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## Human Rights, Gay Rights, or Both? International Human Rights Law and Same-Sex Marriage

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**HUMAN RIGHTS, GAY RIGHTS, OR BOTH?  
INTERNATIONAL HUMAN RIGHTS LAW AND  
SAME-SEX MARRIAGE**

*Jessica Brown\**

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“The struggle to end discrimination against lesbian, gay, bisexual, and transgender persons is a global challenge, and one that is central to the United States’ commitment to promoting human rights.”

—President Barack Obama, December 6, 2011

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\* Jessica Brown received her J.D. from the University of Nevada, Las Vegas, William S. Boyd School of Law in 2016. The Author would like to thank Gary Chartier, J.D., Ph.D. for his comments, suggestions, and encouragement. The Author would also like to thank J. Caleb Donaldson, J.D. for his comments and encouragement in the first iterations of this article.

## I. INTRODUCTION

On December 6, 2011, President Barack Obama announced a White House initiative to further “advance the human rights of lesbian, gay, bisexual and transgender [LGBT] persons” through U.S. diplomacy and foreign assistance. The White House directed U.S. agencies to “report on [the] progress” of nations to combat homophobia, protect the vulnerable, and fight LGBT discrimination.<sup>1</sup> In 2012, the U.S. Agency for International Development (USAID) announced a strategy designed to prevent and respond to gender-based violence globally.<sup>2</sup> The report suggested that the United States intended to promote LGBT rights using economic incentives. Although the Obama administration declined to specify how aid will be tied to national practices abroad,<sup>3</sup> it made clear that it considered the values and interests of the United States to be advanced through the international promotion of LGBT rights.<sup>4</sup>

International law doctrines related to aspects of gay rights, notably marriage equality,<sup>5</sup> continue to develop. In this Article, I examine the international legal basis for marriage equality as a human right.

After a brief introductory discussion of international human rights in theory and in U.S. foreign policy, I go on to discuss the background to the promotion positive LGBT rights, the significance of marriage as a legal and cultural institution, and key reasons LGBT persons seek the benefits of marriage. I go on to examine same-sex marriage within international legal frameworks—the International Convention on Civil

1. Presidential Memorandum—International Initiatives to Advance the Human Rights of Lesbian, Gay, Bisexual, and Transgender Persons, OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE (Dec. 6, 2011), <https://www.whitehouse.gov/the-press-office/2011/12/06/presidential-memorandum-international-initiatives-advance-human-rights-1>.

2. *United States Strategy to Prevent and Respond to Gender-based Violence Globally*, USAID, <http://www.state.gov/documents/organization/196468.pdf> (last visited May 3, 2013).

3. *Id.* at 33; Eyder Peralta, *U.S. Says It Will Use Foreign Aid To Promote Gay Rights*, NATIONAL PUBLIC RADIO (Dec. 6, 2011, 4:17 PM) <http://www.npr.org/blogs/thetwo-way/2011/12/06/143221630/u-s-says-it-will-use-foreign-aid-to-promote-gay-rights> (stating “The New York Times reiterates that it’s not yet clear whether the U.S. will withhold foreign aid from countries with poor records, but among those that could face some pressure from the U.S. are allies like Saudi Arabia and Afghanistan, which criminalize homosexuality.”); see also Steven Lee Meyers & Helen Cooper, *U.S. to Aid Gay Rights Abroad, Obama and Clinton Say*, N.Y. TIMES (Dec. 6, 2011), <http://www.nytimes.com/2011/12/07/world/united-states-to-use-aid-to-promote-gay-rights-abroad.html> (stating “Neither Mr. Obama nor Mrs. Clinton specified how to give the initiative teeth. Caitlin Hayden, the National Security Council’s deputy spokeswoman, said the administration was “not cutting or tying” foreign aid to changes in other nation’s practices. Still, raising the issue to such prominence on the administration’s foreign policy agenda is important, symbolically, much like President Jimmy Carter’s emphasis on human rights.”).

