 26.[105] Through the Views adopted in these cases, the

103. *See id.* ¶¶ 8.2–8.3 (rejecting Joslin's claim under article 26, instead arguing that "article 23, paragraph 2, of the Covenant expressly addresses the issue of the right to marry. Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision.").

104. *See* U.N. Human Rights Comm., Zwaan-de Vries v. Netherlands, Communication No. 182/1984, ¶ 14, U.N. Doc. A/42/40 (1987) (analyzing a Netherlands unemployment benefits law that required women to be the "breadwinner" to receive benefits, a condition that did not apply to married men); *see also* Broeks, *supra* note 99, ¶ 2.1 (examining, again, a Netherlands statute that caused a married woman, Mrs. Broeks, to be denied unemployment benefits); Ato del Avellanal, *supra* note 69, ¶ 2.1 (outlining a case where a married woman, who owned two apartments buildings in Lima, could not collect on overdue rent because article 168 of the Peruvian Civil Code specified that "when a woman is married, only the husband is entitled to represent matrimonial property before the Courts."); Aumeeruddy-Cziffra, *supra* note 99, ¶ 1.2 (featuring a claim by authors who argued, "under the new laws, alien husbands of Mauritian women lost their residence status in Mauritius and must now apply for a 'residence permit' which may be refused or removed at any time by the Minister of Interior.").

105. *See* Zwaan-de Vries, *supra* note 104, ¶ 14 (claiming that a Netherlands

Committee established a body of law and certain legal principles that pertain to sex-based discrimination and established the test by which differential treatment in a State party's laws must be assessed.[106]

This jurisprudence necessarily has weight in cases coming before the Committee challenging States parties' marriage laws as discriminatory due to distinctions based on sex and/or sexual orientation, including *Joslin*, because of the Committee's classification of sexual orientation as protected within the reference to "sex" in ICCPR Articles 2 and 26.[107] The cases discussed below are the key sex discrimination cases decided by the Committee prior to the adoption of its Views in *Joslin* that should have guided the Committee's consideration of the merits in *Joslin* with respect to the author's Article 26 claim. Indeed, before and after *Joslin*, the Committee did consider and apply this jurisprudence in cases alleging violations of Article 26 on the basis of sex and/or sexual orientation.[108] In light of the Committee decisions discussed herein, the Committee's

---

unemployment benefits statute is discriminatory based on sex); *see also* Broeks, *supra* note 99, ¶¶ 2.1-2 (featuring a Netherlands woman who argued that the termination of her unemployment benefits violated article 26 of the ICCPR); Ato del Avellanal, *supra* note 69, ¶¶ 10.2, 11 (finding that article 168 of the Peruvian Civil Code "constituted discrimination on the ground of sex."); Aumeeruddy-Cziffra, *supra* note 99, ¶ 9.2(b)2(i)5 (using article 26 to support equal treatment based on sex).

106. *See* Zwaan-de Vries, *supra* note 104, ¶ 14 (holding that a differentiation based on sex "is not reasonable."); *see also* Broeks, *supra* note 99, ¶¶ 13–14 (noting that while a "differentiation based on reasonable and objective criteria" does not amount to discrimination prohibited by article 26, the facts in the present case failed to meet such a standard); Ato del Avellanal, *supra* note 69, ¶¶ 10.2, 11 (clarifying that "article 26 provides that all persons are equal before the law and entitled to equal protection of the law" before striking down article 168 of the Peruvian Civil Code). *But see* Aumeeruddy-Cziffra, *supra* note 99, ¶ 5.7 ("For the reasons given above . . . the Committee finds that the 17 unmarried coauthors cannot presently claim to be victims of any breach of their rights under the Covenant.").

107. *See* ICCPR, *supra* note 17, art. 2 (requiring "[e]ach State Party . . . to respect and to ensure all individuals within its territory . . . the rights recognized in the present Covenant, without distinction of any kind, such as . . . sex.").

108. *See* Zwaan-de Vries, *supra* note 104, ¶¶ 14-15 (basing its ruling on Article 26, as opposed to other jurisprudence stemming from the Commission); Broeks, *supra* note 99, ¶ 14 (narrowing its focus to, and supporting its decision on, article 26); Ato del Avellanal, *supra* note 69, ¶¶ 10.2–11 (buttressing its decision with Articles 3, 14, paragraph 1, and 26 of the Covenant). *But see* Aumeeruddy-Cziffra, *supra* note 99, ¶ 10.2 ("The Committee further is of the view that there has not been any violation of the Covenant in respect to the other provisions invoked.").

complete disregard for the *Joslin* authors' Article 26 claims shows a deviation from its established jurisprudence.

A. THE "BREADWINNER" CASES

In the late 1980s, there was a collection of cases where individuals brought the Netherlands before the Human Rights Committee for discriminatory treatment stemming from sex-based distinctions in Netherlands' laws that were based upon the outdated "[male] breadwinner" concept.[109] In 1984, in the case of *Zwaan-de Vries v. Netherlands*, Mrs. Zwaan-de Vries challenged provisions in the Netherlands Unemployment Benefits Act (WWV), which required a married woman—in order to receive WWV benefits—"to prove that she was a 'breadwinner'—a condition that did not apply to married men."[110] Mrs. Zwaan-de Vries became unemployed in February 1979 and was granted unemployment benefits until October 1979.[111] She was then denied continuation of the unemployment benefits under the Unemployment Benefits Act because she was a married woman and was not the family's "breadwinner."[112] However, unlike married women, the Act did not require married men to prove that they were a "breadwinner" to receive benefits.[113] Mrs. Zwaan-de Vries claimed that she was treated differently because she was married and a woman, and therefore the State party violated her rights under Article 26.[114]

The Human Rights Committee concluded that while the differentiation "appear[ed] on one level to be one of status[, it] is in fact one of sex, placing married women at a disadvantage compared with married men."[115] The Committee declared that such differentiation was not reasonable and found a violation of Article 26 "because [Mrs. Zwaan-de Vries] was denied a social security benefit

109. *See* Zwaan-de Vries, *supra* note 104, ¶ 14 (noting that women were denied benefits they were not the "breadwinner," an implicit basis on the traditional belief that a man should be a family's "breadwinner.").
110. *Id.*
111. *Id.* ¶ 2.1.
112. *Id.* ¶¶ 2.1, 8.2.
113. *Id.* ¶ 8.2.
114. *See id.* ¶ 2.2 ("The author claims that the only reason why she was denied unemployment benefits is because of her sex and marital status and contends that this constitutes discrimination within the scope of article 26 of the Covenant.").
115. *Id.* ¶ 14.

on an equal footing with men."[116] The *Zwaan-de Vries* decision gives insight into what the Committee considers "reasonable" for purposes of its Article 26 test: where the distinction placed one sex at a disadvantage compared to the other, the distinction is not reasonable.[117] In addition, it shows that a State argument that the sex-based distinction in the law is based upon prevailing societal views at the time the law is enacted cannot save the discriminatory provision.

In *Broeks v. Netherlands*, decided on the same day as *Zwaan-de Vries*, the Human Rights Committee considered another challenge to the Netherlands' Unemployment Benefits Act and its differential treatment of men and women based upon the "[male] breadwinner" concept.[118] Mrs. Broeks, who was married during the relevant period, was dismissed from employment in February 1979 due to disability. For a period of time, she received both disability benefits and unemployment benefits; then, in June 1980, the "unemployment payments were terminated in accordance with Netherlands law."[119] Mrs. Broeks claimed that the Netherlands' Unemployment Benefits Act made an "unacceptable distinction" "on the grounds of sex and status" and therefore violated her right to equality before the law and equal protection of the law without discrimination under Article 26.[120] Pursuant to the applicable section of the Unemployment Benefits Act, WWV benefits could not be claimed by married women who were "neither breadwinners nor permanently separated from their husbands."[121] Whether a married woman could be deemed a "breadwinner" under the Act depended in part "on the absolute amount of the family's total income and on what proportion of it was contributed by the wife."[122] Because Mrs. Broeks was not the family breadwinner or separated from her husband, the law excluded her from continued unemployment benefits.[123] According to Mrs. Broeks, "if

116. *Id.* ¶ 15.
117. *See id.* ¶ 14 ("Thus a differentiation which appears on one level to be one of status is in fact one of sex . . . [s]uch a differentiation is not reasonable.").
118. *See* Broeks, *supra* note 99.
119. *Id.*
120. *Id.* ¶ 2.3.
121. *Id.* ¶ 8.2.
122. *Id.*
123. *See id.* ¶ 14 (striking down Mrs. Broeks' unemployment benefits denial, which was passed upon her sex).

she were a man, married or unmarried, the law in question would not deprive her of unemployment benefits."[124] The condition of proving breadwinner status or permanent separation from her spouse applied solely to married women, and did not apply to married men.[125]

The State party argued that ICCPR Article 26 is limited to "the sphere of civil and political rights" and did not apply to social security benefits, which it claimed should be addressed only under the International Covenant on Economic, Social and Cultural Rights (ICESCR), which recognizes the right to social security benefits in its Article 9.[126] Mrs. Broeks astutely rebutted that Article 26 is not explicitly confined to equal treatment with reference to civil and political rights, but rather stipulates a general principle of equality.[127] As Mrs. Broeks explained, "[a] contrary interpretation of Article 26 . . . would turn that article into a completely superfluous provision, for it would not differ from article 2[(1)] . . . [,]"[128] which *is* limited to ICCPR rights.[129] The State party then attempted to justify the difference in treatment with a "social justification of the 'breadwinner' concept at the time the law was drafted."[130] The Netherlands claimed that "a proper balance was achieved between the limited availability of the public funds . . . on the one hand and the Government's obligation to provide social security on the other," based upon "*then prevailing views in society in general concerning the roles of men and women within marriage and society*."[131] It further explained that the

124. *Id.* ¶ 2.3.

125. *See id.* ¶ 8.2 (clarifying that "WWV benefits . . . could not be claimed by those married women who were neither breadwinners nor permanently separated from their husbands").

126. *See id.* ¶ 8.3 (noting the argument by the Netherlands Government, which took the view that "[A]rticle 26 of the Covenant does not entail an obligation to avoid discrimination").

127. *See id.* ¶ 5.3 ("the author stated that article 26 of the Covenant was explicitly not confined to equal treatment with reference to certain rights but stipulated a general principle of equality.").

128. *Id.* ¶ 5.7.

129. *Compare* ICCPR, *supra* note 17, art. 2(1) (featuring an overarching obligation for State parties "to respect and to ensure to all individuals . . . the rights recognized in the present Covenant, without distinction of any kind"), *with* ICCPR, *supra* note 17, art. 26 (outlining that Article 26 "prohibit[s] any discrimination").

