Notes

A Harmonious Union? The Relationship Between States and the Human Rights Committee on the Same-Sex Marriage Issue

*International human rights law is having an increasingly significant impact on domestic debates around same-sex marriage. Within international human rights law, the treaty having the greatest impact is the International Covenant on Civil and Political Rights (ICCPR). The ICCPR contains guarantees of equality and non-discrimination. Furthermore, its Optional Protocol allows individuals to petition the United Nations Human Rights Committee (Committee) and assert government violations of their rights. Several individuals have petitioned the Committee, asserting that denials of same-sex marriage and partnership benefits at the domestic level violate the ICCPR. In response, the Committee has issued its views on the merits of the complaints. Domestic courts and other stakeholders in New Zealand, Australia and South Africa have increasingly utilized the “jurisprudence” of the Committee to support arguments in favor of same-sex marriage.*

*The Committee is sensitive to the climate of prevailing opinion within states. Accordingly, there exists a dialogue between the Committee and State Parties on the same-sex marriage issues. Five factors pertaining to the Committee-State Party dialogue are likely to influence the likelihood of the Committee articulating a marriage equality-protective interpretation of the ICCPR in the future. These factors are: (1) the number of state parties enacting same-sex marriage; (2)*
the level of "internal enforcement" of the Committee's views through incorporation into national judicial decisions; (3) the level of "external enforcement" of the Committee's views through bilateral and multilateral diplomacy; (4) the potential costs to the Committee's legitimacy and reputation should it pronounce an ICCPR right to same-sex marriage before states indicate willingness to accept such a right; and (5) the degree to which same-sex marriage recognition remains overwhelmingly confined to Western states. At some point in the foreseeable future, the Committee will be sufficiently emboldened by positive indications from member states to hold that the ICCPR provides a right to same-sex marriage.

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INTRODUCTION

A notable trend in civil rights law over the past decade has been the increasing number of jurisdictions instituting same-sex marriage.\(^1\) Successful passage of same-sex marriage, also termed "marriage equality," has taken one of two paths—either enactment by a legislature following lobbying and other forms of advocacy by citizens,\(^2\) or through a court decision holding that denial of same-sex marriage violates a state or national constitution.\(^3\) In either case, the focus of the issue is on the domestic legal framework.

One area that has received little attention is the influence of international human rights law on legislative and judicial debates around same-sex marriage. This Note analyzes the extent to which courts and those petitioning legislative bodies have invoked international human rights law when seeking to bolster claims in favor of marriage equality. In order to confine the scope of this endeavor to a manageable framework, analysis is limited to the International Covenant on Civil and Political Rights (hereinafter referred to as the ICCPR or Covenant).

The following discussion proceeds in seven parts. The first part discusses the nature of the ICCPR as a human rights instrument with secondary enforcement mechanisms. The next two sections each discuss the two provisions of the ICCPR most relevant to the issue of same-sex marriage. The first of these provisions is the article 26 right to equality and freedom from discrimination, which arguably supports a pro-marriage equality interpretation of the ICCPR. The

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1. As of April 20, 2013, thirteen countries have enacted same-sex marriage. In order of enactment, these countries are the Netherlands, Belgium, Spain, Canada, South Africa, Norway, Sweden, Portugal, Iceland, Argentina, Denmark, Uruguay and New Zealand. In the United States, same-sex marriage is legal in Massachusetts, Connecticut, Iowa, Vermont, Washington D.C., New Hampshire, New York, Maine, Maryland and Washington. See, e.g., Current Status Around-the-World (International), MARRIAGE EQUALITY USA, (April 17, 2013), http://www.marriageequality.org/Around%20the%20World.

2. Legislative enactment has been the dominant path towards enacting marriage equality, having taken place in jurisdictions including Argentina, Denmark and Norway; see, e.g., id.

second provision is the article 23(2) right to marriage, which arguably supports the opposite proposition. The fourth section goes on to discuss how the seemingly conflicting propositions offered by articles 26 and 23(2) may be reconciled with one another. Thereafter, the fifth section analyzes the Human Rights Committee’s (hereinafter referred to as HRC or Committee) response to individual complaints based on discrimination on the basis of sexual orientation. Sixth, the Note examines how judges and proponents of same-sex marriage in New Zealand, Australia and South Africa have incorporated HRC jurisprudence and the ICCPR into their arguments.

The seventh and final section argues that the issue of same-sex marriage provides a clear and timely framework through which to analyze the dialogue between the Committee and state parties to the ICCPR. Over time, the ongoing dialogue between the HRC and state parties to the ICCPR produces normative changes in the positions of each. Just as the Committee’s pronouncements influence domestic proponents of same-sex marriage, the Committee is in turn sensitive to the climate of opinion in state parties’ societies when it decides how forcefully to articulate its recommendatory views. The final section also identifies five factors pertaining to aspects of the Committee-state party dialogue that, if changed, may prompt the Committee to articulate a marriage equality-protective interpretation of the ICCPR in the future. These factors are: (1) the number of state parties enacting same-sex marriage; (2) the level of “internal enforcement” of the Committee’s views through incorporation into national judicial decisions; (3) the level of “external enforcement” of the Committee’s views through bilateral and multilateral diplomacy; (4) the potential costs to the Committee’s legitimacy and reputation should it pronounce an ICCPR right to same-sex marriage before states indicate willingness to accept such a right; and (5), the degree to which same-sex marriage recognition remains overwhelmingly confined to Western states.

The Note concludes by expressing optimism that the Committee-state party dialogue will ultimately serve to promote international recognition of a right to same-sex marriage. As the number of jurisdictions instituting marriage equality increases, the Committee will likely interpret the ICCPR more liberally in the realm of LGBT rights. At some point in the foreseeable future, the Committee will be sufficiently emboldened by positive indications from member states to hold that the ICCPR provides a right to same-sex marriage.
I. The International Covenant on Civil and Political Rights

The ICCPR was adopted by the General Assembly on December 16, 1966. It entered into force on March 23, 1976 when Czechoslovakia became the thirty-fifth state party to deposit its instrument of ratification with the United Nations (UN) Secretary-General. Currently there are 167 state parties to the ICCPR.

As its title indicates, the ICCPR guarantees a number of substantive civil and political rights. These include the right to life; freedom of movement; freedom of opinion and expression; and freedom of association. Under article 2, the Covenant's key operative provision, state parties undertake to "respect and to ensure" the rights in the ICCPR on a non-discriminatory basis to all individuals within their territory and subject to their jurisdiction. Article 2 is universally understood as imposing a binding legal obligation on state parties. Furthermore, state parties undertake to adopt legislation or other measures necessary to give effect to the rights set out in the Covenant.

The Covenant envisages that rights will be enforced at the domestic level at first instance. Under article 2(3)(a), state parties are obliged to provide an "effective remedy" to those persons who allege a violation of their rights. Provision of an effective remedy involves the claim being determined by a competent judicial, administrative or legislative authority with enforcement powers.

A. The Human Rights Committee

Aside from providing that rights are to be primarily enforced by state parties, the Covenant establishes secondary enforcement

4. Status of the International Covenant on Civil and Political Rights, U.N. TREATY COLLECTION, n. 7 http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#7 (last visited Jan. 10, 2012). In article 49, paragraph 2, the ICCPR provides that: "The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession."

5. Id.


8. Id. art. 2, para. 3(b), (c).
mechanisms at the international level. It establishes the Human Rights Committee, which is made up of eighteen elected human rights experts from different state parties who serve in a personal, independent capacity. The Committee is empowered to request reports from states on their implementation of the Covenant rights. It is then entitled to transmit its own reports in response to those of state parties, which can help to induce compliance. The Committee may also periodically issue "general comments" setting out its interpretation of Covenant rights. Given the expertise and experience of the Committee, these general comments "command authenticity and respect."

Individuals subject to the jurisdiction of state parties to the First Optional Protocol of the ICCPR are entitled to take advantage of a further enforcement mechanism. The First Optional Protocol authorizes the Committee to act in a quasi-judicial capacity by receiving and considering "communications" from individuals asserting a violation of rights contained in the Covenant. In making a communication, individuals must set out the facts on which the complaint is based and why they believe these facts disclose a violation of the Covenant. Individuals must also detail the steps they have taken to exhaust domestic remedies before filing the communication. The Protocol's requirement that individuals exhaust domestic remedies before submitting a communication denotes the Committee's status as a secondary enforcement mechanism to domestic judicial channels.

Consideration of communications is entirely on the basis of

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9. Members of the Committee have all been legal experts of some kind, reflecting the emphasis on "legal experience" in the ICCPR. Id. art. 28, para. 2; see McGoldrick, supra note 6, at 45.