4. I use the terms “gay,” “LGBT” and “same-sex” interchangeably throughout this Article.

5. I will use the terms “same-sex marriage” and “marriage equality” throughout this Article to refer to the marriage of two people of the same gender.

and Political Rights (ICCPR) and emerging Customary International Law (CIL). Finally, I argue that the United States and other countries with international influence should advocate not merely the protection of LGBT persons against criminal prosecution and repression based on sexual preference but also the protection of marriage equality as a crucial source of legal and cultural benefits for LGBT persons.

## II. BACKGROUND: PROMOTING POSITIVE LGBT RIGHTS

Presidential administrations have used compliance with human rights law as predicates for the delivery of international aid. The U.S. Department of State releases an annual “Trafficking in Persons” report in which countries are rated based on their efforts to reduce or eliminate human trafficking. The World Bank then uses the information in the report to approve or deny aid.<sup>6</sup> Countries with emerging economies have a great incentive, therefore, to take steps to ameliorate trafficking. Significantly, the Obama administration has not specified what state practices, discriminatory or beneficial, are to be included in the criteria to evaluate countries on rights afforded to LGBT persons. The U.S. Agency for International Development (USAID) published reports based on “core principles” that “advance the freedoms and security of LGBT people” that the agency itself established.<sup>7</sup> Meanwhile, U.N. Member States have made significant efforts in the General Assembly to end discrimination against lesbian, gay, bisexual, and transgendered (LGBT) persons.<sup>8</sup> A total of 96 Member-States sponsored a resolution to combat violence and discrimination based on sexual orientation and gender.<sup>9</sup> And, 113 member countries have legalized consensual homosexual acts.<sup>10</sup> Countries that continue to criminalize same-sex relations risk criticism from the United Nations, the United States, and Europe.<sup>11</sup>

6. See generally *Social Development Notes: Conflict, Crime and Violence* (2009), WORLD BANK, [http://siteresources.worldbank.org/EXTSOCIALDEVELOPMENT/Resources/244362-1239390842422/6012763-1239905793229/Human\\_Trafficking.pdf](http://siteresources.worldbank.org/EXTSOCIALDEVELOPMENT/Resources/244362-1239390842422/6012763-1239905793229/Human_Trafficking.pdf) (last visited May 3, 2015) [hereinafter WORLD BANK].

7. LGBT Vision for Action, USAID, at ii, <http://www.usaid.gov/sites/default/files/documents/1874/LGBT%20Vision.pdf> (last visited May 2, 2013).

8. *Bowers v. Hardwick* was overturned by the United States in 2003. *Bowers*, 478 U.S. at 191 (“[R]espondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.”).

9. UN: *Landmark Resolution on Anti-Gay Bias*, HUM. RTS. WATCH (Sept. 26, 2014), <http://www.hrw.org/news/2014/09/26/un-landmark-resolution-anti-gay-bias>.

10. *Id.*

11. *Fact Sheet: Working to Advance the Human in Housing Rights of Lesbian, Gay, Bisexual, and Transgender (LGBT) Persons Globally*, OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE (Dec. 6, 2011), <https://www.whitehouse.gov/the-press-office/2011/12/06/fact-sheet-working-advance-human-rights-lebian-gay-bisexual-and-transge>; WORLD BANK, *supra*

Yet, questions remain as to where human rights and LGBT rights intersect, where LGBT rights are concomitant with human rights, and where LGBT interests fall outside the human rights framework. According to the U.N. Charter, human rights are universal, inalienable, indivisible, and interdependent.<sup>12</sup> In other words, human rights apply to all human beings; human rights cannot be taken away by the state or others; and, in principle, no human right is more important than another human right. The *Universal Declaration of Human Rights* (DHR) and subsequent treaties, conventions, covenants and pacts, do not establish human rights because rights are inherent entitlements possessed by all human beings. Rather, these documents *describe* and *guarantee* human rights.<sup>13</sup>

British philosopher Isaiah Berlin parsed rights into positive and negative categories. According to Berlin, negative rights include the right to be left alone or without interference.<sup>14</sup> Since 2008, the General Assembly has voted on resolutions and declarations that have focused primarily on negative rights such as protecting LGBT persons from violence and discrimination.<sup>15</sup> The United Nations encourages member countries to (1) protect LGBT persons from homophobic and transphobic violence, (2) decriminalize private sexual conduct between same-sex consenting adults, (3) prohibit discrimination on the basis of sexual orientation and gender in housing and employment, and (4) allow for

note 6.