130. Broeks, *supra* note 99, ¶ 8.4.

131. *Id.* ¶ 8.2.

distinction in the law was "inspired . . . by the *de facto* social and economic situation which existed at the time when the Act was passed and which would have made it pointless to declare the provision applicable to men. . . ."[132] This *de facto* economic and social situation was the assumption that unlike women, "[v]irtually all married men who had jobs could be regarded as their family's breadwinner, so that it was unnecessary to check whether they met this criterion for the granting of benefits upon becoming unemployed."[133]

In finding a violation of Article 26, the Human Rights Committee confirmed that Article 26 does not just replicate the rights already provided in Article 2—it does not guarantee equality solely with regard to the rights within the Covenant. Rather, according to the Committee, Article 26 is "concerned with the obligations imposed on States in regard to their legislation and the application thereof."[134] In other words, Article 26 is a free-standing right to equality and can be applied to *any* State party's law that discriminates on the basis of a protected ground.

Moreover, as in *Zwaan-de Vries*, the Committee in *Broeks* concluded that the Netherlands' Unemployment Benefits Act's requirement that married women, but not married men, prove their breadwinner status was not a reasonable differentiation between the sexes.[135] The Committee echoed its view in *Zwaan-de Vries* that: "a differentiation which appears on one level to be one of status is in fact one of sex, placing married women at a disadvantage compared with married men. Such a differentiation is not reasonable[.]"[136] The

132. *Id.* ¶ 8.4.
133. *Id.* ¶ 8.2.
134. *Id.* ¶ 12.3.
135. *See id.* ¶ 14 (noting that "articles 84 and 85 of the Netherlands Civil Code impose equal rights and obligations on both spouses with regard to their joint income.").
136. *Id.* At the time of the Broeks decision, the test applied by the HRC in assessing whether distinctions in a State party's law constituted discrimination in violation of Article 26 was whether the sex-based distinction was based on "reasonable and objective criteria." In 1989, the Committee adopted General Comment 18, which formally added the requirement that the law's "aim is to achieve a purpose which is legitimate under the Covenant." *General Comment No. 18*, *supra* note 27, ¶ 13. However, the Committee did not elaborate on what constitutes a "legitimate aim" in its General Comment 18.

Committee's view again illustrates that where a distinction in the law places the members of one sex at a disadvantage to the other sex, the distinction is discriminatory. Also like the Committee's conclusion in *Zwaan-de Vries*, the prevailing views in society at the time the law was enacted could not save the law from its discriminatory nature.

B. ATO DEL AVELLANAL V. PERU

As mentioned above, in the case of *Ato del Avellanal v. Peru,* the Government of Peru put forth no justification for the distinction in its law between married women and married men.[137] However, the specification in Peru's property law that when a woman is married, only the husband can represent matrimonial property in court stems from the doctrine of the husband's role as head of the household, with sole decision-making authority.[138] The head of household doctrine (as well as its common law corollary of the husband's "marital power" under coverture) is yet another example of a social norm that placed women in a subordinate position to men and that was once widely accepted but has since been shed by countries around the world.[139]

137. Although the HRC decision in Ato del Avellanal was adopted in 1988, the Peruvian law at issue in this case was changed in 1984 to say that the husband and woman decide who will represent the property. *See* Ato del Avellanal, *supra* note 69, ¶ 8 (adding that the State made no submission "despite a reminder sent to the State party on 17 May 1988.").

138. *See id.* ¶¶ 10.2–11 (adding that the end result of this "constitute[s] discrimination on the ground of sex.").

139. *See, e.g. Kirchberg v. Feenstra*, 450 U.S. 455, 456 (1980) (striking down a Louisiana statute that gave the husband—as "head and master"—"exclusive control over the disposition of community property," including administration of the estate "without the consent or permission of his wife" because it violated the U.S. Constitution Fourteenth Amendment's Equal Protection Clause by discriminating against women on the basis of sex); *see also* André Tune, *Husband and Wife Under French Law: Past, Present, Future*, 104 U. PA. L. REV. 1064, 1068–69 (1956) (explaining that portions of France's Civil Code relating to a wife's status were drafted under the influence of Bonaparte, a believer in the inferiority of women and how such beliefs in the French Civil Code have shifted since); *see also* Legal Capacity of Married Persons Act 9 of 2006 § 3 (Lesotho) ("(1) Subject to the provisions of this Act with regard to the administration of a joint estate, the common law, customary law and any other marriage rules in terms of which a husband acquires the marital power over the person and property of his wife are repealed. (2) The marital power which a husband has over the person and property of his wife before the commencement of this Act is repealed."); *see also Sacolo v. Sacolo* (1403/06) [2019] SZHC 166 para. 30.1 (Eswatini) (declaring unconstitutional

Peru's property law tenet that only husbands could represent matrimonial property in court reveals remnants of that outdated social norm in Peru's civil code. With no justification from the State party, the Committee found that the application of the Peruvian law constituted *inter alia* discrimination on the basis of sex in violation of ICCPR Article 26.[140]

C. "THE MAURITIAN WOMEN CASE"

In *Shirin Aumeeruddy-Cziffra v. Mauritius*, known as "The Mauritian Women Case," the Human Rights Committee concluded that a Mauritian law that automatically granted citizenship to foreign-born wives of Mauritian men but not to foreign-born husbands of Mauritian women constituted sex-based discrimination.[141] In *Aumeeruddy-Cziffra*, 20 Mauritian women brought a complaint alleging that the country's enactment of the Immigration (Amendment) Act, 1977 and the Deportation (Amendment) Act, 1977 discriminated on the basis of sex in violation of Article 26.[142] The two statutes treated men and women differently "by subjecting only the foreign husband of a Mauritian woman—but not the foreign wife of a Mauritian man—to the obligation to apply for a residence permit in order to enjoy the same rights as before the enactment of the statutes, and by subjecting only the foreign husband to the possibility of deportation."[143] The Mauritian women argued that solely on the basis

---

Eswatini's common law marital power—which placed married women in a subordinate position to their husbands by precluding them from appearing in court, administering property or entering into a contract—"on the basis that it was discriminatory against married women").

140. Ato del Avellanal, *supra* note 69, ¶¶ 10.2, 11. *See also* Morales de Sierra v. Guatemala, Case 11.625, Inter-Am. Comm'n H.R., Report No. 4/00, OEA/Ser.L./V/II.111, doc. 20 rev. ¶¶ 38–39 (2000) (finding a violation of the wife's right to equality and non-discrimination where sex-based distinctions in the domestic law—which "attribute[d] responsibility for sustaining the home to the husband, and responsibility for caring for minor children and the home to the wife"—"mandated a system in which the ability of approximately half the married population . . . is subordinated to the will of the other").

141. *See* Aumeeruddy-Cziffra, *supra* note 99, ¶ 5.7 (explaining that this distinction "cannot be said to be arbitrary or unlawful interference with the family life of its nationals.").

142. *Id.* ¶ 10.1.

143. *Id.* ¶ 8.1.

of their sex, the male citizens of Mauritius were given superior rights because if they married a foreign wife, she would automatically become a resident and would not be subject to deportation.[144]

The State party argued ''that if the right 'to enter, reside in and not be expelled from' Mauritius is not one guaranteed by the Covenant, the authors cannot claim that there has been any violation of [*inter alia*] Article 26."[145] The State party also attempted to justify the sex-based distinction in its law on the basis of security concerns: concerns the State party attributed solely to foreign husbands.[146] However, the Human Rights Committee explained that "[w]here the Covenant requires a substantial protection as in article 23, it follows from those provisions that such protection must be equal, that is to say not discriminatory, for example on the basis of sex."[147] It found Article 26's reference to "equal protection of the law" particularly relevant in this regard.[148] Thus, the Committee's analysis focused not on whether a "consistent" or "uniform" understanding of "family" included, for example, couples without children;[149] rather, it focused on whether the substantive protection afforded in Article 23(1)[150] was afforded equally.

The Committee acknowledged that "it might be justified for Mauritius to restrict the access of aliens to their territory and to expel them therefrom for security reasons;" however, in the Committee's view, "legislation which only subjects foreign spouses of Mauritian women to those restrictions but not foreign spouses of Mauritian men is discriminatory with respect to Mauritian women and cannot be justified by security requirements."[151] As such, the Committee found

144. *See id.* ¶¶ 5.1, 7.2–7.3 (alleging that the Immigration Amendment Act, 1977, and the Deportation Amendment, 1977, limited rights to the wives of Mauritius citizens only).

145. *Id.* ¶ 5.3.

146. *See id.* ¶ 5.7 (outlining the State's argument, which featured this rationale to argue that the restriction is not arbitrary).

147. *Id.* ¶¶ 9.2(b)(2)(ii)(2).

148. *Id.*

149. *Id.* ¶ 9.2(b)(2)(ii)(1) (declaring that each couple concerned constitutes a "family" within the meaning of Article 23(1), although not all couples had a child).

150. ICCPR, Art. 23(1) ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.").

151. *See* Aumeeruddy-Cziffra, *supra* note 99, ¶ 9.2(b)(2)(ii)(3).