10. ICCPR, supra note 7, art. 28.

11. Id. art. 40, para. 1(b).

12. Id. art. 40, para. 4.

13. Id.


18. Id. art. 2.
written information submitted by the individual and state party concerned. State parties are provided with the opportunity to submit written explanations or statements clarifying the alleged violation.\textsuperscript{19} The Committee then considers all of the written material before providing its non-binding “views” on the merits of the communication to the individual complainant and the state party.\textsuperscript{20} Despite being merely hortatory, Committee views, which are published in the style of a judicial opinion,\textsuperscript{21} carry persuasive authority. As observed by former Committee member Professor Christian Tomuschat:

The views of the Human Rights Committee gain their authority from their inner qualities of impartiality, objectiveness and soberness. If such requirements are met, the views of the Human Rights Committee can have a far-reaching impact, at least vis-à-vis on such Governments which have not outrightly broken with the international community and ceased to care anymore for concern expressed by international bodies.\textsuperscript{22}

As the International Court of Justice lacks jurisdiction to interpret the ICCPR,\textsuperscript{23} the Committee can be correctly characterized as the authoritative international interpreter of the rights within the ICCPR. When it determines that the Covenant has been violated, the Committee will direct states to take appropriate remedial actions. Accordingly, the 114 state parties to the First Optional Protocol frequently alter their legislation and policies to minimize the political fallout associated with adverse Committee decisions.\textsuperscript{24} In this way, the individual communications procedure can be characterized as a robust enforcement mechanism.

II. Article 26

Article 26 of the ICCPR provides a broad-based equality and

\begin{itemize}
  \item 19. \textit{Id.} art. 4.
  \item 20. \textit{Id.} art. 5.
  \item 21. \textit{TYAGI, supra} note 14, at 587.
  \item 23. \textit{TYAGI, supra} note 14, at 51.
\end{itemize}
non-discrimination guarantee. It 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.25

Article 26 is expressed in similar terms to article 2(1), which provides:

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.26

The italicized passage indicates that the non-discrimination guarantee in article 2(1) is limited to the rights enumerated in the Covenant. Carlson and Gisvold characterize article 2(1) as having an "accessory character"—it may only be invoked as a guarantee of non-discrimination in the state party’s conferral of another Covenant right.27 In contrast, the terms of article 26 do not limit its application to Covenant rights. Article 26 mandates equality before, equal protection of, and a guarantee of non-discrimination before “the law.” The Committee, in its General Comment No. 18, confirmed that article 26 is a stand-alone, autonomous equality guarantee with application beyond the rights enumerated in the Covenant. It noted that article 26:

[P]rohibits 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 content should not be

25. ICCPR, supra note 7, art. 26.
26. Id. (emphasis added).
27. SCOTT N. CARLSON & GREGORY GISVOLD, PRACTICAL GUIDE TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 156 (2003).
discriminatory.28

Despite the broad terms of article 26, the Committee further observed that not every distinction in treatment would constitute unlawful discrimination. Differences in treatment would not violate article 26 if the criteria for differentiation were "reasonable and objective," and the aim was to achieve a legitimate purpose under the Covenant.29

III. ARTICLE 23(2)

The "stand-alone" nature of article 26 means that state parties must measure their relationship-recognition policies against "reasonable and objective" criteria if these policies exclude same-sex couples. However, article 26 is not the only applicable Covenant right in relation to marriage. Article 23(2) provides that "[t]he right of men and women of marriageable age to marry and to found a family shall be recognized."

On its face, the article 23(2) right need not be limited to heterosexual couples. It does not state that men and women must marry each other—instead, it indicates that each gender has a right to marry. However, two major considerations point against such an interpretation. The first is the language of article 23(2) when compared to other Covenant rights. While other rights in the Covenant are expressed in universal terms, expressing that the rights apply to "all peoples" and "everyone," article 23(2) is the only right in which the beneficiaries of the right are divided by gender. The gendered language indicates that the right of a man to marry must be exercised in concert with a woman, and vice versa.

The second consideration is the historical context in which the ICCPR was adopted and ratified. Same-sex marriage did not receive legal recognition until the Netherlands became the first state to provide the right in 2001.30 Accordingly, it cannot be argued that the


29. Id. ¶13. The reasonable and objective inquiry is highly subjective, making it difficult to predict how it will be applied in future. The Committee has in practice proceeded with the inquiry on a case-by-case basis. See, e.g., JOSEPH, SCHULTZ & CASTAN, supra note 24, at 540–56 (surveying communications).

states signing and ratifying the Covenant in the 1960s and 1970s believed they were undertaking to recognize marriage equality.

The preparatory materials to the ICCPR, otherwise known as the *travaux préparatoires*, support this historical understanding. There was no discussion of the intended sex of the marital partners when article 23 was negotiated. Instead, the main focus of the debate was on the wording of article 23(4), which provides for the equality of spouses both during and upon dissolution of a marriage. The lack of attention given to the sex of spouses indicates that states simply understood marriage in its traditional, heterosexual sense.

The presence of a right to heterosexual marriage in the Covenant presents an obstacle for those seeking to invoke the ICCPR in support of same-sex marriage. While article 26 is a stand-alone equality and non-discrimination guarantee that would, on its face, require a state to advance reasonable and objective criteria for limiting marriage to heterosexual couples, it must be reconciled with the heterosexual conception of marriage in article 23(2). The need to reconcile articles 26 and 23(2) raises an issue of treaty interpretation.

IV. RECONCILING ARTICLE 23(2) AND ARTICLE 26

Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 (Vienna Convention) codify the broad rules of treaty interpretation. Article 31(1) sets out the broad rule of interpretation. It establishes that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Article 31(2) further provides that a treaty’s “context” includes its text, which in turn encompasses any preambles and annexes, and agreements or instruments made by the parties in connection with its conclusion.

The references in article 31(1) to “context” and “object and purpose” signify two major approaches that can be taken to reconcil-

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33. Id.
34. Id. art. 31(2).
ing articles 23(2) and 26 of the ICCPR. The first is a textualist approach that attempts to reconcile the two articles by focusing on the strict wording of the Covenant.\textsuperscript{35} The second is a broader teleological approach that views the Covenant as a living instrument, capable of evolving over time in accordance with changing state party practice.\textsuperscript{36}

Keeping in mind the gendered language and drafting history of article 23(2), a purely textualist approach to reconciling the two articles militates against a right to same-sex marriage in the Covenant. As article 23(2) specifically provides for a right to marriage, "logic, consistency and integrity [of the Covenant]" dictate that article 26 cannot be used to extend the nature of that specific right.\textsuperscript{37} In other words, because the Covenant merely requires state parties to provide for heterosexual marriage, article 26 would undermine the express wording of article 23(2) if it could be used to impose a further, unenumerated obligation on state parties to provide for same-sex marriage. This principle is expressed in the well-known maxim \textit{lex specialis derogat generali}—specific law (article 23(2)) prevails over general law (article 26).\textsuperscript{38} The primary advantage of this textualist approach to interpretation is that the internal coherence and integrity of the Covenant is upheld.\textsuperscript{39} Article 26 is therefore only applicable to those rights not specifically enumerated in the Covenant.

In contrast, a teleological approach to interpretation provides three reasons in support of the proposition that the Covenant contains a right to same-sex marriage. First, article 31(1) of the Vienna Convention directs consideration of the "object and purpose" of the treaty at issue. The object and purpose of the Covenant, expressed in its preamble, supports marriage equality. The relevant section reads:

\begin{quote}
The States Parties to the present Covenant,
Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of \textit{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
\end{quote}

\textsuperscript{36} \textit{Id.} at 578.

\textsuperscript{38} \textbf{BLACK'S LAW DICTIONARY} (9th ed. 2009).
\textsuperscript{39} Zanghellini, \textit{supra} note 37, at 144.
in the world .... Agree upon the following articles ....40

The preamble emphasizes the dual principles of human dignity and equality. A teleological approach would seek to give these principles effect when interpreting article 23(2). Meaningful recognition of the "inherent dignity" of persons suggests that individuals be permitted to marry persons with whom they have formed significant emotional and affective attachments, regardless of sex. The 2008 California Supreme Court decision in favor of marriage equality was premised on the principle that marriage equality promotes human dignity and equality. The Court noted:

One of the core elements of the right to establish an officially recognized family that is embodied in the California constitutional right to marry is a couple's right to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families, and assigning a different designation for the family relationship of same-sex couples while reserving the historic designation of "marriage" exclusively for opposite-sex couples poses at least a serious risk of denying the family relationship of same-sex couples such equal dignity and respect.41

Second, a teleological approach to interpretation is likely to view the interrelationship between the rights in the ICCPR more expansively than a strictly textual, literal approach. In other words, while a textual approach would hold that article 23(2) effectively trumps the general equality guarantee in article 26, an evolutionary approach would support a reading of the Covenant that recognized the integrated, interrelated nature of rights. Under it, the specific right to marriage in article 23(2) would be "informed" by the general guarantee of equality and non-discrimination in article 26. Article 26 would interpret article 23(2) as recognizing the right of men and women to marry the sex of their choice, rather than necessarily the other. A broader interpretation of the article 23(2) marriage right is "arguably more sound"42 than an interpretation which considers the provision in isolation from the rest of the Covenant.

Finally, a teleological approach would provide scope to view the Covenant as a living instrument capable of changing over time. It

40. ICCPR, supra note 7, pmbl. (emphasis added).
41. In re Marriage Cases, 183 P.3d 384, 400 (Cal. 2008).
would characterize the right to marriage, like other rights, as capable of evolving to reflect contemporary social and political morality. Advocates could point to the increasing prevalence of same-sex marriage in national jurisdictions to argue that the traditional understanding of marriage is changing to accommodate same-sex relationships. Adopting a teleological approach in this context would suggest that a liberal interpretation be given to article 23(2).