12. *Human Rights, Sexual Orientation and Gender Identity*, U.N. GENERAL ASSEMBLY (Sept. 22, 2014), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/148/76/PDF/G1114876.pdf?OpenElement>.

Recalling the universality, interdependence, indivisibility and interrelatedness of human rights as enshrined in the Universal Declaration of Human Rights and consequently elaborated in other human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and other relevant core human rights instruments . . .

*Id.*

13. On its own, a document does not guarantee rights. Government actors and individuals choose to implement putative guarantees. Thus, institutions and individual actors play integral roles with regards to marriage.

14. Isaiah Berlin, *Two Concepts of Liberty*, FOUR ESSAYS ON LIBERTY, at 7-8, [https://www.wiso.uni-hamburg.de/fileadmin/wiso\\_vwl/johannes/Ankuendigungen/Berlin\\_twoconceptsof liberty.pdf](https://www.wiso.uni-hamburg.de/fileadmin/wiso_vwl/johannes/Ankuendigungen/Berlin_twoconceptsof liberty.pdf) (last visited May 3, 2013).

15. *In Turnaround, US signs UN Gay Rights Document*, Y NET NEWS.COM (Mar. 18, 2009, 8:32 PM), <http://www.ynet.co.il/english/Ext/Comp/ArticleLayout/CdaArticlePrintPreview/1,2506,L-3688718,00.html>; *A Timeline: LGBT Rights and International Organizations*, SOUTHERN POVERTY LAW CENTER (July 2013), <http://www.splcenter.org/get%20informed/publications/Dangerous%20Liaisons/A%20Timeline%3A%20GBT%20Rights%20and%20International%20Organizations>.

freedom of expression, association and assembly of LGBT persons.<sup>16</sup>

On the other hand, Berlin explained that a positive liberties derive “from the wish on the part of the individual to be his own master,” and equal to others.<sup>17</sup> When the U.S. Supreme Court refers to the “fundamental right to marry,” the Court invokes the language of positive liberties, thus obliging the state to provide citizens the option to marry.<sup>18</sup>

The most prominent claim for positive LGBT liberties is the right to marry.<sup>19</sup> Legal theorist Cass Sunstein writes “[L]ike the right to vote, the right to marry is the right of equal access to a publically-administered institution.”<sup>20</sup> The argument for same-sex marriage is thus: if marriage is a positive right in many countries around the world because marriage confers legal, social and financial benefits; then the fundamental human right of equal treatment necessarily requires that same-sex marriage must also be legal.

### III. THE SIGNIFICANCE OF MARRIAGE

“According to [Paula] Ettelbrick, same-sex marriage would undermine the goals of gay liberation; affirming gay and lesbian identity and relationship diversity . . . Marriage, by legally distinguishing legitimate and illegitimate relationships, wrongly discourages relationship diversity . . .”<sup>21</sup>

—Elizabeth Brake

Gay marriage is not without controversy, even among LGBT rights activists. Queer theorists, radical feminists, and libertarians like Judith Butler, Martha Fineman, and David Boaz, reject gay marriage and advocate for the abolition of marriage in general.<sup>22</sup> Marriage abolitionists argue the institution, whether or not it is recognized by the state, reinforces gender roles that, historically, gave husbands broad control

16. *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS at 13, <http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf> (last visited May 3, 2015).