"a violation of articles 2(1), 3 and 26 of the Covenant in conjunction with the rights of the three married co-authors under article 23(1)."[152]

D. MÜLLER AND ENGELHARD V. NAMIBIA

Just four months before issuing its decision in *Joslin*, the Committee held in the case of *Müller and Engelhard v. Namibia*, that "the argument of a long-standing tradition cannot be maintained as a general justification for different treatment" on the basis of sex.[153] Mr. Müller, a German citizen, moved to Namibia in 1995 and worked as a jewelry maker in a store owned by Ms. Engelhard.[154] The two married in 1996, and Mr. Müller wished to adopt his wife's surname.[155] According to the Aliens Act No. 1 of 1937, a person had to apply to "the Administrator General or an officer in the Government Service" "to assume the surname of another," except in certain cases, including "when a woman on her marriage assumes the surname of her husband."[156] Mr. Müller claimed that he was a victim of a violation of, *inter alia,* ICCPR Article 26.[157] The basis of Mr. Müller's Article 26 claim was that the Aliens Act required Mr. Müller to follow a "described procedure of application to a government service" in order to assume his wife's surname, "whereas women wanting to assume their husbands' surname [could] do so without following this procedure."[158] In addition, Ms. Engelhard claimed that her surname could "not be used as the family surname without complying with these same procedures," whereas a husband's surname could be used as the family surname without following any prescribed procedure, which constituted discrimination in violation of Article 26.[159] Mr. Müller and Ms. Engelhard asserted that "this section of the [Aliens Act] clearly differentiates in a discriminatory way between men and women, in that women automatically may assume the surnames of

152. *Id.* ¶¶ 9.2(b)(2)(i)(8), 9.2(b)(2)(ii)(1)–(2), 9.2(b)(2)(ii)(4).
153. U.N. Human Rights Comm., Müller v. Namibia, Communication No. 919/2000, ¶ 6.8, U.N. Doc. CCPR/C/OP/7 142 (Mar. 26, 2002).
154. *Id.* ¶¶ 1, 2.1.
155. *Id.* ¶ 2.1.
156. *Id.* ¶ 2.2.
157. *See id.* ¶ 3.1 (adding that her claim also included a violation of the Aliens Act Section 9, paragraph 1(a)).
158. *Id.*
159. *Id.*

their husbands on marriage, whereas men have to go through specified procedures of application."[160]

The State party (Namibia) argued in response that the purpose of the distinction in the law in question was to "fulfill legitimate social and legal aims" and was "based on a long-standing tradition for women in Namibia to assume their husbands' surname."[161] The State party's contention was that "the law, dealing with the normal state of affairs [wa]s *merely reflecting a generally accepted situation in Namibian society*."[162] In response to this justification, the same Committee members as those deciding *Joslin* placed emphasis on "the importance of the principle of equality between men and women" over arguments of "a long-standing tradition" and found a violation of Article 26.[163] The Committee reasoned that subjecting the "choosing [of] the wife's surname as family name to stricter and much more cumbersome conditions than . . . [the] choice of [the] husband's surname cannot be judged to be reasonable."[164] It further concluded that the State party's "reason for the distinction has no sufficient importance in order to outweigh the generally excluded gender-based approach."[165]

These cases represent two key points that are relevant to the Committee's decision in *Joslin*. First, they further establish the role of Article 26 in any case raising a challenge to a State party law that distinguishes on the basis of a protected ground and the heavy burden of justification for the State in such cases. Second, they show the Committee's repeated refusal to accept "social norms" prevalent in the State party at the time of drafting the law to justify distinctions in the law that disadvantage members of one sex compared to members of the other. These cases are each directly applicable to cases coming before the Committee due to distinctions based on sexual orientation. These cases should have instructed the Committee on how to properly assess the author's Article 26 allegations in *Joslin*. However, as noted *supra* in Part II, the Committee's decision in *Joslin* refused to engage

160. *Id.*
161. *Id.* ¶ 6.8.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*

in a proper assessment of the authors' Article 26 claim.

V. PROPER ANALYSIS OF *JOSLIN V. NEW ZEALAND'S* ARTICLE 26 CLAIMS: ADDRESSING STATE PARTY ARGUMENTS AND ANTICIPATING FUTURE ONES

A. THE STATE'S BURDEN OF PROOF

Under proper analysis, taking into consideration the Human Rights Committee's relevant jurisprudence, a State party's marriage law that excludes same-sex couples violates ICCPR Article 26. The Human Rights Committee has consistently stated that not every distinction in the law constitutes discrimination.[166] What must be assessed when complainants argue that they have been discriminated against on the basis of sex or sexual orientation is: (i) whether the distinction in the law is based on reasonable and objective criteria, and (ii) whether the law aims to achieve a legitimate purpose under the Covenant.[167] Any difference in treatment based on a protected Article 26 ground "places a heavy burden on the State party to explain the reason for the differentiation."[168] In fact, the Committee's decision in *Müller and Engelhard v. Namibia*, discussed *supra*, suggests that there is a

166. *Id.* ¶ 6.7 (clarifying that distinctions based on "reasonable and objective criteria" do not qualify as discrimination).

167. *See General Comment No. 18*, *supra* note 27, ¶ 13 (observing that a differentiation that is reasonable, objective, and achieves a purpose is legitimate and does not constitute discrimination); *see also* Zwaan-de Vries, *supra* note 104, ¶ 13 ("[a] differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26."); U.N. Human Rights Comm., Vos v. Netherlands, Communication No. 218/1986, ¶ 11.3, U.N. Doc. CCPR/C/OP/3/281/1986 (1989) (clarifying that differences that result from the uniform application of a law does not, on its face, comstitute discrimination); Broeks, *supra* note 99, ¶ 13 (permitting, under article 26, differentiation based on reasonable and objective criteria); U.N. Human Rights Comm., Love v. Australia, Communication No. 983/2001, ¶ 8.2, U.N. Doc. CCPR/C/77/D/983/2001 (2003) (recalling the Committee's "constant jurisprudence" that not all distinctions constitute discrimination); Q, *supra* note 97, ¶ 7.3 ("The Committee recalls . . . that article 26 requires reasonable and objective justification and a legitimate aim for distinctions that relate to an individual's characteristics."); C, *supra* note 99, ¶ 8.4 (making the claim that the continued detention of the author did not serve a legitimate purpose).

168. Müller, *supra* note 153, ¶ 6.7.

presumption of discrimination that the State party must overcome:

> A different treatment based on one of the specific grounds enumerated in article 26 . . . places a heavy burden on the State party to explain the reason for the differentiation. The Committee, therefore, has to consider whether the reasons underlying the differentiation on the basis of gender [in the State party's law] *remove this provision from the verdict of being discriminatory*.[169]

The State party in *Joslin* did not meet this burden of proof, and no consideration was given by the Committee to whether New Zealand's proffered justifications removed the presumption that the differential treatment in New Zealand's marriage law was discriminatory.[170]

B. REFUTING STATE PARTY ARGUMENTS

The State party in *Joslin* put forth several justifications for the difference in treatment in its Marriage Act, likely anticipating that the Human Rights Committee would engage in Article 26 analysis.[171] Indeed, echoing the Committee's Article 26 test, the Government of New Zealand specifically argued that "any differentiation [in its Marriage Act] is objectively and reasonably justified, for a purpose legitimate under the Covenant."[172] It expounded on this argument by claiming that the New Zealand Marriage Act "relies on clear and historically objective criteria and seeks to achieve the purpose of protecting the institution of marriage and the social and cultural values that the institution represents."[173] It then asserted that "[t]his purpose is explicitly recognized as legitimate. . . ."[174] This language illustrates a textbook defense to an allegation of discrimination under Article 26, clearly anticipating that the Committee would conduct a thorough analysis of the authors' claims and assess whether the distinction in the New Zealand Marriage Act constituted discrimination in violation

169. Müller, *supra* note 153, ¶ 6.7; Ato del Avellanal, *supra* note 69, ¶ 9.2.
170. *See generally* Joslin, *supra* note 2.
171. *See generally id.* ¶¶ 4.1–4.14 (relying mainly on article 23, paragraph 2, to justify its position as well as asserting affirming homosexual marriage would "require redefinition of a legal institution protected and defined by the Covenant itself.").
172. *Id.* ¶ 4.14.
173. *Id.*
174. *Id.*

of Article 26.

The Government of New Zealand sought to save its Marriage Act from an Article 26 violation with three different justifications: (1) the "inherent nature of marriage" and universal understanding of marriage is that marriage is between "individuals of opposite sexes;"[175] (2) the nature of the couple and not the individual is the determinative factor and therefore, the law did not differentiate between persons;[176] and (3) the Marriage Act "seeks to achieve the purpose of protecting the institution of marriage and the social and cultural values that that institution represents."[177]

The Human Rights Committee should have considered and rejected each of the State Party's justifications; however, because the Committee never engaged in Article 26 analysis, it did not even acknowledge them. Nonetheless, New Zealand's arguments did not justify the distinction in its marriage law based on sex/sexual orientation and such arguments should fail on an even greater scale in any similar case brought before the Committee today. In the absence of the Human Rights Committee's views on the proffered justifications in *Joslin*, the following sections consider each in turn and explain why each fails to save a State party's discriminatory marriage laws from violating ICCPR Article 26.

1. Inherent Nature/Universal Understanding of Marriage

A frequent argument put forth by governments in an attempt to justify bans on marriage between same-sex partners centers around the "inherent nature" and/or the "universal understanding" of marriage. In *Joslin*, the government of New Zealand argued that "the inability of homosexuals to marry does not follow from a distinction, exclusion or restriction but rather from the inherent nature of marriage itself."[178] The State party defended further that "marriage is at present universally understood as open only to individuals of opposite sexes,

175. *Id.* ¶ 4.11.

176. *See id.* ¶ 4.12 (articulating that marriage, as an institution, is an example between the "difference between couples of opposite sexes and other groups or individuals").

177. *Id.* ¶ 4.14.

178. *Id.*

and is so recognized in the civil law of all other States parties to the Covenant."[179]

This justification— based on outdated social norms— resembles the justification put forth by the State party in *Broeks v. Netherlands*, discussed *supra* in Part IV. In *Broeks*, the State party argued that the relevant provision in its Unemployment Benefits Act was not applicable to men because of the "de facto social and economic situation which existed at the time when the Act was passed and which would have made it pointless to declare the provision [requiring proof of being a family breadwinner] applicable to men."[180] Thus, according to the State party, the differentiation between married women and married men in its law was not discriminatory but was "based on reasonable social and economic considerations."[181] This is essentially the argument put forth by New Zealand in *Joslin*—that because the social construct of marriage (*i.e.,* the "universal understanding" of marriage in society at the time) was between a man and a woman, the distinction was permissible.[182]

However, also similar to the social situation relied upon by the State party in *Broeks*, with marriage "a new social trend has been growing in recent years, which has made it undesirable for the provision to remain in force in the present social context."[183] Just as the understanding of women's and men's roles in marriage had changed by the time of the Committee's *Broeks* decision, the "understanding of marriage" as only between a man and a woman has changed since the Committee's ruling in *Joslin*. Two decades after the government of New Zealand put forward the inherent nature/universal understanding of marriage justification, 29 countries around the world—including 28 States parties to the ICCPR—have legalized same-sex marriage.[184] The Supreme Court of the United States has

179. *Id.*

180. Broeks, *supra* note 99, ¶ 8.4.

181. *Id.* Those considerations assumed that all married men were breadwinners even if they were supported by their wives.

182. *See* Joslin, *supra* note 2, ¶ ¶ 4.2–4.11.

183. Broeks, *supra* note 99, ¶ 8.4.

184. At the time of this publication, the 29 countries that permit same-sex couples to marry are: Argentina, Australia, Austria, Belgium, Brazil, Canada, Colombia, Costa Rica, Denmark, Ecuador, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, (parts of) Mexico, the Netherlands, New Zealand, Norway,

effectively gutted the "inherent nature of marriage" argument.[185] And the Inter-American Court of Human Rights issued an advisory opinion stating that Member States have an obligation to recognize the right to same-sex marriage under the American Convention on Human Rights.[186] Thus, no "universal understanding" of marriage exists today, with States parties and human rights bodies expressly adopting different understandings.