Accordingly, the Committee is faced with two interpretative approaches that present different outcomes for same-sex marriage recognition. Evidence of increasingly evolutionary interpretations is found in the Committee's jurisprudence on communications alleging sexual orientation discrimination. These communications are discussed below.

V. COMMITTEE JURISPRUDENCE

A. Toonen v Australia

The Toonen communication was the first decision of the Committee that opened the door for discrimination claims based on sexual orientation. Nicholas Toonen was a gay rights activist who challenged provisions of the Tasmanian Criminal Code that outlawed all forms of private homosexual conduct between consenting adults. He asserted that the continued existence of the law threatened his private life and liberty and encouraged a climate of widespread discrimination and prejudice against gay people in Tasmania. After unsuccessfully advocating for legislative change within the state, Toonen brought a claim before the Committee asserting violations of his rights under articles 2(1), 17 (privacy) and 26 of the ICCPR. The violation of the equality right was asserted on the basis that the Criminal Code did not outlaw the same private sexual activities between heterosexual and lesbian couples.

Australia conceded that Toonen had been the victim of arbi-

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45. Toonen, supra note 43, at para. 2.1–2.7.
46. Id. at para. 3.1.
47. Id. at para. 3.1(c).
trary interference with his private life.\textsuperscript{48} It informed the Committee that Tasmania was the sole remaining Australian state that continued to criminalize homosexual activity.\textsuperscript{49} Continued decriminalization reflected a general consensus within Australia that criminalizing consensual adult homosexual conduct was no longer seen as necessary to sustain the "moral fabric" of Australian society.\textsuperscript{50} As a result, it neither attempted to justify the Criminal Code on public health or moral grounds, nor advance "reasonable and objective criteria" that might render the discrimination lawful under article 26.\textsuperscript{51}

Australia did, however, seek the Committee's guidance in respect of the prohibited grounds of discrimination in article 26. Having reviewed General Comment No. 18 and finding that it suggested the Committee would favor an expansive approach to the prohibited grounds, Australia questioned whether sexual orientation discrimination would fall under the catch-all term "other status" in article 26.\textsuperscript{52} In response, the Committee "confine[d] itself" to noting that the reference to "sex" in articles 2(1) and 26 encompassed sexual orientation.\textsuperscript{53} It concluded that there had been a violation of Toonen's right to privacy under article 17, rendering it unnecessary to consider whether there had also been a violation of article 26.\textsuperscript{54}

The Committee's expansive reading of "sex" perhaps represents a more conservative approach than explicitly recognizing "sexual orientation" as a freestanding ground of prohibited discrimination under the catch-all term "other status." However, the Committee's failure to recognize sexual orientation as a freestanding ground of prohibited discrimination has had little practical impact on the ability of LGBT persons to have recourse to the Committee as a secondary enforcement mechanism. In fact, Toonen was significant for giving complainants the green light to bring future claims of discrimination on the basis of sexual orientation before the HRC.

\textsuperscript{48} Id. at para. 6.1.
\textsuperscript{49} Id. at para. 6.6.
\textsuperscript{50} Id. at para. 6.7.
\textsuperscript{51} Id. at para. 6.1, 6.7.
\textsuperscript{52} Id. at para. 6.9.
\textsuperscript{53} Id. at para. 8.7.
\textsuperscript{54} Id. at para. 11. In a separate opinion, Mr. Bertil Wennegren held that there was also a violation of the equality right under article 26. This was on the basis that the impugned provisions of the Tasmanian Criminal Code distinguished between heterosexual and homosexual couples, with only the consensual sexual acts of the latter group being criminalized. The provisions also outlawed consensual sexual acts between same-sex male couples, but not same-sex female partners.
B. Joslin v New Zealand

The issue of whether the ICCPR provided a right to same-sex marriage was placed squarely before the Committee in Joslin v New Zealand.55 The authors were two lesbian couples who had unsuccessfully applied for marriage licenses pursuant to the Marriage Act 1995. Both the New Zealand High Court and Court of Appeal (in Quilter v. Attorney-General, discussed below) had affirmed that the Act confined marriage to between one man and one woman. Having exhausted their domestic appeal avenues,56 the authors submitted a communication to the HRC. In it, they asserted that the failure of New Zealand to allow same-sex marriage violated a number of rights, including the article 17 right to privacy, article 23 rights to family and marriage and article 26 guarantee of equality and non-discrimination.57

New Zealand advanced a number of arguments as to why the ICCPR did not oblige it to open marriage to same-sex couples. First, the state placed significant weight on the failure of any country, as of November 1998, to provide for same-sex marriage. This failure highlighted the "fundamental understanding" that the Covenant and other international human rights instruments confined marriage to between a man and a woman.58 Second, the use of gender-specific terms under article 23(2), contrary to the universal language deployed elsewhere in the Covenant, was cited as evidence that the Covenant conferred a right to heterosexual marriage only.59 Finally, the presence of this specific right to heterosexual marriage was argued to preclude a contrary interpretation being derived from the general equality guarantee in article 26.60

In a brief consideration of the merits running to a mere four paragraphs, the Committee held that article 23(2) had been "consistently and uniformly understood" to confer a right to marry on oppo-


56. Id. at para. 7.3. Although the authors had not exercised their further right of appeal to the Privy Council, New Zealand expressly declined to challenge admissibility on this basis. In light of this concession, the Committee decided the communication was admissible.

57. Id. at para. 1.

58. Id. at para. 4.2, 4.3, 4.11.

59. Id. at para. 4.3.

60. Id. at para. 4.5.
same-sex couples only. In light of the narrow scope of this right, New Zealand's "mere refusal" to provide for same-sex marriage could not be held to violate the Covenant. The Committee's failure to acknowledge the potential gloss that article 26 might place on article 23(2) demonstrated a conservative reticence to explore teleological approaches to interpretation.

Despite this adverse finding for the authors of the communication, the Committee's views contain two indications that more favorable views may be handed down if a similar case was brought today. First, the Committee qualified its understanding of the scope of article 23(2) in light of how states "consistently and uniformly understood" that article. The qualification indicates that the Committee would expand the boundaries of article 23(2) if states' understanding of the nature of marriage changed. For instance, a marked increase in the number of states legalizing same-sex marriage would undermine the "uniform understanding" among state parties that marriage is a necessarily heterosexual institution.

On this point, opponents of same-sex marriage may argue that an increase in the incidence of jurisdictions extending marriage to same-sex couples would not alter the understanding of the article 23(2) right as at the time when state parties signed and ratified the Covenant. However, such arguments are likely to fail in the face of the increasingly liberal views of the Committee towards LGBT rights. Such interpretations ensure the continued congruence between state practice at a domestic level and their obligations in the international realm.

The second indication that the Committee may in the future adopt a broader right to marriage under international law comes from the separate concurring opinion of Committee members Mr. Rajjoomer Lallah and Mr. Martin Scheinin. Noting the majority's views that New Zealand's failure to provide same-sex marriage did not constitute a violation of article 26, the concurring members observed that:

This conclusion 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

61. Id. at para. 8.2.
62. Id. at para. 8.3.
63. See infra Parts V.C and V.D (discussing the Committee's opinions in Young v. Australia and X v. Columbia).
supports the position that such differentiation may very well, depending on the circumstances of a concrete case, amount to prohibited discrimination. . . . [W]hen the Committee has held that certain differences in the treatment of married couples and unmarried heterosexual couples were based on reasonable and objective criteria and hence not discriminatory, the rationale of this approach was in the ability of the couples in question to choose whether to marry or not to marry, with all the entailing consequences. No such possibility of choice exists for same-sex couples in countries where the law does not allow for same-sex marriage or other types of recognized same-sex partnership with consequences similar to or identical with those of marriage. Therefore, a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26, unless otherwise justified on reasonable and objective criteria. 64

Accordingly, same-sex couples may succeed in bringing before the Committee communications asserting that they are denied other benefits conferred by state parties on heterosexual couples. If the state party is unable to offer reasonable and objective criteria as to why certain benefits offered to heterosexual couples are denied to same-sex couples, the Committee may hold that the denial violates article 26.