17. Berlin, *supra* note 14, at 8.

18. See Frank B. Cross, *The Error of Positive Rights*, 48 U.C.L.A. L. REV. 857 (2001).

19. JORDI DÍEZ, THE POLITICS OF GAY MARRIAGE IN LATIN AMERICA: ARGENTINA, CHILE AND MEXICO 43 (2015).

20. Cass R. Sunstein, *The Right to Marry*, 26 CORDOZO L. REV. 2081 (2005).

21. ELIZABETH BRAKE, MINIMIZING MARRIAGE: MARRIAGE, MORALITY AND THE LAW 120 (2012).

22. Gregg Strauss, *Why the State Cannot “Abolish Marriage” A Partial Defense of Legal Marriage Based on the Structure of Intimate Duties*, 90 INDIANA L. REV. (working draft) at 3, [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6033&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6033&context=faculty_scholarship).

over wives. Marriage was a legal mechanism granted to men that gave men exclusive control over procreation, cohabitation, and children within the family.<sup>23</sup> Radical feminists such as Catherine Mackinnon maintain that marriage remains the primary mechanism used to control female sexuality, property, and children.<sup>24</sup> Additionally, queer theorists suggest, marriage attempts to impose a social structure not only deleterious or inapplicable to gay intimates, but also unnecessarily restrictive with regards to perceived heterosexual norms such as monogamy.

Nonetheless, LGBT persons overwhelmingly support marriage equality. Research in this area suggests the broad support for same-sex marriage among LGBT persons is for two primary reasons: marriage automatically grants practical legal and financial privileges to couples, and marriage provides social benefits such as community recognition.<sup>25</sup> In fact, Article 23 the International Covenant on Civil and Political Rights (ICCPR) places a positive obligation on nations to protect marriage because, according to the language of the ICCPR, the “family is the natural and fundamental group unit of society.”<sup>26</sup> Thus, states may not interfere with marriage or the family without a legitimate purpose.<sup>27</sup>

When nation states fail to recognize same-sex marriage, those nation-states fundamentally treat LGBT persons unequally due to the automatic advantages conferred to couples upon marriage. Most nations confer considerable privileges to couples directly upon the act of getting married; this affords couples economic advantages in addition to legal rights over their non-married counterparts. Marital rights may include the right to precedence in intestacy, immigration rights for a spouse, medical and health benefits, tax benefits, automatic parental rights for both spouses for any child born within a marriage, and the right to social security benefits earned by a deceased spouse, among dozens of other

23. Mary Anne Case, *Marriage Licenses* (lecture at 1765), <http://www.law.uchicago.edu/files/files/case-mariagellicenses.pdf>.

24. See KATHERINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 13-36 (1989); see *Feminist Perspectives on Reproduction and the Family*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Oct. 21, 2013), <http://plato.stanford.edu/entries/feminism-family/>.

25. See Aaron Blake, *Meet the LGBT Americans Who Oppose Gay Marriage*, WASH. POST (Jan. 27, 2015), <http://www.washingtonpost.com/blogs/the-fix/wp/2015/01/27/meet-the-lgbt-americans-who-oppose-gay-marriage/> (stating 93% of LGBT Americans support same-sex marriage); KATRINA KIMPORT, *QUEERING MARRIAGE: CHALLENGING FAMILY FORMATION IN THE UNITED STATES* 48 (2013).

26. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 173, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976), [https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtds\\_g\\_no=iv-4&lang=en](https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtds_g_no=iv-4&lang=en) [hereinafter ICCPR]; UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948); see GUÐMUNDUR S. ALFREDSSON & ASBJØRN EIDE, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT* 343 (1999).

27. *Id.*

legal and financial privileges.<sup>28</sup> Marriage also affords considerable economic stability. Married couples tend to be “better off” than unmarried peers, and marriage is “about as good a predictor of economic success as are education, race and ethnicity.”<sup>29</sup>

The act of getting married also provides social benefits and a sense of legitimacy to a couple’s relationship. The South African Constitutional Court stated in *Minister of Home Affairs v. Fourie* that same-sex marriage couples should be able to “enjoy the same status, entitlements and responsibilities accorded to heterosexual couples through marriage” and recognized that, contrary to their treatment historically, recognizes that LGBT persons constitutionally have “inherent dignity and are . . . worthy of the human respect possessed by and accorded to heterosexuals and their relationships.”<sup>30</sup> The social benefits associated with marriage include the presumption that a married couple share intimacy, domestic and economic cooperation, and a mutual commitment to sustaining the relationship. In Europe, social welfare policies grant the same rights, privileges and benefits in law to children of unmarried parents as to children of married parents; thus, marriage rates are lower in Europe than in countries that do not confer those rights.<sup>31</sup> Yet, most Europeans will marry at some point because of the *social* benefits conferred upon a married couple.<sup>32</sup> Same-sex couples seek these intangible benefits as