Moreover, New Zealand's proposition that "[t]he ordinary meaning of the words 'to marry' refers to couples of opposite sexes" was based on a now-outdated dictionary definition.[187] The meaning relied on by the State party was drawn from the Shorter Oxford English Dictionary, Clarendon (1993), which defined "marry" as to "'join (two persons, one person to another) in marriage; constitute as husband and wife

---

Portugal, South Africa, Spain, Sweden, Taiwan, the United Kingdom, the United States, and Uruguay. *See Marriage Equality Around the World*, THE HUMAN RIGHTS CAMPAIGN FOUNDATION, https://www.hrc.org/resources/marriage-equality-around-the-world (last accessed June 18, 2020) (listing the 29 countries around the world that have legalized same-sex marriage through court decisions or legislative reform). Costa Rica is the most recent State party to recognize same-sex marriage, with a 2018 Supreme Court ruling taking effect on 26 May 2020, after the country's legislature failed to amend the marriage law in line with the court's ruling. *See Costa Rica allows same-sex marriages in first for Central America*, Aljazeera (May 26, 2020), https://www.aljazeera.com/news/2020/05/costa-rica-sex-marriages-central-america-200526123834393.html. Taiwan is the only country that has legalized same-sex marriage but is not a State party to the ICCPR, as Taiwan is not a member state of the United Nations. *See* U.N. Treaty Collection, International Covenant on Civil and Political Rights Status of Ratifications, https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND (last accessed June 18, 2020); *see also* List of United Nations Member States, https://www.un.org/en/member-states/ (last accessed June 18, 2020).

185. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2595-96 (2015), discussed *infra*, Part V.B.3.

186. Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples: State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in Relation to Article 1 of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A.) No. 24, ¶ 229.8 (Nov. 24, 2017) [hereinafter Inter-Am. Ct. H.R. Advisory Opinion] ("Under Articles 1(1), 2, 11(2), 17 and 24 of the [American] Convention, States must ensure full access to all the mechanisms that exist in their domestic laws, including the right to marriage. . . .").

187. *Id.* ¶ 4.3.

according to law or custom'" and defined "marriage" as a "'legally recognized personal union entered into by a man and a woman.'"[188] Today, the online Oxford Dictionary provides the following definitions for the verb "marry," none of which suggest an understanding that marriage can only take place between a man and a woman: "1. Join in marriage. 1.1. Take (someone) as one's wife or husband in marriage. 1.2 Enter into marriage. . . ."[189] It now defines "marriage" as "the legally or formally recognized union of two people as partners in a personal relationship (historically, and in some jurisdictions specifically, a union between a man and a woman)."[190] Many other dictionary publishers have similarly updated their definitions of "marry" and "marriage," with some even explicitly providing for the inclusion of unions between persons of the same sex.[191]

Finally, and perhaps most importantly in terms of overturning *Joslin*, the Human Rights Committee itself has expanded the understanding of marriage through the issuance of numerous

188. *Id.* ¶ 4.3, n.11.

189. *Marry*, LEXICO, https://en.oxforddictionaries.com/definition/marry (last accessed June 18, 2020). *See also Marry*, OXFORD ADVANCED LEARNER'S DICTIONARY, https://www.oxfordlearnersdictionaries.com/definition/english/marry?q=marry (last accessed June 18, 2020) (defining the verb "marry" as: "to become the husband or wife of somebody; to get married to somebody"). Note that The Shorter Oxford English Dictionary, which was cited by the State party in *Joslin*, has not been updated since 2007 and, therefore, the definition in the print editions of the Shorter Oxford English Dictionary has not been so updated.

190. *Marriage*, LEXICO, https://en.oxforddictionaries.com/definition/marriage (last accessed June 18, 2020).

191. *See, e.g.*, *Marry*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/marry (last accessed June 18, 2020) ("1 a: to join in marriage according to law or custom[;] b: to give in marriage[;] c to take as spouse. . . . 2: to unite in close and usually permanent relation"); *Marry*, Cambridge English Dictionary, https://dictionary.cambridge.org/us/dictionary/english/marry (last accessed June 18, 2020) ("to become the legally accepted husband or wife of someone in an official or religious ceremony"); *see also*, Rebecca Greenfield, *How Marriage Is Defined Around the World*, The Atlantic, July 26, 2013, https://www.theatlantic.com/national/archive/2013/07/how-marriage-defined-around-world/312757/ (discussing recent changes in the Oxford Dictionaries and the French dictionary *Larousse*, with the *Larousse* dictionary updating its definition of "marriage" to include a "solemn act between two same-sex or different-sex persons, who decide to establish a union.").

Concluding Observations in recent years that specifically call upon States parties to remove discrimination in their marriage laws. This development in the Human Rights Committee's reporting process is discussed in detail *infra* in Part VI. In light of these developments, no State party today can reasonably support distinctions in their marriage laws based upon a "universal understanding" that marriage is only between a man and a woman.

2. Nature of the Couple Is Determinative Factor

The State party in *Joslin* further argued that "the inability of homosexual couples to marry under New Zealand law is not a distinction or differentiation based on sex or sexual orientation. It is the nature of the couple, rather than that of individual members, that is determinative."[192] The State party urged that the Marriage Act was simply "the provision of a defined civil status to a certain defined form of social group."[193]

In support of this proposition, the State party referred to the 1998 decision by the European Court of Justice in *Grant v. South-West Trains Ltd*.[194] The State party noted that the decision by the European Court of Justice held that "the provision of particular benefits to couples of opposite sexes but not to homosexual couples did not discriminate on the grounds of sex, for the provision applied in the same manner to male and female persons."[195] In relying on this case for support, the State party missed a crucial distinction between the applicable legal standard in *Grant v. South-West Trains Ltd.* case and that in *Joslin*. Specifically, in its ruling, the European Court of Justice clarified that unlike the ICCPR, "[European] Community law as it stands at present does not cover discrimination based on sexual orientation"[196] and refused to "extend the scope of Article 119" to do so.[197] In contrast, the Human Rights Committee *had* established that

192. Joslin, *supra* note 2, ¶ 4.13.

193. *Id.*

194. *See id.* (citing Case C-249/96, Grant v. South West Trains Ltd., 1998 E.C.R. I-636 ¶ 47).

195. *Id.* (emphasis added.)

196. Case C-249/96, Grant v. South West Trains Ltd., 1998 E.C.R. I-636 ¶ 47.

197. *Id.* ¶¶ 43–46, 48. The European Court of Justice found the Human Rights Committee's decision in *Toonen* of little weight in deciding the case before it—as,

the ICCPR covers discrimination based on sexual orientation—beginning with its 1994 decision in *Toonen v. Australia*.[198] As such, the European Court of Justice's holding in *Grant v. South-West Trains Ltd.* is irrelevant to the Article 26 allegation at issue in *Joslin* and any future similar case before the Committee.

Moreover, New Zealand's proposition in *Joslin* that "the inability of homosexuals to marry" under the Marriage Act did not constitute a distinction or differentiation on the basis of sex or sexual orientation because "[i]t is the nature of the couple, rather than of that of individuals members, that is determinative"[199] and the Marriage Act "d[id] not differentiate between *persons*"[200] has lost any legitimacy (if it ever had any) by subsequent HRC jurisprudence. For example, in *X v. Colombia,* the Committee found that the State party violated Article 26 "by denying the author's right to his partner's pension on the basis of his sexual orientation" where the law distinguished between same-sex couples in de facto marital unions and opposite-sex couples in such unions.[201] Pursuant to the law at issue in *X v. Colombia*, same-sex partners were not entitled to pension benefits, while unmarried heterosexual partners *were* entitled to such benefits.[202] The law—like that at issue in *Joslin*—made a distinction based upon the nature of the couple; nonetheless, the Committee found a violation of the author's

---

"those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community. . . .," noting that the findings of the HRC decision "has no binding force in law" and "cannot in any case constitute a basis for the Court to extend the scope of Article 119 of the Treaty." However, the ECJ further "observed" that "the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed on 2 October 1997, provides for the insertion in the EC Treaty of an Article 6a which, once the Treaty of Amsterdam has entered into force, will allow the Council under certain conditions . . . to take appropriate action to eliminate various forms of discrimination, including discrimination based on sexual orientation."

198. Toonen, *supra* note 31, ¶ 8.7.

199. Joslin, *supra* note 2, ¶ 4.13.

200. *Id.*

201. X, *supra* note 35, ¶ 7.2.

202. *Id.* ¶¶ 2.1–2.3 (noting that the body of law at issue allows for non-married permanent partners to receive pensions, and that though the law does not explicitly state that a marriage or life partnership necessarily is between two differently gendered people for purposes of receiving benefits, the author was denied benefits upon the death of his same-sex life partner).

individual right under Article 26.[203] The Committee recalled that in previous communications, "the Committee found that differences in benefit entitlements between married couples and heterosexual unmarried couples were reasonable and objective *as the couples in question had the choice to marry or not*, with all the ensuing consequences."[204] However, in *X v. Colombia*, the Committee found that the State party put forth no argument or provided any evidence to "demonstrate that such a distinction between same-sex partners, who are not entitled to pension benefits, and unmarried heterosexual partners, who are so entitled, is reasonable and objective."[205]

Moreover, common sense dictates that the nature of the individual *is* relevant, and any state law that denies same-sex partners the capacity to marry denies those *individuals* the ability to marry whomever they wish. In states that prohibit the marriage of same-sex couples, individuals can only realize their right to marry if they choose to marry someone of the opposite sex. As the Supreme Court of Iowa explained in the 2009 case of *Varnum v. Brien*, "civil marriage with a person of the opposite sex is as unappealing to a gay or lesbian person as civil marriage with a person of the same sex is to a heterosexual. Thus, the right of a gay or lesbian person . . . to enter into civil marriage only with a person of the opposite sex is no right at all."[206] By restricting the Covenant's right to marry to exclude same-sex unions, the Committee voided that right for *individuals* wishing to marry someone of the same sex, not just for same-sex *couples*.

3. Protecting the Institution of Marriage

Finally, the State party argued in *Joslin* that the Marriage Act's differentiation between same-sex couples and "couples of differing sexes" relied on "clear and historically objective criteria and s[ought]

203. *Id.* ¶ 7.2. As the American Psychological Association, the American Psychiatrists Association and others noted in their *amicus* brief submitted in support of same-sex marriage in the U.S. Supreme Court case *Obergefell v. Hodges*, "it is only by acting with another person—or desiring to act—that individuals express their [sexual orientation]." Brief for American Psychological Association as Amici Curiae Supporting Petitioners at 10, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574) [hereinafter APA Amicus Brief].