C. Young v. Australia

Australia faced the difficulty of providing reasonable and objective criteria to justify the provision of differential benefits when responding to a claim for equal pension benefits in Young v. Australia. 65 Mr. Young was the surviving partner of a long-term relationship with the deceased, a former serviceman. He was denied a veteran’s dependent pension by the Repatriation Commission under the Veteran’s Entitlement Act on the basis that the Act conferred pensions on opposite-sex couples only. After unsuccessfully appealing the denial to both the Veteran’s Review Board and the Human Rights and Equal Employment Opportunity Commission, Young filed a

64. *Id.* at Appendix (emphasis added).

communication with the Committee arguing that the denial of the pension on the basis of his sexual orientation violated his right to equal treatment in breach of article 26 of the ICCPR.\textsuperscript{66}

The Committee upheld his claim. Australia failed to advance any arguments in support of how the distinction between same and opposite-sex couples in the provision of veteran dependent pensions satisfied the “reasonable and objective criteria” test for discrimination under article 26.\textsuperscript{67} Unlike unmarried heterosexual couples, Mr. Young and his partner had not had the choice to marry and take advantage of the pension benefits.\textsuperscript{68} In providing Young with an “effective remedy” under article 2(3)(a) of the Covenant, the Committee concluded that he was entitled to have his pension application reconsidered without discrimination on the basis of his sex or sexual orientation.\textsuperscript{69} Australia was also directed to ensure that similar violations did not occur in future.\textsuperscript{70}

The majority’s robust interpretation of article 26 led Committee members Mrs. Ruth Wedgwood and Mr. Franco DePasquale to issue a cautionary concurring opinion.\textsuperscript{71} They first took issue with the Committee’s lax application of the First Optional Protocol’s requirement that individuals exhaust domestic remedies before lodging complaints with the Committee. Mr. Young had failed to exercise further appeal rights to higher Australian courts before the Committee ruled his communication was admissible. The failure to appeal, cautioned the members, had deprived Australian courts of the opportunity to voluntarily apply Covenant norms in any decision handed down. Noting that the number of complaints before the Committee continued to increase, the two warned that the “Committee will have to exercise greater discipline in consigning to the national courts the decisions that are properly theirs.”\textsuperscript{72}

In addition to cautioning that the proper adjudicative body here would have been an Australian court, the two members sought to limit the precedential value of the Committee’s findings in this case. Australia’s failure to even attempt to offer reasonable and ob-

\textsuperscript{66} Id. at para. 3.1.
\textsuperscript{67} Id. at para. 10.4.
\textsuperscript{68} Id.
\textsuperscript{69} Id. at para. 12.
\textsuperscript{70} Id.
\textsuperscript{71} Id. at Appendix. Australia relied upon Mr. Young’s failure to exhaust domestic remedies as a basis for challenging the admissibility of his case before the Committee.
\textsuperscript{72} Id.
jective criteria under the article 26 analysis resulted in the Committee "essentially enter[ing] a default judgment." 73 This failure, warned Wedgwood and DePasquale, ought not to be taken as an admission that differential treatment in the provision of entitlements, based on sexual orientation, could never be justified under article 26. 74 In a future communication, a respondent state could theoretically successfully advance such criteria. Accordingly, in the view of the two Commissioners, "the Committee must continue to be mindful of the scope of what it has, and has not, decided in each case." 75

By emphasizing both the exhaustion of domestic remedies requirement and the possibility that states may successfully put forward reasonable and objective criteria, the two members were seeking to mollify potential concerns that the Committee was intruding too far into the realm of policy decisions better left to states. In other words, state parties should be given the opportunity to justify or remedy policies that may violate the Convention before weathering criticism from the Committee. Providing an opportunity not only respects state sovereignty over often-controversial social policy decisions, but also insulates the Committee from accusations of overreach and interference.

D. X v. Colombia

The concurring opinion's cautions against Committee overreach in Young v. Australia were reiterated in a more recent case, X v. Colombia. 76 Similarly to Young, the communication concerned a surviving partner of a male same-sex relationship applying for transfer of his deceased partner's pension. The Social Welfare Fund of the Colombian Congress denied his request on the basis that the two did not "share married life," as required by the relevant Act. 77 After unsuccessfully pursuing a range of domestic remedies, X lodged a complaint with the Committee, asserting violation of a range of articles including article 26.

The Committee majority conducted its analysis of the merits

73. Id.
74. Id.
75. Id.
77. Id. at para. 2.3.
exclusively under article 26. It reiterated that disparities in benefits between married couples and unmarried opposite-sex couples were justifiable under article 26 due to the ability of the latter to choose whether to marry or not.78 Here, “married life” had been interpreted to include unmarried opposite-sex couples, but not same-sex. The Act accordingly drew a distinction between opposite-sex and same-sex couples. As the state failed to advance any arguments that this distinction was based on “reasonable and objective criteria,”79 it was held to have violated X’s rights under article 26. Like Mr. Young, X was entitled to have his request for a pension reconsidered without discrimination based on his sex or sexual orientation, and Colombia was directed to take steps to prevent future violations.

_X v. Colombia_ represents a significant step forward in the Committee’s jurisprudence on LGBT rights. The majority observed that while unmarried couples possessed the option of getting married in order to gain pension benefits, there was no comparable option for same-sex couples.80 Impugning the pension law on this basis highlights the Committee majority’s recognition of same- and opposite-sex couples as equally deserving of legal protection. This recognition provides a solid foundation for the potential success of a future communication that challenged a state party’s denial of same-sex marriage.

The majority’s progressive decision provoked a vocal and conservative dissent from two Committee members, Mr. Abdelfattah Amor and Mr. Ahmed Tawfik Khalil. The two chastised the majority for a “pioneering and standard-setting role [that was not] circumscribed by legal reality.”81 At heart of the dissent was a criticism that the Committee was overreaching its proper role in interpreting state party obligations under the Covenant. The Committee, as far back as _Toonen_, had “gone beyond mere interpretation” in affirming that sexual orientation fell within the prohibited grounds of discrimination in article 26.82 It had effectively “created” a new right that was neither supported by the text of the Covenant, nor the historical

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78. _Id._ at para. 7.2.

79. Colombia advanced an argument at para. 4.10 that the purpose of the rules governing the pension regime was to protect heterosexual unions, and not to undermine same-sex partnerships. However, in paragraph 7.1, the Committee majority rejected this justification with no analysis.

80. _X v. Colombia, supra_ note 76, Annex.

81. _Id._

82. _Id._
context in which it was adopted.\textsuperscript{83} Its progressive, teleological approach to interpretation minimized the significance of article 23(2), which excluded same-sex couples from the concept of "family" deserving protection under the Covenant.\textsuperscript{84}

Finally, the dissenters questioned the application of the "reasonable and objective criteria" test for justifiable discrimination. They advocated reversing the burden of proof under this inquiry. Rather than states being directed to justify their policies, LGBT individuals seeking benefits ought to be required to assert precisely why they ought to be entitled to the same protection as heterosexuals. This proposition rested on what the members believed to be the presumptive legality of heterosexual marriage, due to its widespread prevalence across the societies of state parties. The dissenters rejected the conventional starting point that all couples are entitled to equal protection.\textsuperscript{85}

The vehemence of the dissenters' views aside, they do highlight the important point that the Committee must ensure that its own views do not fall too far out of line with those held by the majority of state parties to the Covenant. Excessive variance between interpretations of the Covenant at the international and domestic levels would result in the Committee losing legitimacy and respect.

VI. DOMESTIC UTILIZATION

Domestic utilization of the ICCPR and Committee jurisprudence in legal and policy debates helps to harmonize the Committee's and state parties' interpretations of the rights of LGBT persons. Three countries—New Zealand, Australia and South Africa—provide good examples of the extent of domestic utilization of the Committee's jurisprudence.

A. New Zealand

New Zealand's national debate on same-sex marriage rose to prominence with the 1998 Court of Appeal decision in \textit{Quilter v. Attorney-General}.\textsuperscript{86} The appellants in the case were three lesbian cou-
ples who had unsuccessfully attempted to procure marriage licenses under the Marriage Act of 1955. Although the Act did not define the term "marriage," the lower tier High Court accepted that the term was understood in 1955 to be limited to its traditional conception as encompassing only opposite-sex unions. On appeal, the appellants argued that the prohibition on sexual orientation discrimination under section 19 of the New Zealand Bill of Rights Act 1990 (BORA) required the traditional definition to be reinterpreted to include same-sex couples.

Although the bench of five justices unanimously held that any change in the traditional definition of marriage would need to come from Parliament, a striking feature of the Court of Appeal's judgment was the extent of its analysis of New Zealand's obligations under the ICCPR. Such analysis is partially explained by the long title of the BORA. The long title provides that the BORA is an Act to "affirm New Zealand's commitment to the International Covenant on Civil and Political Rights." The Covenant is also mentioned in the long title to the Human Rights Act 1993. The reference to the Covenant is significant because section 19 of the BORA imports the prohibited grounds of discrimination that are listed in the Human Rights Act.

Justice Thomas began his analysis of New Zealand's ICCPR obligations by confirming that article 26 was vested with "substantive and autonomous effect." He did not view the right to marry, contained in article 23(2), as determinative of the issue. Rather, he viewed Article 23(2) as more properly concerned with ensuring the freedom of marriage, and the equal rights of spouses entering into it, rather than the sex of the spouses. He analyzed the jurisprudence of the Human Rights Committee, noting that:

> It may well be ... that the Human Rights Committee may not presently hold that a prohibition on same-sex

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87. Id. at 523.
88. Id.
89. Id.
92. Id. at 553.
93. Id.
marriage is a violation of art. 26. But it would seem unnecessary and unfortunate to seek to construe the article itself negatively or narrowly in an attempt to arrive at that conclusion. To date the committee have declined to adopt a negative or narrow approach as is evident, for example, from its decision to hold that art 26 embraces sexual orientation as well as sex and to declare that the article is to be construed independently of other provisions in the covenant.94

Justice Thomas then conducted a brief inquiry into whether limiting marriage to heterosexual couples would satisfy the "reasonable and objective" test that is required to render distinctions in treatment lawful under article 26.95 He observed that the two primary arguments in favor of heterosexual marriage—definitional and procreative—were unlikely to pass this test.96 Accordingly, he determined that the exclusion of same-sex couples from marriage "inescapably judges them less worthy of the respect, concern and consideration deriving from the fundamental concept of human dignity underlying all human rights legislation."97 However, despite finding that the denial of marriage to same-sex couples constituted impermissible discrimination under the BORA, Justice Thomas concluded that any change to the traditional meaning of "marriage" would need to come from the legislature, not the judiciary.98

Contrary to Justice Thomas, Justice Keith argued that article 26 "was to be supported and qualified by other provisions ... Both the general and the particular background to art 26 might have suggested that it would in practice have a limited stand-alone effect."99 He argued that in providing for a right to marriage, article 23(2) was

94. Id. at 552.
95. Id.
96. Id. The definitional argument holds that marriage has always been defined as a union between one male and one female, while the procreative argument posits that marriage is entered into for the purpose of producing children.
97. Id. at 555.
98. Id. at 541–543. Justice Thomas held that, in enacting the Marriage Act of 1955, the New Zealand Parliament clearly intended to limit the definition of marriage to marriages between one man and one woman. Due to the BORA's status as an ordinary Act of Parliament rather than supreme law, the Court could not use the BORA to extend the clear meaning of marriage under the Marriage Act of 1955 to same-sex couples. According to Justice Thomas, "Parliament [was] both constitutionally and practically equipped to decide" whether or not to pass legislation extending marriage to same-sex couples. Id.
99. Id. at 561–62.
the governing provision.\textsuperscript{100} As marriage was understood in purely heterosexual terms at international law, the standing interpretation of traditional marriage in New Zealand could not be impugned as discriminatory.\textsuperscript{101}

Following their unsuccessful appeal, the \textit{Quilter} appellants forewent an appeal to the Privy Council and instead lodged a complaint with the HRC. The complaint was reported as the \textit{Joslin} communication, discussed above.\textsuperscript{102}

On April 17, 2013, New Zealand became the thirteenth country to recognize same-sex marriage when its Parliament enacted the Marriage (Definition of Marriage) Amendment Bill.\textsuperscript{103} The Act recognizes marriages between couples regardless of their sex, sexual orientation, or gender identity.\textsuperscript{104}

Supporters of marriage equality invoked the ICCPR and the relevant communications of the HRC as the Bill moved through the legislative process. During the Bill’s first reading, its sponsor, Louise Wall MP, observed that “[i]t is the State’s role to uphold our laws and our international obligations and to ensure that everyone has equality under the law.”\textsuperscript{105} Ms. Wall then credited the plaintiffs in \textit{Joslin} with having tested the Marriage Act against the ICCPR before the HRC, observing that “their courage in challenging the discriminatory implementation of the provisions in the Marriage Act set the platform for the consideration of this bill tonight.”\textsuperscript{106}

After passing its first reading, individuals and organizations were given the opportunity to make public submissions in respect of the Bill.\textsuperscript{107} The Human Rights Commission, New Zealand’s national human rights institution, devoted a section of its submission to discussing the international standards to which New Zealand was sub-

\textsuperscript{100} \textit{Id.} at 562.
\textsuperscript{101} \textit{Id.} at 563.
\textsuperscript{102} See \textit{Joslin}, supra note 55, at para. 2.4–3.1.
\textsuperscript{103} Isaac Davidson, \textit{Same-sex marriage law passed, NEW ZEALAND HERALD} (APR. 17, 2013, 11:00 PM), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10878200.
\textsuperscript{104} Marriage (Definition of Marriage) Amendment Act 2013 (N.Z.).
\textsuperscript{105} [2012] 683 NZPD 4913 (N.Z.) (statement of Louise Wall MP).
\textsuperscript{106} \textit{Id.}
ject. The Commission discussed the important stand-alone article 26 right to equality and non-discrimination. It sought to minimize the applicability of article 23(2) to the issue of same-sex marriage by noting it is the only right in the ICCPR referring to “men and women” rather than “persons.” Seeking also to minimize the effect of Joslin, the Commission suggested that the guarantees of equality within the ICCPR should be interpreted consistently with increasingly favorable social attitudes towards marriage equality.

B. Australia

Recourse to article 26 of the ICCPR has been particularly strong in recent Australian debates on same-sex marriage. The absence of a national charter or bill of rights explains why Australian citizens frequently invoke article 26.

In June 2009, Green Party Senator Sarah Hanson-Young introduced a private senator’s bill that aimed to amend the definition of “marriage” in the federal Marriage Act 1961 so as to include same-sex unions. The bill, entitled the Marriage Equality Amendment Bill 2009 (MEAB) was referred to the Senate Legal and Constitutional Affairs Legislation Committee (Senate Committee) for legal consideration and public consultation. During its consideration of the MEAB, the Senate Committee received a record 28,000 submissions, the most ever received by such a committee in Australia.

As noted by the Senate Committee, “[o]ne of the key arguments for legalizing same-sex marriage was its protection under Aus-


109. Id. at 5–6.

110. Id.

111. Id. at 6–7.


114. Id. at para. 1.1; Appendix 1 (Dissenting Report by Australian Greens).
tralia’s international human rights obligations.”

A number of organizations specifically referred to article 26 in their submissions before the Senate Committee.

Analysis of the ICCPR formed the central plank of the submission made by Dr. Paula Gerber and others from the Castan Centre for Human Rights Law at Monash University in Melbourne. The Centre highlighted the autonomous nature of the article 26 guarantees of equality and non-discrimination. It argued that Joslin ought to be distinguished from the more positive interpretations given to LGBT rights in Toonen and Young because it had been able to avoid addressing the issue of discrimination under article 26 by interpreting the right to marriage under article 23(2). Article 23(2) was characterized as “ambiguous” in determining which couples were entitled to be married, because it did not explicitly exclude same-sex unions. In the Centre’s view, the dual operation of changing societal attitudes towards same-sex marriage, and the need to implement human rights in a manner that recognizes human dignity, equality and justice, would over time result in article 23(2) being interpreted through the “lens” of article 26.

Article 26 was also used by the Australian Human Rights Commission as the primary basis for its submission to the Senate Committee in favor of the MEAB’s passage. It surveyed the leading HRC communications on LGBT rights. Like the Castan Centre, it sought to minimize the significance of Joslin. The Commission asserted that Joslin did not prevent state parties from recognizing same-sex marriage. Instead, it merely did not impose a positive obligation on them to do so. Furthermore, the Committee’s view as expressed in Joslin was likely to evolve in accordance with the increasing trend among state parties to give judicial and legislative recogni-

115. Id. at para. 3.31.


117. Id. at 11.

118. Id. at 8, 24.


120. Id. at para. 21.
tion to same-sex marriage.\textsuperscript{121}

Similarly to the Castan Centre and Commission’s submissions, the Human Rights Law Resource Centre in Melbourne argued that the Marriage Act in its present form was “incompatible” with Australia’s obligations under both articles 2 and 26 of the ICCPR.\textsuperscript{122} It criticized \textit{Joslin} for “focusing narrowly” on the definition of marriage in article 23(2), in isolation from the broader equality provisions of the Covenant.\textsuperscript{123} A preferable approach, reflecting contemporary relationship structures, would treat the ICCPR as a “living document that is capable of responding to the changing norms and values of society.”\textsuperscript{124}

Despite the force of these submissions, the Senate Committee ultimately recommended that the MEAB not be passed, noting that the current heterosexual definition of marriage in the Act was “a clear and well-recognised legal term which should be preserved.”\textsuperscript{125} As a nod to same-sex couples, the Senate Committee did, however, recommend a governmental review of relationship recognition arrangements in order to provide consistent entitlements for same-sex couples under federal and state laws.\textsuperscript{126} The Senate itself later followed the Committee’s recommendations, rejecting the MEAB by a vote of forty-five to five.\textsuperscript{127}

Since the November 2009 report, the Australian marriage equality movement has been gaining momentum. In September 2010, Senator Hanson-Young reintroduced her Marriage (Equality) Amendment Bill into the Senate.\textsuperscript{128} Two months later, the House of Representatives supported a motion that requested Members of Parliament to seek their constituents’ views on same-sex marriage.\textsuperscript{129} After a year of public dialogue and debate, the Australian Labor Party in December 2011 passed a motion that would allow party mem-

\begin{itemize}
  \item \textsuperscript{121} \textit{Id.} at para. 23.
  \item \textsuperscript{123} \textit{Id.} at para. 14.
  \item \textsuperscript{124} \textit{Id.} at para. 17.
  \item \textsuperscript{125} Senate Report, \textit{supra} note 113, at para. 5.14.
  \item \textsuperscript{126} \textit{Id.} at para. 5.4.
  \item \textsuperscript{127} Witzleb, \textit{supra} note 112, at 158.
  \item \textsuperscript{128} \textit{Id.}
  \item \textsuperscript{129} \textit{Id.}
\end{itemize}
bers to vote according to their conscience, rather than party lines, on any bill that came before Parliament that would institute marriage equality. In February 2012, Senator Hanson-Young referred her reintroduced MEAB to a senate committee in order to once again receive public feedback on the issue of marriage equality. Most recently, two marriage equality bills were voted down in the Australian House of Representatives and Senate in September 2012.