204. X, *supra* note 35, ¶ 10.4.

205. *Id.*

206. *See Varnum v. Brien*, 763 N.W.2d 862, 885 (Iowa 2009).

to achieve the purpose of protecting the institution of marriage and the social and cultural values that that institution represents."[207] The State party did not identify what "objective criteria" it was referring to, but supported the legitimacy of this aim with the purported "explicit[]recogni[tion] as legitimate" by ICCPR Article 23(2).[208] This justification by the State party—like those seen put forth in numerous sex-based discrimination cases that came before—is essentially a justification of tradition.

The purpose of protecting the institution of marriage has long been used to support the legitimacy of marriage laws that fail to treat same-sex couples and different sex couples equally under the law.[209] However, this argument has been struck down on constitutional grounds in both South Africa (in 2005)[210] and the United States (in 2015).[211] In *Minister of Home Affairs and Another v. Fourie and Another*, the South African Constitutional Court found that the failure of South Africa's common law and Marriage Act to provide same-sex couples with the same ability to marry as different sex couples violated their constitutional right to equal protection free from discrimination.[212] In so holding, the court considered the government's argument that the discrimination in South Africa's marriage law was justified because permitting same-sex couples to marry "would undermine the institution of marriage."[213]

The Constitutional Court dismissed the State's attempt to justify the discrimination, noting that "[g]ranting access to same-sex couples would in no way attenuate the capacity of heterosexual couples to marry in the form they wished and according to the tenets of their religion."[214] The Constitutional Court rejected the government's justification arguments and concluded that:

---

207. Joslin, *supra* note 2, ¶ 4.14.
208. *See generally id.*
209. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2595–96 (2015) (detailing the evolution of the "institution of marriage").
210. *See Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 48 para. 76;
211. *See Obergefell*, 135 S. Ct. at 2595.
212. *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 48 para. 76; *see* S. AFR. CONST., 1996, art. 9(3).
213. *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 69–70 para. 110.
214. *Id.* at 70 para. 111.

> [T]he failure of the common law and the Marriage Act to provide the means whereby same-sex couples can enjoy the same status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes an unjustifiable violation of their right to equal protection of the law under [Constitution] section 9(1), and not to be discriminated against unfairly in terms of section 9(3) of the Constitution.[215]

In 2015, the United States Supreme Court effectively confronted such hollow justifications in *Obergefell v. Hodges*. The *Obergefell* opinion, written by Justice Anthony Kennedy, offers some useful reasoning for future petitioners to attack any proffered justification of protecting the "institution of marriage."[216] In *Obergefell*, the U.S. Supreme Court held that "same-sex couples may exercise the fundamental right to marry."[217] In so holding, the Court noted that, "in interpreting the [U.S. Constitution's] Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[218]

---

215. *Id.* at 70–71 paras. 113–14. Section 9(1) of the South African Constitution states: "everyone is equal before the law and has the right to equal protection and benefit of the law." S. AFR. CONST., 1996, sec. 9(1). Section 9(3) provides: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."); *id.* sec. 9(3). *See also Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 66 para. 105 ("I conclude that while it is true that international law expressly protects heterosexual marriage it is not true that it does so in a way that necessarily excludes equal recognition being given now or in the future to the right of same-sex couples to enjoy the status, entitlements, and responsibilities accorded by marriage to heterosexual couples.").

216. *See Obergefell v. Hodges*, 135 S. Ct. at 2584, 2599-2600 (quoting *Griswold v. Connecticut, 381 U.S. 479 (1965)* ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.")).

217. There is no substantive right to marry within the U.S. Constitution; however, the Court based its finding on the application of the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment. The Equal Protection Clause of the U.S. Constitution is found in Section 1 of the 14th Amendment and provides: "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV, § 1.

218. *See Obergefell*, 135 S. Ct. at 2603.

As Justice Kennedy pointed out, the "[i]nstitution [of marriage]—even as confined to opposite-sex relations—has evolved over time."[219] For example, in countries such as the United States, Germany, and South Africa, the "institution of marriage" was once observed as something permissible only between members of the same race.[220] The institution of marriage also once viewed men as the head of household.[221] In *Obergefell*, the Court recalled its earlier jurisprudence on the long-standing marriage principle of coverture, which denied women equality with men in marriage.[222] The majority opinion noted that though treating men as the head of the household was once a widely accepted aspect of the institution of marriage, the U.S. Supreme Court "invoked equal protection principles to invalidate [those] laws imposing sex-based inequality in marriage."[223] Justice Kennedy explained:

> As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. *These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential*. These new insights have

219. *Id.* at 2595; Day v. Governor of the Cayman Islands (Unreported, Grand Court of the Cayman Islands, Civ. Cause Nos. 111, 184, 29 Mar. 2019) ¶ 96 ("The institution of marriage has been undergoing evolutionary change for over 250 years, ever since the State took control over it.").

220. *See Loving v. Virginia*, 388 U.S. 1, 2–3 (1967) ("This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. . . . [In] 1958, . . . a grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriage. . . . [T]he trial judge . . . stated in [his] opinion that: 'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And, but for the interference with his arrangement, there would be no cause for such marriage. The fact that he separated the races shows that he did not intend for the races to mix.'").

221. *See Obergefell*, 135 S. Ct. at 2595 ("Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity," citing 1 W. Blackstone, Commentaries on the Laws of England 430 (1765)).

222. *Id.* at 2595–98.

223. *Id.* at 2604 (citing *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) and *Califano v. Westcott*, 443 U.S. 76 (1979), among others).

> strengthened, not weakened, the institution of marriage.[224]

The Court highlighted these examples to "show [that] the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage. . . ."[225]

The Human Rights Committee should similarly embrace the role of ICCPR Article 26 in identifying and correcting inequalities based on outdated, sexist social norms. And it has done so in cases such as *Zwaan de-Vries*, *Broeks*, *Aumeeruddy-Cziffra*, and *Müeller*, discussed *supra*. For like the petitioners in *Obergefell*, the authors in *Joslin* did not seek to "devalue the institution of marriage," but rather they "[sought] it for themselves because of their respect—and need—for its privileges and responsibilities."[226] It should not be the role of international human rights institutions to perpetuate outdated norms and prejudices in society; rather, the human rights instruments and enforcement bodies should be at the forefront of recognizing the equality of all persons and guaranteeing freedom and equal protection to all.

C. CONFRONTING THE COMMITTEE'S INTERPRETATION OF ARTICLE 23(2)

Even if a future case challenges a State's marriage law on Article 26 grounds only, without a direct challenge based on Article 23(2)'s right to marry, the implicated State party will likely rely on the Committee's Views adopted in *Joslin* as justification for the

---

224. *See id.* at 2595–96; *see also* Inter-Am. Ct. H.R. Advisory Opinion, *supra* note 186, ¶ 225 (explaining that recognizing the right to same-sex marriage under the American Convention on Human Rights "is not diminishing the institution of marriage but, to the contrary, considers marriage necessary to recognize equal dignity to those persons who belong to a human group that has historically been oppressed and discriminated against.").

225. *Obergefell*, 135 S. Ct. at 2604. Other countries, such as South Africa, similarly struck down marital power (or the legal doctrine of coverture) based upon their constitutions' equality provisions. *See, e.g.*, *Gumede v. President of the Republic of South Africa* 2008 (3) SA 152 (CC) at 22–23 paras. 34–35 (S. Afr.) (holding that South Africa's codified customary KwaZulu Natal statutes' designation of the husband as "family head" was unconstitutional because it discriminated against women based on sex by placing the wife in a subordinate position to her husband).

226. *Obergefell*, 135 S. Ct. at 2594.

differential treatment. Specifically, it may argue that confining marriage to unions between a man and a woman serves a legitimate purpose under the Covenant—to fulfill its obligations under Article 23(2).[227] Therefore, a future complainant should be prepared to address the Committee's narrow interpretation of Article 23(2) set forth in *Joslin* to rebut potential State party defenses to Article 26 allegations.

1. A Contextual Reading

One problem with the Committee's narrow reading of Article 23 is that it ignored key elements of the Vienna Convention on the Law of Treaties' general rules of treaty interpretation. The Vienna Convention provides *inter alia* that a treaty shall be interpreted "in accordance with the ordinary meaning given to the terms of the treaty in their context and in light of its object and purpose."[228] A treaty's "context" includes its preamble.[229] The emphasis throughout the ICCPR Preamble is on protecting the dignity and equality of *all human beings*:

> The States Parties to the present Covenant,
>
> Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of *all members of the human family* is the foundation of freedom, justice and peace in the world,
>
> Recognizing that these rights derive from the inherent dignity of the *human*

227. Joslin, *supra* note 2, ¶¶ 8.2–8.3.

228. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, U.N.T.S. 1155, 331 (1969). *See also* RICHARD K. GARDINER, TREATY INTERPRETATION 197 (2nd ed. 2015) ("Context is defined by . . . directing attention to the whole text of the treaty, its preamble, and any annexes."); Inter-Am. Ct. H.R. Advisory Opinion, *supra* note 186, ¶ 59 ("According to the systematic interpretation contained in the Vienna Convention on the Law of Treaties, 'the provisions must be interpreted as part of a whole, the significance and scope of which must be established based on the legal system to which it belongs.'"); U.N. Human Rights Comm., Lovelace v. Canada, Communication No. R.6/24, ¶ 16, U.N. Doc. A/36/40 (1981) ("Article 27 must be construed and applied in the light of the other provisions mentioned above, such as articles 12, 17 and 23 in so far as they may be relevant to the particular case, and also the provisions against discrimination, such as articles 2, 3 and 26, as the case may be.").

229. Vienna Convention on the Law of Treaties, *supra* note 228, art. 31(2) ("The context for the purposes of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes. . . .").

> *person*,
>
> Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free *human beings* enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby *everyone* may enjoy his civil and political rights, as well as his economic, social and cultural rights,
>
> Considering the obligations of States under the Charter of the United Nations to promote *universal respect* for*,* and observance of, human rights and freedoms,
>
> . . . .[230]

As propounded in Richard Gardiner's Treaty Interpretation, "where there is doubt over the meaning of a substantive provision, the preamble may justify a wider interpretation, or at least rejection of a restrictive one."[231] With regards to ICCPR Article 23(2), the treaty's general object and purpose as set forth in its preamble justifies a wider interpretation of that provision. The preamble shows that the treaty should be interpreted in a way that affords the rights to—and ensures the equal rights of— *all* human beings. This wider interpretation would also bring the Committee's reading of Article 23(2) in line with the interpretation it expounded with regard to the non-discrimination language in Articles 26 and 2(1). Instead, the Committee ignored the ICCPR's preamble in *Joslin* and took a restrictive interpretation of Article 23(2)—one that excludes from its protection the rights of persons based upon their sexual orientation (a protected status) and that created an internal conflict in treaty terms (prohibiting discrimination based on sexual orientation in all public and private spheres, while excluding individuals from the right to marry based on sexual orientation).

In adopting a restrictive interpretation to Article 23, the Committee relied heavily on the fact that ICCPR Article 23(2) "is the only

230. ICCPR, *supra* note 17, pmbl.

231. GARDINER, *supra* note 228, ¶ 4.2.5. *See also* ICCPR, *supra* note 17, ¶ 5(1) ("Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.").

substantive provision in the Covenant which defines a right by using the term 'men and women', rather than 'every human being', 'everyone' and 'all persons.'"[232] As the State party noted in its arguments, ICCPR Article 23 was drawn from Article 16 of the Universal Declaration of Human Rights (UDHR), which is the "only gender-specific reference in the Declaration."[233] According to the Committee, the "[u]se of the term 'men and women,' rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from" Article 23(2) "is to recognize as marriage only the union between a man and a woman wishing to marry each other."[234]

While the State party looked to the *travaux préparatoires* of the ICCPR to support its interpretation of Article 23(2), the State party—and, in turn, the Committee—appear to have ignored the *travaux préparatoires* of the UDHR, which should be equally instructive given the connection between the two instruments and the drafting history of the right to marry contained therein.[235] The *travaux préparatoires* of the UDHR shows that the first draft of the Declaration, presented by the drafting committee in June 1947, stated the right to marry in gender neutral terms: "Every one has the right to contract marriage in accordance with the law of the State."[236] After further debate among the country representatives on the drafting committee, the language evolved to include reference to the right of "men and women of full age" to marry found in UDHR Article 16(1).[237]

---

232. Joslin, *supra* note 2, ¶¶ 8.2–8.3.

233. *Id.* ¶ 4.4.

234. *Id.* ¶ 8.2.

235. *Id.* ¶ 4.4 ("Article 23 was drawn directly from article 16 of the Universal Declaration of Human Rights, which provides, in the only gender-specific reference in the Declaration, to the right of '[m]en and women . . . to marry.'").

236. U.N. Econ. & Soc. Council, Comm'n on Human Rights Drafting Comm., Drafting Outline of International Bill of Rights, art. 13, U.N. Doc. E/CN.4/Ac.1/3 (June 4, 1947), https://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/AC.1/3.

237. *See, e.g.*, *Summary Record of the Sixth Meeting [of the Working Group on the Declaration of Human Rights]*, *in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: THE TRAVAUX PRÉPARATOIRES VOL. 1 (OCT. 1946 TO NOV. 1947) 1202–06 (William A. Schabas ed., 2013) [hereinafter *Summary Record of the UDHR Working Group]* ("The Chairman said that the Committee had two proposals before it relating

Nothing in the *travaux préparatoires* suggests that this modification to the provision's language was intended to exclude men from marrying men or women from marrying women. Rather, it appears from the *travaux préparatoires* that the modification to the language stemmed from efforts to bolster the equal rights of women, who at the time held a subordinate position to men in many laws and practices around the world. To this end, the UDHR drafting committee specifically sought advice from the Commission on the Status of Women and delayed voting on the right to marry provision until receiving the Commission's feedback.[238] During the December 1947 session of the Commission on Human Rights, Bodil Begtrup, the Chairman of the Commission on the Status of Women, explained that

> the previous report of the Commission on the Status of Women had advocated fully for equality of civil rights. . . . [insisting] that 'as sex equality was a right which had been acquired but recently, it would be necessary to emphasize it explicitly in certain Articles, and even, to make

---

to the question of marriage"—both of which focused on the equal rights of men and women, and not on who could marry each other: "Mr. Stepanenko (Byelorussian SSR) proposed . . . that this article [regarding the question of marriage and the family] be worded as follows: 'Marriage and the family shall be protected by the State and regulated by law, on the basis of equal rights for men and women, without distinction as to race, religion or origin. Mothers and children are entitled to special protection and assistance by the State.' The Chairman proposed the following article for insertion after Article 15: 'Women and men shall have the same freedom to marry and to choice of marriage partner, and the same access to remedies for breach of marriage.' . . . Mr. Cassin (France) considered it essential to affirm the principle of the free consent of the two parties, which was not universally recognized, and he ventured to suggest the following draft for the first paragraph: 'Marriage requires the free consent of each of the parties; children cannot marry.' . . . the third paragraph would contain the remainder of the Byelorussian proposal: 'they shall be regulated by law, on the basis of equal rights for men and women, without distinction as to race, religion or origin.'"); *cf.* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 16(1) (Dec. 10, 1948).

238. William A. Schabas, *Introductory Essay* to THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: THE TRAVAUX PRÉPARATOIRES VOL. 1 (OCT. 1946 TO NOV. 1947) xcix (William A. Schabas ed., 2013) ("The Economic and Social Council adopted a resolution declaring that 'the Commission on the Status of Women be represented by its officers . . . at the sessions of the Commission on Human Rights when sections of the draft of the international bill of human rights concerning the particular rights of women are under consideration, to participate, without vote, in the deliberations thereon.' In addition, the preliminary draft of the international bill was to be circulated to the Commission on the Status of Women at the same time as it was made available to the members of the Commission on Human Rights.").

particular mention of certain rights guaranteed specially to women.'[239]

This and other references in the lengthy *travaux préparatoires* of the International Bill of Human Rights demonstrate the central role that was played during drafting by concerns to guarantee equality among women and men in light of pervasive subordination of women historically and at that time.[240] There is no indication in the drafting record that the language was intended to limit or restrict the scope of the right, other than the explicit limitation on age ("men and women of full age").[241] As better explained by the South African Constitution Court in *Fourie*, "[t]he reference to 'men and women' [in international law] is descriptive of an assumed reality, rather than prescriptive of a normative structure for all time."[242]

---

239. *Id.* at ci.

240. *See, e.g.*, *Summary Record of the UDHR Working Group*, *supra* note 237, at 1202–06; *see also* ROSS, *supra* note 78, at 55–56 ("In June 1946, the UN Economic and Social Council established the Commission on Human Rights and a separate Commission on the Status of Women. . . . the eighteen-member [Commission on Human Rights] had only two women—India's Hansa Mehta and the United States' Eleanor Roosevelt, serving as Chair—but they were extremely powerful advocates for women's rights. As a result, the UDHR provided the world's first comprehensive articulation of women's rights to equality both in general and in marriage.").

241. The ICCPR uses "marriageable age" rather than "full age." ICCPR, *supra* note 17, Art. 23(2). However, in *Joslin*, the State party and the Committee focused solely on the words "men and women" and ignored its full context, which is "men and women of marriageable age." Joslin, *supra* note 2, ¶ 8.2; however, the UDHR's *travaux préparatoire* reveals that preventing early marriage—which was permissible under many States parties' domestic legal frameworks— was an important consideration during the drafting. *See Summary Record of the UDHR Working Group*, *supra* note 237, at 1199; *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 63-64 para. 100.

242. *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 63-64 para. 100. *See also* Inter-Am. Ct. H.R. Advisory Opinion, *supra* note 186, ¶ 182 ("[R]egarding Article 17(2) of the [American] Convention [on Human Rights], the Court considers that although it is true that, taken literally, it recognizes the 'right of men and women of marriageable age to marry and to raise a family,' this wording does not propose a restrictive definition of how marriage should be understood or how a family should be based. In the opinion of this Court, Article 17(2) is merely establishing, expressly, the treaty-based protection of a specific model of marriage. In the Court's opinion, this wording does not necessarily mean either that this is the only form of family protected by the American Convention."). Article 17(2) of the American Convention provides: "The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination

2. Contradictory Approaches

Perhaps the most glaring problem with the Human Rights Committee's restrictive reading of Article 23(2) in *Joslin* is that it contradicts the approach the Committee took in *Toonen v. Australia*, when the Committee recognized sexual orientation as falling within the treaty's reference to sex.[243] A similar argument as asserted by the State and accepted by the Committee in *Joslin* applies to whether sexual orientation is protected by the Covenant: Neither the Covenant's drafters nor the States parties entering into the treaty agreement intended to include sexual orientation within the reference to "sex" in Articles 2(1) and 26.[244] Nor did they have any intention at the time of drafting to give sexual orientation protected status from discrimination.[245] Indeed, the Covenant's *travaux préperatoires* give no indication that sexual orientation was considered for protection at all.[246] Given the societal situation at the time—including the classification of homosexuality as a mental disorder when the Covenant was drafted (1954) and adopted (1966)[247]—there is little question that the treaty's references to "sex" in Articles 2 and 26 were "consistently and uniformly understood" to obligate States parties only to protect against discrimination between men and women.[248] As noted by the U.S. Supreme Court in 2015, "[o]nly in more recent years have psychiatrists and others recognized that sexual orientation is both

established in this Convention." American Convention on Human Rights, Organization of American States, art. 17(2), Nov. 22, 1969.

243. *See* Toonen, *supra* note 31, ¶ 8.7 ("On the basis of the above, the State party contends that there is now a general Australian acceptance that no individual should be disadvantaged on the basis of his or her sexual orientation."); Joslin, *supra* note 2, ¶ 4.12.

244. *Id.* ¶ 2.4.

245. *Id.*

246. Schabas, *supra* note 238, at 1202–1206.

247. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015) (noting that homosexuality was classified as a mental disorder by the American Psychiatric Association from 1952 to 1973.); APA Amicus Brief, *supra* note 203, at 7–8 ("When the American Psychiatric Association published the first *Diagnostic and Statistical Manual of Mental Disorders* (DSM) in 1952, homosexuality was listed as a mental disorder. . . . recognizing the lack of scientific evidence for this classification, the American Psychiatric Association removed homosexuality from the DSM in 1973. . . .").

248. Joslin, *supra* note 2, ¶ 8.2.

a normal expression of human sexuality and immutable."[249]

Despite the historic context within which the ICCPR was drafted, the Committee introduced sexual orientation as a protected ground of the Covenant in 1994.[250] Had it employed the same approach in *Toonen* as it took in *Joslin*—to apply a narrow interpretation of the afforded rights based upon the intention at the time of drafting—the Committee could never have expanded the protection against sex-based discrimination to include discrimination based on sexual orientation. Sex-based discrimination would have been limited to the way in which the language was understood at the time of drafting: as impermissible distinctions between men and women. To the contrary, when it comes to other rights, the Committee has adopted views that extend far beyond the intention of the Covenant's drafters and any "universal understanding" of terms.