C. South Africa

In the South African Constitutional Court decision of Minister of Home Affairs v. Fourie, Justice Sachs was charged with determining whether the denial of marriage to same-sex couples violated the nation’s constitution. As part of its unsuccessful attempt to confine marriage to opposite-sex couples, the South African government argued that the exclusion of same-sex couples could not be held discriminatory because international law recognized and protected heterosexual marriage only. It referred to both the Universal Declaration of Human Rights (UDHR) and the HRC’s views in Joslin in support of its proposition.

Justice Sachs dispensed with this contention quickly. He observed that there was nothing in either the UDHR or ICCPR that suggested families needed to be constituted according to any particular model. Furthermore, even if this was the instruments’ intention, such suggestion could not be taken as excluding the protection of other family structures at some future point. He added:

Indeed, rights 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. The horizon


134. Id. at para. 99.

135. Id. at para. 101.
of rights is as limitless as the hopes and expectations of humanity.\textsuperscript{136}

Justice Sachs rejected the government’s reliance on Joslin. The fact that the ICCPR did not require states to enact same-sex marriage could not be extrapolated to hold that the Covenant prohibited same-sex couples from participating in marriage.\textsuperscript{137} Accordingly, international law could not be used to deny same-sex couples marriage under South African law.\textsuperscript{138}

VII. COMMITTEE-STATE PARTY DIALOGUE

New Zealand’s, Australia’s and South Africa’s reliance on the ICCPR to support marriage equality demonstrates the existence of a dialogue between the Committee and domestic legal participants and institutions. As the Committee continues its trend towards giving the article 26 right to equality and non-discrimination liberal interpretations, proponents of same-sex marriage will invoke its authoritative views before domestic courts and legislatures. Likewise, the frequency with which domestic jurisdictions succeed in achieving marriage equality will embolden the Committee to move closer to an interpretation of the ICCPR that recognizes a right to same-sex marriage.

Several commentators have expressed great hope for the power of this Committee-state party dialogue in the same-sex marriage context. In a recent article, Sonia Bychkov Green goes so far as to assert that the number of jurisdictions legalizing same-sex marriage is resulting in the right attaining the status of customary international law.\textsuperscript{139} She cites the number of jurisdictions referring to international law obligations when justifying the legalization of same-sex marriage as evidence of the necessary state \textit{opinio juris} to confer customary status.\textsuperscript{140}

While well-meaning in her expression of hope for the influence of international human rights law in national debates on same-sex marriage, Green overstates its normative power. There is un-

\textsuperscript{136} Id. at para. 102.
\textsuperscript{137} Id. at para. 103.
\textsuperscript{138} Id. at para. 105.
\textsuperscript{140} Id. at 93.
doubtedly a trend towards greater recognition of same-sex marriage in a number of (predominantly Western) states. However, it is plainly incorrect to characterize the right as having already attained the status of customary international law.\textsuperscript{141} Green’s custom contention is likely driven by a desire to induce the United States to comply with its ICCPR obligations, despite its declaration that articles 1–27 are not self-executing.\textsuperscript{142}

Slightly less radical is Edward Sadtler’s contention that the Committee’s interpretation of the ICCPR “arguably mandates a right to same-sex marriage.”\textsuperscript{143} Sadtler expresses confidence in the dialogue between member states and the Committee, arguing that “by using international law to support arguments for same-sex marriage, gay and lesbian rights activists will assist the development of such a right.”\textsuperscript{144} This is correct.

However, these optimistic projections do not address the crucial question of precisely when the Committee will be sufficiently emboldened by messages from state parties to articulate a more marriage-equality protective interpretation of the ICCPR. In order to make this assessment, we need to examine the positive factors that would spur the Committee in this direction. It is also necessary to evaluate those negative factors that would make it reluctant to interpret the ICCPR in this way.

There are five factors that will likely have a material effect on the Committee’s willingness to interpret the Covenant in a manner that would recognize same-sex marriage. Presence of the first three factors will increase the willingness of the Committee to give the ICCPR a same-sex marriage friendly interpretation. These factors are (i) an increase in the number of state parties enacting same-sex marriage; (ii) greater “internal enforcement” of the Committee’s views through incorporation into national judicial decisions; and (iii) “external enforcement” of the Committee’s views through bilateral and multilateral diplomacy.

The final two factors act as constraints on the Committee’s recognizing a right to same-sex marriage in the ICCPR. These factors are (iv) the legitimacy and reputational costs the Committee would suffer if it pronounced an ICCPR right to same-sex marriage

\textsuperscript{142} Status of the ICCPR, supra note 4.
\textsuperscript{143} Sadtler, supra note 42, at 408.
\textsuperscript{144} Id.
before states had indicated they would accept this; and (v) an awareness that same-sex marriage recognition is overwhelmingly confined to Western states.

These five factors are discussed in turn.

1. Increase in the number of states enacting same-sex marriage

An increase in the number of state parties recognizing marriage equality would almost certainly prompt the HRC to articulate this right more strongly. Thirteen countries currently recognize a right to same-sex marriage. These countries are (in order of the date of enactment of marriage equality laws): the Netherlands, Belgium, Spain, Canada, South Africa, Norway, Sweden, Portugal, Iceland, Argentina, Denmark, Uruguay and New Zealand.145 All thirteen countries have ratified the ICCPR;146 together they represent approximately eight percent of the total number of state parties to the treaty.

Eight percent of state parties likely remains far from the level of marriage equality endorsement necessary for the Committee to interpret the ICCPR as providing for same-sex marriage without apprehending a backlash from state parties. However, this percentage does not take into account states that provide other forms of legal recognition for same-sex relationships. An additional nineteen state parties to the ICCPR provide intermediary relationship recognition regimes, such as civil unions and domestic partnerships, for same-sex couples.147 Adding these states to those which recognize full marriage equality produces a figure of seventeen percent of state parties to the ICCPR.

Alongside states that provide for full marriage equality, these nineteen states should be included in the assessment of the level of support the Committee would command if it affirmed an ICCPR right to same-sex marriage. This is because these states have shown a willingness to recognize the rights of same-sex couples, which reduces the likelihood of a backlash if the Committee gave the ICCPR a


146. Status of the ICCPR, supra note 4.

147. These states are Andorra, Australia, Austria, Brazil, Colombia, Croatia, Czech Republic, Denmark, Ecuador, Finland, France, Germany, Greenland, Hungary, Ireland, Luxembourg, Slovenia, Switzerland and the United Kingdom. See International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), Lesbian and Gay Rights in the World (May 2011), available at http://old.ilga.org/Statehomophobia/ILGA_map_2011_A4.pdf.
same-sex marriage friendly interpretation. Moreover, the Young and X v. Colombia cases discussed above demonstrate the difficulty these states would face in attempting to articulate "reasonable and objective" bases for differential relationship recognition regimes between same- and opposite-sex couples. This difficulty would make them less likely to resist moving from domestic partnership or civil union regimes to full marriage equality.

Furthermore, the seventeen percent figure does not take into account the fact that a number of states within the United States have given some form of legal recognition to same-sex relationships.148 Given that the United States arguably remains the most influential state within the United Nations system due to its population size and level of financial contributions,149 its position on marriage equality may exert significant weight on the Committee.

The degree of support for marriage equality expressed by the most influential states within the international community likely exerts an even greater influence on the Committee than a simple tabulation of the number of states recognizing same-sex marriage. Support for same-sex marriage within leading international powers such as the United States and United Kingdom150 will arguably count for more than support in a number of smaller, less influential states. Accordingly, it is incorrect to speculate that the Committee would articulate an ICCPR right to marriage equality when a numerical majority of state parties to the ICCPR recognize this right domestically. The international standing, rather than sheer number, of the states recognizing the right is likely to carry greater weight in the Committee's calculations.

The number of states (including those which play an influential role in international affairs) recognizing same-sex marriage is probably not currently sufficient to provide the Committee with the support necessary to read a right of same-sex marriage into the Covenant. However, domestic and international pressures in support of


150. Note that the United Kingdom is currently debating the issue of same-sex marriage. See, e.g., Ministers to consult on legalising same-sex marriages, BBC News (Sept. 17, 2011), http://www.bbc.co.uk/news/uk-politics-14960385. The fact that neither the United States nor the United Kingdom is party to the First Optional Protocol would not affect the degree of influence they would exert on the Committee's views in response to individual communications if these states enacted same-sex marriage.
marriage equality are gradually converging. These pressures represent additional variables that will increase the likelihood of the Committee giving the ICCPR a same-sex marriage friendly interpretation.