Furthermore, part of the State party's argument in *Joslin* with regard to the proper understanding of Article 23(2)'s text was that no state party entered a reservation that would suggest an understanding that the right to marry included the right to marry someone of the same sex.[251] But the same is true with regard to the general equality rights afforded in Article 26—no State party entered a declaration, objection, or reservation to Article 2(1) or Article 26 that indicates any understanding that sexual orientation was to be included as a protected ground within those articles.[252] Yet, many States parties were, and remain, very clearly opposed to such an interpretation and do not recognize the right to equality before the law, equal protection of the law, and freedom from discrimination based on sexual orientation—even outside the context of marriage.[253]

In 2008, the Representative of Syria presented a statement to the

249. *Obergefell*, 135 S. Ct. at 2596.

250. *See supra* Part II.

251. *Id.* ¶ 4.3 ("[N]o States parties provide for homosexual marriage; nor has any State understood the Covenant to so require and accordingly entered a reservation.").

252. *See Status of Ratification Interactive Dashboard*, U.N. OHCHR, https://indicators.ohchr.org/ (last accessed Aug. 30, 2019) (select International Covenant on Civil and Political Rights from the drop-down menu).

253. *See, e.g.*, Human Rights Comm., Fifth Periodic Reports of States Parties Due in 2000: Iraq, ¶ 177, U.N. Doc. CCPR/C/IRQ/5 (Dec. 12, 2013) [hereinafter HRC Fifth Periodic Report: Iraq].

United Nations (U.N.) General Assembly on behalf of 57 countries raising concerns about the U.N.'s attempt to apply the principles of non-discrimination and equality to one's sexual orientation through the U.N.'s human rights treaties.[254] The statement reads in part:

> [W]e are seriously concerned at the attempt to introduce to the United Nations some notions that have no legal foundations in any international human rights instrument. We are even more disturbed at the attempt to focus on certain persons on the grounds of their sexual interests and behaviors, while ignoring that intolerance and discrimination regrettably exist in various parts of the world, be it on the basis of color, race, gender, or religion to mention only a few.
>
> . . . .
>
> [W]e affirm that those two notions are not and should not be linked to existing international human rights instruments. . . .
>
> We recognize that the enumerated rights contained in the Universal Declaration of Human Rights were codified in subsequent international legal instruments. We note with concern the attempts to create 'new rights' or 'new standards' by misinterpreting the Universal Declaration and international treaties to include such notions that *were never articulated nor agreed by the general membership*. . . .[255]

Despite these concerns held by at least 58 States parties to the ICCPR, the Human Rights Committee has continued to reinforce its expansive reading of Article 26's right to equal protection on the basis of sex and prohibition against sex-/sexual orientation-based

---

254. *Response to SOGI Human Rights Statement – Read by Syria*, ARC INT'L (Dec. 18, 2008), https://arc-international.net/global-advocacy/sogi-statements/syrian-statement/. The Statement by Syria was made on behalf of Afghanistan, Algeria, Bahrain, Bangladesh, Benin, Brunei Darussalam, Cameroon, Chad, Comoros, Cote d'Ivoire, Democratic People's Republic of Korea, Djibouti, Egypt, Eritrea, Ethiopia, Fiji, The Gambia, Guinea, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kenya, Kuwait, Lebanon, Libyan Arab Jamahiriya, Malawi, Malaysia, Maldives, Mali, Mauritania, Morocco, Niger, Nigeria, Oman, Pakistan, Qatar, Rwanda, Saudi Arabia, Senegal, Sierra Leone, St. Lucia, Solomon Islands, Somalia, Sudan, Swaziland (now Eswatini), Syria, Tajikistan, Togo, Tunisia, Turkmenistan, Uganda, United Arab Emirates, United Republic of Tanzania, Yemen and Zimbabwe.

255. *Id.*

discrimination.[256]

Many States parties not only rebuke the U.N.'s "focus on certain persons" and "attempts to create 'new rights,'" but in fact criminalize the conduct of gay, lesbian and bisexual individuals—both in the form of personal relations and in the exercise of their civil and political rights.[257] In response to those States parties, the Committee has condemned such forms of discrimination, called for the decriminalization of same-sex relations between consenting adults, and taken a broad view of the "universality of human rights and non-discrimination."[258] For example, in 2013, the Government of Iraq reported with respect to ICCPR Article 21 (right to peaceful assembly) that "homosexuals are prohibited [from holding peaceful demonstrations] since their sexual practices, being contrary to the teachings of the Islamic sharia, constitute a punishable offence under Iraqi law."[259] In 2014, the Government of Kuwait reported that:

> Sexual relations between persons of the same sex are condemned, prohibited and criminalized in accordance with the provisions of the Islamic sharia law which, as already indicated, constitutes the principle source of legislation in the State of Kuwait. Such acts, . . . are blatantly contrary to human nature in view of their negative effects on individuals,

256. *See, e.g.*, Human Rights Comm., Concluding Observations on the Fourth Periodic Report of Algeria, ¶¶ 19–20, U.N. Doc. CCPR/C/DZA/CO/4 (Aug. 17, 2018) [hereinafter HRC Concluding Observations: Algeria]; Human Rights Comm., Concluding Observations on the Fifth Periodic Report of the Sudan, ¶ 16, U.N. Doc. CCPR/C/SDN/CO/5 (Nov. 19, 2018) [hereinafter HRC Concluding Observations: Sudan]; Human Rights Comm., Concluding Observations on the Fifth Periodic Report of Cameroon, ¶¶ 13–14, U.N. Doc. CCPR/C/CMR/CO/5 (Nov. 30, 2017) [hereinafter HRC Concluding Observations: Cameroon]; Human Rights Comm., Concluding Observations on the Seventh Periodic Report of Ukraine, ¶ 10, U.N. Doc. CCPR/C/UKR/CO/7 (Aug. 22, 2013) [hereinafter HRC Concluding Observations: Ukraine]; HRC Concluding Observations: Tanzania, *supra* note 37, ¶ 22.

257. *See, e.g.*, HRC Fifth Periodic Report: Iraq, *supra* note 253, ¶ 177; HRC Concluding Observations: Algeria, *supra* note 256, ¶ 19; HRC Concluding Observations: Sudan, *supra* note 256, ¶ 15; HRC Concluding Observations: Cameroon, *supra* note 256, ¶ 13; HRC Concluding Observations: Ukraine, *supra* note 256, ¶ 10; HRC Concluding Observations: Tanzania, *supra* note 37, ¶ 22.

258. Human Rights Comm., Concluding Observations on the Fifth Periodic Report of Iraq, ¶ 11, U.N. Doc. CCPR/C/IRQ/CO/5 (Dec. 3, 2015) [hereinafter HRC Concluding Observations: Iraq].

259. HRC Fifth Periodic Report: Iraq, *supra* note 253, ¶ 177.

> society and the pedagogic and social norms on which public order and public morals in the State are based.[260]

In 2017, the State party of Cameroon similarly reported to the Human Rights Committee that "[t]he position of Cameroon on homosexuality is constant" and that the "Government rejected the [Committee's] recommendation to decriminalize this behavior during . . . its Universal Periodic Review in 2009."[261] The Government of Cameroon explained in its 2017 report that "[t]he rationale for this position is that in the present state of morals, homosexuality is a practice that is contrary to the values accepted in the Cameroonian society."[262] Notably, at the time of signing and ratifying the ICCPR, the governments of Iraq, Kuwait, and Cameroon did not enter any reservations, objections or declarations to limit the application of the Covenant rights based on individuals' sexual orientation or to suggest that they intended to exclude homosexual or bisexual individuals from the protection of any of the rights contained in the Covenant, including Article 26's right to equal protection and non-discrimination.[263]

The Committee's response to the Government of Iraq regarding its freedom of assembly laws—specifically, the government's prohibition against homosexuals holding peaceful demonstrations—further undermines the Committee's narrow interpretation of Article 23(2) in *Joslin*. ICCPR Article 21 specifically permits States parties to restrict the right to peaceful assembly if those restrictions "are necessary in a democratic society in the interests of . . . the protection of . . . morals. . . ."[264] If Iraq's restriction were evaluated in line with the Committee's reasoning in *Joslin*—it would be considered "in light of the scope of" the substantive right to peaceful assembly provided

260. Human Rights Comm., Consideration of reports submitted by States parties under article 40 of the Covenant, Third Periodic Reports of States Parties Due in 2014: Kuwait, ¶ 141, U.N. Doc. CCPR/C/KWT/3 (Dec. 8, 2014).

261. HRC Concluding Observations: Cameroon, *supra* note 256.

262. *Id*. ¶ 45.

263. *Status of Ratification Interactive Dashboard*, *supra* note 252.

264. ICCPR, *supra* note 17, art. 21 ("The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.").

for in Article 21. Article 21 is the only substantive provision in the Covenant that does not specify *who* has the right to freedom of assembly.[265] But it *does* provide specific reasons for which this right may be restricted—namely, if such restriction is necessary in the interest of the protection of morals.[266] There is no question that at the time of drafting, many countries around the world considered homosexuality against the morals of society. This is still true today, as is clear from the laws of numerous States parties, States parties' periodic reports (such as those mentioned above), and Concluding Observations issued by the Committee.[267]

Yet the Committee responded to the Iraqi Government as follows: "While the Committee observes the dignity of morality and cultures internationally, it recalls that they must always be subject to the principles of universality of human rights and non-discrimination."[268] The Committee expressed "regret" as to "the lack of clarity on the right of homosexuals to hold peaceful demonstrations."[269] It then urged Iraq to "[t]ake the measures necessary to ensure that such persons can fully enjoy all the human rights enshrined in the Covenant, including the right to peaceful assembly[.]"[270] There was no consideration of what morals the Covenant drafters had in mind and whether homosexuality may in fact have been considered immoral at the time of drafting.

The Committee should not use the Covenant drafters' failure to consider the rights of individuals based on their sexual orientation to limit or restrict the applicability of Covenant rights today. Indeed, it would have been illogical—and likely reprehensible by many States parties—for the Covenant drafters in the 1950s to consider including within the right to marry the right to marry someone of the same sex given the perception of homosexuality during that period of history.