2. Internal enforcement

Incorporation of the Committee’s views into domestic court decisions is the second factor most likely to equip the Committee with greater normative power and confidence on the marriage equality issue. As shown by the examples of New Zealand and South Africa outlined above, courts have already invoked the Committee’s views when determining the rights of same-sex couples to marriage.151

In their seminal article on the issue of supranational adjudication, Lawrence Helfer and Anne-Marie Slaughter identified a number of factors that would increase the ability of supranational bodies to compel compliance with their judgments.152 Foremost among these was incorporation of supranational jurisprudence into national court decisions.153 Incorporation would effectively provide the supranational body with a domestic enforcement mechanism.154

Using the examples of the European Court of Justice (ECJ) and European Court of Human Rights (ECtHR), Helfer and Slaughter demonstrated how these supranational bodies made their jurisprudence legally enforceable by garnering the support of national courts. Over time, the ECJ and ECtHR fostered positive dialogues with private litigants, lawyers and judges participating in domestic legal processes.155 These dialogues emphasized a) that the two supranational bodies provided channels of recourse for individuals seeking to enforce their rights under European Community and Convention law; and b) that the supranational bodies shared with national courts a duty to collaborate in order to protect individual rights in a coherent, unified manner.156 Greater dialogue between the two supranational bodies and those involved in domestic legal processes helped to form

151. See supra Part VI.
153. Id. at 291.
154. Id.
155. Id. at 309.
156. Id. at 310.
a “community of law” with a shared commitment to upholding Community and Convention law.\textsuperscript{157}

Helfer and Slaughter propose several ways in which the Committee can encourage domestic courts to incorporate its views into their binding judgments. Paramount among these proposals is that the Committee attempt to develop its own community of law with those involved in domestic legal processes.\textsuperscript{158} A logical first step would be for Committee experts to increase communication with the judges of the ECtHR.\textsuperscript{159} Communicating with ECtHR judges would help harmonize interpretations given to rights that are expressed in a substantially similar manner in both the ICCPR and the Convention.\textsuperscript{160} Integration into the European community of law would also equip the Committee with experience and tools to forge links with domestic legal participants residing in states outside of Europe who seek to challenge marriage laws through legal processes.\textsuperscript{161} Eventually, states would frequently cite Committee views in a range of human rights cases.

Beth Simmons agrees that internal enforcement mechanisms are the most effective way of guaranteeing human rights enumerated in international treaties.\textsuperscript{162} When states sign and ratify treaties, they make a public, legal commitment which leads to expectations among interested parties as to how the state will behave in respect of its obligations.\textsuperscript{163} The commitment allows interested parties to measure the width of the “expectations gap” between how interested parties expected the state to act, and how it acted or failed to act in reality.\textsuperscript{164} The expectations gap is widest, and the state’s costs of non-compliance highest, when a domestic court uses the treaty (or a treaty body’s interpretation) to authenticate an individual’s complaint that his or her rights have been violated under domestic law.\textsuperscript{165} Following a finding of breach, the state would be required to amend its policies so as to act consistently with its treaty commitments.

\begin{itemize}
\item[157.] Id. at 367.
\item[158.] Id. at 366–86.
\item[159.] Id. at 373.
\item[160.] Id. at 374.
\item[161.] Id. at 376, 389.
\item[162.] BETH SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009).
\item[163.] Id. at 7–14.
\item[164.] Id. at 14.
\item[165.] Id. at 130.
\end{itemize}
Accordingly, the Committee would be more willing to extol an ICCPR right to same-sex marriage if that instrument and its interpretations of the rights therein were increasingly incorporated into domestic judicial decisions. The Committee has considerable power to facilitate this outcome. Committee experts can increase dialogue with judges on the ECJ and ECtHR to forge a nascent community of law.\textsuperscript{166} It can then expand this community beyond Europe, encouraging those participating in domestic legal processes to incorporate its jurisprudence into pleadings and judicial decisions. Grounding ICCPR provisions and the Committee’s views in the domestic realm greatly constrains the current latitude of states to choose not to comply with that treaty. If the Committee’s pronouncements on ICCPR rights were better incorporated into domestic judicial decisions, the Committee would be more likely to adopt interpretations of articles 23(2) and 26 of the ICCPR that recognized same-sex marriage.

3. External enforcement

An increase in external pressure on those states that have yet to recognize same-sex marriage rights is the third factor which would encourage the Committee to interpret the ICCPR as supporting same-sex marriage rights.

“External enforcement” encompasses several forms of pressure. The first is pressure from other states, acting in a bilateral or multilateral capacity. States cooperate on a range of matters in a number of bilateral and multilateral forums. Constant interaction facilitates the operation of what Professor Harold Koh has termed the “transnational legal process” (TLP).\textsuperscript{167} Koh describes TLP as the theory and practice of how public and private actors interact in a variety of forums to make, interpret, enforce and internalize rules of transnational law.\textsuperscript{168} He argues that the interaction between states as part of the TLP means that the process can act as an enforcement mechanism of international law norms.\textsuperscript{169}

For example, if a number of influential states were to enact same-sex marriage, they would be able to exert leverage over other states who had not yet taken this step when interacting with them in bilateral and multilateral forums. The failure of states to comply with

\textsuperscript{166} See, e.g., Helfer & Slaughter, supra note 152, at 359.
\textsuperscript{167} Harold Koh, Transnational Legal Process 75 NEB. L. REV. 181 (1996).
\textsuperscript{168} Id. at 183–84.
\textsuperscript{169} Id. at 203.
an emerging norm of same-sex marriage would create tensions that hindered marriage equality-friendly states’ ongoing cooperation with those states they viewed as violating a norm of international human rights law.\textsuperscript{170} To avoid these tensions and continue benefiting from cooperation with other states, non-compliant states would be “socialized” into instituting the right to same-sex marriage at the domestic level.\textsuperscript{171}

In addition to the subtle operation of TLP, states could make their displeasure with states that do not recognize same-sex marriage known in a more explicit way. An example would be if states sympathetic towards the rights of same-sex couples grouped together to pass a resolution in an international forum that expressed support for these couples, or condemned those states which lagged on this front. The Human Rights Council passed a resolution in June 2011 expressing its “grave concern” at global violence and discrimination committed against persons on the basis of their sexual orientation.\textsuperscript{172} The passage of similar resolutions dealing explicitly with same-sex marriage would signal to the Committee that states would be more willing to accept an interpretation of the ICCPR favorable to same-sex marriage.

The physical proximity of states that have recognized same-sex marriage to those that have not is also likely to exert external pressure. In the realm of treaty adoption, governments have been shown to time their ratifications so as to keep pace with their regional counterparts.\textsuperscript{173} States wish to avoid regional criticism of being an “outlier” in complying with shared human rights obligations.\textsuperscript{174} There is no reason why this desire to avoid being labeled an outlier would not apply to the issue of same-sex marriage. The number of jurisdictions that have recently enacted same-sex marriage gives credence to this “domino” type effect.

Another form of external pressure may come from the growth of groups within international civil society that support marriage equality. Many non-governmental organizations currently participate in international forums in an effort to promote a range of LGBT

\textsuperscript{170} Id.
\textsuperscript{171} Id. at 206.
\textsuperscript{173} SIMMONS, supra note 162, at 110–11.
\textsuperscript{174} Id.
rights, including marriage equality.\textsuperscript{175} These organizations face low start-up costs and are able to communicate cheaply and efficiently by utilizing modern technologies.\textsuperscript{176} The more vocal and successful these organizations are in advancing the marriage equality cause, the more likely the Committee will be to extol a right to same-sex marriage.

Despite its various permutations, the value of external pressure is more likely a matter of its theoretical interest than its practical effectiveness. Human rights treaties such as the ICCPR are unique in that signatory states’ obligations to comply with them are owed to individuals as opposed to other states; in other words, states do not owe reciprocal obligations to each other to guarantee human rights.\textsuperscript{177} Accordingly, the typical incentives that encourage states to pressure others to comply with their treaty commitments are absent in the human rights context.\textsuperscript{178} The interest of states that recognize same-sex marriage in maintaining effective cooperation and general good relations with those that do not will exert greater power than the interest of the former states in promoting the right of same-sex marriage for the citizens of the latter states. The result is that external pressure in the same-sex marriage context is likely to remain weak.

4. Legitimacy and reputational costs

Loss of legitimacy and reputation among state parties are the principal costs that the Committee faces if it prematurely announces that the ICCPR contains a right to same-sex marriage. As discussed in the opening sections of this paper, the Committee commands considerable respect and authority among member states as an expert human rights body. If the Committee was to interpret the ICCPR as providing for same-sex marriage, and this interpretation was out of line with the majority of state party practice, it would likely lose


\textsuperscript{176} SIMMONS, supra note 162, at 32.

\textsuperscript{177} Id. at 122.

\textsuperscript{178} Id.
some of this respect and authority.