---

265. *Id.*
266. *Id.*
267. *See, e.g.*, HRC Fifth Periodic Report: Iraq, *supra* note 253, ¶ 177.
268. *See* HRC Concluding Observations: Iraq, *supra* note 258, ¶ 11; *see also* Human Rights Comm., Concluding Observations on the Initial Report of Liberia, ¶ 19, U.N. Doc. CCPR/C/LBR/CO1 (Aug. 27, 2018); Human Rights Comm., Concluding Observations on the Third Periodic Report of Kuwait, ¶ 12, U.N. Doc. CCPR/C/KWT/CO/3 (Aug. 11, 2016).
269. HRC Concluding Observations: Iraq, *supra* note 258, ¶ 11.
270. *Id.* ¶ 12(b).

However, the Human Rights Committee has since underscored an expansive reading of treaty rights with its decision to establish the Covenant's equal protection on the basis of sexual orientation in *Toonen*.[271] It has continued to propel that position in the two decades since first recognizing the treaty's protection of sexual orientation.[272] And like the Committee reminded the Government of Iraq with respect to the right to peaceful assembly, the universality of human rights and non-discrimination must prevail over the religious, cultural, moral, and (outdated) social norms that have been used to restrict the right to marry based on sexual orientation.

VI. TIME TO BRING A NEW TEXT CASE: THE COMMITTEE'S RECENT PUSH FOR STATE PARTY RECOGNITION OF SAME-SEX MARRIAGES

While much attention has been given to the changing perception of marriage in countries around the world, less attention has been paid to the Human Rights Committee's own explicit reversal on same-sex marriage through recent Concluding Observations. Despite its ruling in *Joslin*, the Committee is now urging States parties to recognize marriage for same-sex couples in order to fulfill their treaty obligations to eliminate discrimination based on sexual orientation pursuant to Articles 2(1) and 26.[273] Through explicit calls for States parties to amend their marriage laws, the Human Rights Committee's own work suggests that the time has come to bring a new test case before it. Bringing a new challenge to a State party's ban on same-sex marriage on the basis of an Article 26 violation will force the Committee's hand to adopt in its views its own strong stance asserted vis-à-vis certain States parties through the reporting procedure.

---

271. *See* Toonen, *supra* note 31, ¶ 9.

272. *See* Young, *supra* note 35, ¶ 10.4 ("The Committee also recalls its jurisprudence that the prohibition against discrimination under article 26 comprises discrimination based on sexual orientation. . . .the test for the Committee is therefore whether it has been shown that the differential treatment in the author's access to divorce proceedings in Australia following her same-sex foreign marriage, with respect to persons who entered opposite-sex foreign marriages, meets the criteria of reasonable, objectivity and legitimacy of aim."); X, *supra* note 34, ¶ 8; C, *supra* note 101, ¶ 9.

273. *See HRC Concluding Observations: Australia*, *supra* note 45, ¶ 29.

The wave of Concluding Observations calling for State party recognition of marriage equality began in 2017.[274] Prior to Australia amending its Marriage Act to recognize marriage for same-sex couples, the Committee issued a strongly worded *Concluding Observations on the Sixth Periodic Report of Australia* calling on the State to eliminate discrimination on the basis of sexual orientation in its marriage laws in order to fulfill its treaty obligations under Articles 2 and 26.[275] The Concluding Observations issued to Australia at the end of 2017 stated: "the Committee is concerned about the explicit ban on same-sex marriage in the Marriage Act 1961, *which results in discriminatory treatment of same-sex couples*. . . ."[276] The Committee discussed Australia's use of a voluntary postal survey on the legalization of same-sex marriage and expressed its "view that resort to public opinion polls to facilitate *upholding rights under the Covenant* in general, and equality and non-discrimination of minority groups in particular, is not an acceptable decision-making method. . . ."[277] It then urged Australia to "revise its laws, *including the Marriage Act,* to ensure irrespective of the results of the Australian Marriage Law Postal Survey, that all its laws and policies afford equal protection to lesbian, gay, bisexual, transgender and intersex persons, couples and families. . . ."[278]

Australia was just one State party that received Concluding Observations from the Human Rights Committee in 2017 and 2018 that urged the State party to amend its marriage laws to eliminate discrimination based on sexual orientation. Also in December 2017, the Committee issued its *Concluding Observations on the Fifth*

274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.* (emphasis added).
278. *Id.* ¶ 30 (emphasis added). To this end, the Committee urged Australia to "also tak[e] into account the Committee's Views in communications No. 2172/2012, *G v. Australia*, and No. 2216/2012, *C v. Australia*." *Id.* In 2018, the CEDAW Committee praised the Government of Australia for the "[a]mendments to the Marriage Act 1961, guaranteeing the right to marry for all couples, regardless of gender, in 2017" as a positive aspect and progress achieved in its Concluding Observations on the Eighth Periodic Report of Australia; *id.* ¶ 29; Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Eighth Periodic Report of Australia, ¶ 4(a), U.S. Doc. CEDAW/C/AUS/CO/8 (July 25, 2018).

Periodic Report of Mauritius.[279] Therein, the Committee expressed its concern "that lesbian, gay, bisexual and transgender persons are not authorized to officially enter marriage. . . ."[280] It urged Mauritius to "take all necessary measures to eradicate discrimination against lesbian, gay, bisexual and transgender persons with regard to marriage or civil partnerships. . . ."[281] In May 2018, the Human Rights Committee considered the Sixth Periodic Report of Hungary.[282] In its Concluding Observations issued to Hungary, the Committee expressed its "concern that the ban on discrimination in the Fundamental Law does not explicitly list sexual orientation and gender identity among the grounds of discrimination and that its restrictive definition of family may give rise to discrimination, since it does not cover certain types of family arrangements, including same-sex couples."[283] The Committee urged Hungary to "[p]rohibit discrimination on all grounds, including sexual orientation and gender identity, and in all spheres and sectors, *including . . . marriage* and family arrangements."[284] In November 2018, the Committee expressed similar concern over the continued "discrimination against lesbian, gay, bisexual, transgender and intersex persons" in Bulgaria[285] and called upon the State party to "[e]liminate discrimination against persons on the basis of their sexual orientation or gender identity in law and in practice in all spheres, *including . . . marriage* and family arrangements. . . ."[286] Mauritius, Hungary, and Bulgaria are all States

279. *HRC Concluding Observations: Mauritius*, *supra* note 45, ¶ 9.
280. *Id.*
281. *Id.* ¶ 10.
282. *HRC Concluding Observations: Hungary*, *supra* note 45, ¶ 19.
283. *Id.*
284. *Id.* ¶ 20(a).
285. *HRC Concluding Observations: Bulgaria*, *supra* note 45, ¶ 11.
286. *See HRC Concluding Observations: Bulgaria*, *supra* note 45, ¶ 12(a); In several Concluding Observations issued to other State parties in recent years, the Committee's language was not as explicit in calling on the state parties to amend marriage laws to recognize equal rights of same-sex couples, but the action urged by the Committee would lead to the same result. For example, the Committee urged the Dominican Republic to "adopt laws to prohibit discrimination . . . on grounds of sexual orientation . . . and *fully recognize the equality of same-sex couples*. . . ." *Cf.* Human Rights Comm., Concluding Observations on the Sixth Periodic Report of the Dominican Republic, ¶ 10, U.N. Doc. CCPR/C/DOM/CO/6 (Nov. 27, 2017) [hereinafter HRC Concluding Observations: DR]. The Human Rights Committee used similar language in its 2018 Concluding Observations to Lithuania. In response

parties to the ICCPR and the Optional Protocol.[287] At the time of publication, same-sex couples continued to be denied access to legal marriage under the domestic laws of these countries.[288]

The Committee has now created explicit contradictions with its holding in *Joslin* through these recent Concluding Observations.[289] The Committee can no longer ignore an allegation that a State party's refusal to recognize marriage for same-sex partners discriminates on the basis of sexual orientation, nor can it hide behind the text of Article 23(2) to find that no discrimination exists when a State party's marriage law recognizes only marriage between a man and a woman. Through these Concluding Observations, the Committee has now fully undermined its reasoning and ruling in *Joslin*. Should a complainant from any State party with a marriage law that makes distinctions based on sexual orientation—but particularly those where the Committee has explicitly called upon the State party to eliminate such discrimination—bring a new challenge under ICCPR 26, the Committee cannot, without losing all legitimacy, stand with its 2002 ruling.

---

to Lithuania's reporting on efforts to combat discrimination, the Committee called upon the State party to "intensify its efforts to eliminate discrimination, in law and in practice, against persons on the basis of their sexual orientation or gender identity, [and] *ensure that legislation is not interpreted and applied in a discriminatory manner against lesbian, gay, bisexual, transgender and intersex persons. . . .*" Human Rights Comm., Concluding Observations on the Fourth Periodic Report of Lithuania, ¶ 10, U.N. Doc. CCPR/C/LTU/CO/4 (Aug. 29, 2018) [hereinafter HRC Concluding Observations: Lithuania].

287. *See Status of Ratification Interactive Dashboard*, *supra* note 252.

288. *See* Семеен кодекс [Family Code] Act No. 47 of 2009, art. 5 (BG); Magyarország Alaptörvénye [The Fundamental Law of Hungary], Alaptörvény art. L(1); Code Civil [C.Civ] [Mauritius Civil Code] (MU). In February 2018, "the Budapest District Court ruled that the Hungarian state administration must acknowledge the marriage of same-sex couples abroad as equivalent to registered partnerships in Hungary," but not as registered marriages. *See also Budapest Court Rules Foreign Same-Sex Marriages Must Be Recognized in Hungary*, ILGA EUROPE (Feb. 9, 2018), https://www.ilga-europe.org/resources/news/latest-news/budapest-court-equal-marriage.

289. *Compare* Joslin, *supra* note 2, ¶¶ 8.3, 9 *with HRC Concluding Observations: Bulgaria*, *supra* note 45, ¶ 12(a); HRC Concluding Observations: DR, *supra* note 286, ¶ 10; HRC Concluding Observations: Lithuania, *supra* note 286, ¶ 10.

VII. CONCLUSION

The Committee's decisions on sex-based discrimination prior to *Joslin*, its recent Concluding Observations emphasizing States parties' obligations to eliminate discrimination based on sexual orientation in their marriage laws, and the wave of changes in States parties' domestic legal frameworks on marriage all support a renewed attempt for the recognition of marriage equality under the ICCPR. The Human Rights Committee, as the body responsible for upholding the rights set forth within the ICCPR, failed to give the *Joslin* authors' Article 26 claims their due attention. However, the steps taken recently by the Committee suggest that it is now ready to fully recognize the rights guaranteed in the Covenant, including the treaty's guarantee of equal protection and prohibition against discrimination in Article 26. Full recognition of treaty rights includes recognition of individuals' right to marry whomever they choose, free from discrimination based on sexual orientation.