Not all commentators take cognizance of legitimacy and reputational costs. Pratima Narayan urges greater movement on the marriage equality issue at the international rather than domestic level.\(^\text{179}\) She implores the Committee to take “a more aggressive stance” towards affirming the rights of sexual minorities at international law.\(^\text{180}\) A more aggressive stance would “obligate” states to pass laws better recognizing the liberties of LGBT persons.\(^\text{181}\)

The Committee-state party dialogue is fragile. The Committee must retain legitimacy and a good reputation in the eyes of state parties in order to continue functioning effectively as the authoritative interpreter of the ICCPR. As a result, “aggressive stance[s]” as suggested by Narayan are counterproductive. They risk alienating states whose laws are not in compliance with Committee interpretations. Such states are likely to view the Committee as out-of-touch with “real world realities.”

Zanghellini astutely observes that “international law is still in a transitional phase—the process of discarding its traditionally heteronormative character being well underway but still ongoing.”\(^\text{182}\) In this transitional phase, the Committee, as a body having no direct enforcement powers, must tread carefully in order to preserve the legitimacy and good reputation it enjoys in the eyes of state parties. Other commentators share this view. As Robert Scott and Paul Stephen caution, “[a]n especially discreditable decision—one that appears poorly reasoned, unanticipated in light of prior legal authorities, or biased—may immediately undermine a tribunal’s ability to affect the reputation of others.”\(^\text{183}\)

In a similar vein, Helfer and Slaughter assess the development of ECJ and ECtHR supranational law, observing that “supranational courts and tribunals must move cautiously in their early years, striking a delicate balance between independence and deference, permitting states to adjust and respond to the mechanisms of supranational adjudication.”\(^\text{184}\)

Yogesh Tyagi warns that the biggest danger to the Commit-
tee's existence stems from its gradual transition into a body possessing "unprecedented assertiveness, [an] extended mandate, and unlimited enthusiasm to raise expectations."185

Legitimacy and reputational costs make it unlikely that the Committee will unilaterally announce the existence of a "right" to same-sex marriage at international law before it becomes more widely accepted within the international community. Only when this inquiry reveals an audience receptive towards same-sex marriage will the Committee hold that the ICCPR provides for marriage equality. The minority opinions of Commissioners Wedgwood and DePasqua-le in Young, and Commissioners Amor and Khalil in X v. Colombia, highlight that Committee members are, sensibly, aware of the dangers of prematurely reading a right of same-sex marriage into the Covenant. It is difficult to gauge with certainty at what point in time the Committee's view would be deemed acceptable, as opposed to premature. Legitimacy and reputational costs are linked to the sheer number, and influential nature, of state parties having enacted same-sex marriage. The Committee will likely only feel comfortable articulating a marriage-equality friendly interpretation of the ICCPR when it enjoys what it subjectively determines to be a sufficient level of support among state parties.

5. Same-sex marriage as a Western phenomenon

Related to the constraining effects that legitimacy and reputational costs have on the Committee's willingness to articulate a right to same-sex marriage is the fact that recognition of same-sex relationships is overwhelmingly a Western phenomenon.186 The Committee would be reluctant to articulate the right if it caused a backlash from non-Western states who, for cultural or religious reasons, do not view same-sex relationships as deserving of legal protection. A loss of legitimacy and reputation in the eyes of these states is particularly costly, given that the ICCPR may represent one of the few sources of human rights protections for many citizens residing in these countries.

It is important that the Committee not be viewed as a body seeking to impose Western values on non-Western states. As Tyagi once again cautions:

185. T Y AGI, supra note 14, at 812.

[The Committee] should not allow itself to be carried away by far-fetched suggestions that ignore the enormous transnational diversities and the rationale behind the limitations imposed on a treaty-based institution . . . . The moment States parties, especially from Africa, Asia and Latin America, conclude that the [Committee] is trying to assume the role of a supranational organ, their willingness to cooperate will start diminishing and the prospects of any wider acceptance of the ICCPR system will be affected.187

It is important that the Committee avoid propagating a reputation as a Western-sponsored supranational interloper. However, it is equally, if not more important that the Committee not suffer from paralysis and eventual atrophy by failing to give progressive, rights-friendly interpretations to the Covenant based on the conservative policies of non-Western states. There are two ways in which the Committee can tread the line between these two considerations.

The first is by recognizing that states are not monodimensional entities with uniform views on the issue of same-sex marriage. As aptly put by Helfer and Slaughter:

The disaggregation of the state that underlies our distinction between supranational and international adjudication also disaggregates a state’s unitary political identity as “democratic” or “undemocratic,” “liberal” or “illiberal.” Nondemocracies may have democratic impulses, embodied in specific institutions; illiberal states may have strong liberal leanings.188

Accordingly, the Committee should not look solely to official policies and laws when assessing whether a non-Western state is likely to balk at a same-sex marriage friendly interpretation of the ICCPR. A more nuanced inquiry is necessary. In particular, the Committee should consider the number and strength of organizations within the state that are supportive of LGBT rights. The ICCPR is likely to act as a focal point for individuals and groups supportive of human rights in countries where democratic values are not yet stable, but where there are opportunities for participation in the political process.189 If these groups command influence and support within a state which is otherwise hostile to LGBT rights, they will be able to shield the Committee from uniform condemnation by providing al-

188. Helfer & Slaughter, supra note 152, at 335.
189. Simmons, supra note 162, at 155.
ternative, supportive accounts within the state.

The second way in which the Committee can balance the views of states unsupportive of same-sex marriage against a liberal interpretation of the ICCPR is by allowing some flexibility for states in how and when they recognize same-sex relationships. It would be highly inappropriate and potentially self-destructive for the Committee to announce a right to same-sex marriage under the ICCPR, and then require all states to immediately guarantee this right to its citizens. States should be given sufficient time and flexibility to introduce the right. 190

In this respect, the ECtHR developed early on, and has consistently applied, the "margin of appreciation" doctrine. This allows the Court to take into account cultural, religious and philosophical differences between states when determining whether they have breached Convention rights. 191

The Committee should import the margin of appreciation doctrine from the ECtHR in order to counter resistance from non-Western states. Ultimately, the goal would be for all ICCPR state parties to guarantee same-sex marriage to their citizens. Invoking the margin of appreciation doctrine would go a considerable way towards achieving this goal. States would possess the necessary time and flexibility to gradually implement this right. The Committee could monitor state progress through benchmark reporting. By demonstrating a willingness to learn from the ECtHR experience and adopting the margin of appreciation doctrine, the Committee can counter allegations of cultural imperialism from non-Western states that do not support same-sex marriage.

CONCLUSION

The issue of same-sex marriage provides a particularly clear and timely framework through which to examine the operation of the Committee–state party dialogue. The sequence of communications


from Toonen through to X v. Colombia demonstrates the increasing power of article 26 in the push for greater rights for LGBT persons. While barely discussed in Toonen, article 26 became the primary basis through which to impugn the discriminatory pension laws in Young and X v. Colombia. Increasing use of this provision makes it likely that the interpretation given to the article 23(2) right to marry in Joslin would not stand if a similar communication were considered by the Committee today.

However, more frequent recourse to article 26 should not be taken to suggest that the Committee will unilaterally announce that the Covenant provides for a right to same-sex marriage. Five factors exercise a material influence on the Committee’s calculus as to when it can safely articulate a right to same-sex marriage without suffering a backlash from state parties. As to the first factor, the stream of state party dialogue on the issue of same-sex marriage is not yet strong enough to sufficiently embolden the Committee to take such a step. A sufficient number of states, including those exercising considerable international influence, have not yet enacted same-sex marriage. Second, the Committee has yet to follow the example of the ECJ and ECtHR in creating a community of law that would help enforce its views domestically. Third, pressure from external forces is unlikely to have a material impact, although the effect of the increase in international civil society activism on the issue of same-sex marriage is yet to be evaluated. Fourth, the Committee must continue to regularly check the political climate in state party societies and adopt views that are of a similar nature. Taking too bold a step too soon risks undermining the good reputation and legitimacy that the Committee enjoys as an expert human rights body in the eyes of state parties. Finally, announcing an international right to same-sex marriage before states have indicated that they are willing to accept it may also cause a detrimental backlash against other LGBT claims, particularly in non-Western states.

This realistic assessment of the fragile nature of the dialogue should not be taken as overly pessimistic. The legitimacy concerns of the Committee rest squarely on the prevailing attitudes towards same-sex marriage in domestic political environments. Advocates should therefore continue their efforts on this plane to push for marriage equality. Although reliance on the ICCPR and the Committee’s views will be of limited effect in some jurisdictions due to constitutional considerations, in others, such reliance adds considerable

192. Arguments which invoke the ICCPR in the United States are unlikely to receive serious consideration due to the number of reservations, understandings and declarations which that state lodged in its ratification instrument. Similarly, European states are likely to
moral and legal authority towards arguments in favor of same-sex marriage. As the voices of advocates on the domestic plane grow in number, the Committee at the international stratum will respond in kind. It is not utopian to predict that the Committee will, within the foreseeable future, adopt a teleological approach to articles 23(2) and 26, which holds that the ICCPR provides for a right to same-sex marriage.

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look to the European Convention on Human Rights before the ICCPR when debating same-sex marriage. The aforementioned examples of New Zealand and Australia show that the dialogue is stronger when the ICCPR is mentioned as a source of domestic rights protections, or the state lacks its own domestic rights protections.

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