28. See KIMPORT, *supra* note 25; Letter from Dayna K. Shah, Associate General Counsel, U.S. General Accounting Office, to Senator Bill Frist, GAO-04-353R DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (Jan. 2004), <http://www.gao.gov/new.items/d04353r.pdf>; Strauss, *supra* note 22, at 9.

29. Andrew Yarrow, *Falling Marriage Rates Reveal Economic Fault Lines*, N.Y. TIMES (Feb. 6, 2015), <http://www.nytimes.com/2015/02/08/fashion/weddings/falling-marriage-rates-reveal-economic-fault-lines.html>.

30. Minister of Home Affairs v. Fourie, SA 524 (CC), at 15 (Dec. 1, 2005), <http://www.saflii.org/za/cases/ZACC/2005/19.html>.

31. Sarah Lyall, *For Europeans, Love, Yes; Marriage, Maybe*, N.Y. TIMES (Mar. 24, 2002), <http://www.nytimes.com/2002/03/24/world/for-europeans-love-yes-marriage-maybe.html>. The German government provides €184 for the first two children, €190 for the third child, and €215 for every subsequent child per month. Like most European countries, low-income parents in Germany receive significantly more benefits including childcare and supplementary education benefits. Other examples include Norway, which provides 6,000 Kroner per month and childcare; France, which provides €129.99 - €166.55 or more per month depending on the number of children, as well as free childcare and early education; and Ireland, in which the benefit is between €135- €1080 per month depending on the number of children. Child Benefit and Cash-for-Care Benefit to Foreign Employees in Norway, NAV, (Nov. 30, 2015), <https://www.nav.no/en/Home/Benefits+and+services/Relatert+informasjon/Child+benefit+and+cash+benefit+-+Foreign+employees+in+Norway.194616.cms>; Child Benefit, Citizens Information, Budget 2016, [http://www.citizensinformation.ie/en/social\\_welfare/social\\_welfare\\_payments/social\\_welfare\\_payments\\_to\\_families\\_and\\_children/child\\_benefit.html](http://www.citizensinformation.ie/en/social_welfare/social_welfare_payments/social_welfare_payments_to_families_and_children/child_benefit.html); Help and Advice for EU Nationals and Their Families, YOUR EUROPE, [http://europa.eu/your-europe/citizens/family/children/benefits/index\\_en.htm](http://europa.eu/your-europe/citizens/family/children/benefits/index_en.htm).

32. Help and Advice for EU Nationals and Their Families, *supra* note 31.

well.<sup>33</sup>

Concerns that motivate support for the abolition of state-linked marriage seem less germane today in the United States, Canada, Europe, Australia, New Zealand, South Africa,<sup>34</sup> many other countries around the world. In these countries, the state no longer imposes rigid social norms on marriage. Rather, a married couple is free to

have or not have sex, vaginal or not, procreative, contracepted, or otherwise; to be faithful or not, to divorce and remarry, to commingle their finances or keep them separate, to live together or separately, to differentiate roles or share all tasks, to publicize their relationship or be discreet about it, while still having their commitment to one another recognized by third parties including the state.<sup>35</sup>

When individuals enter the modern institution of legal marriage, the state affords those individuals a range of legal and financial privileges, even as it declines to enforce a number of the perceived cultural norms traditionally associated with marriage.<sup>36</sup> Therefore, marriage abolitionist arguments that focus on the inflexibility of the state definition of marriage are less persuasive than they arguably once were because, within a legal marriage, individuals are free to negotiate their own marital arrangements. Legal marriage for same-sex couples eliminates the need to purchase financial services required to secure their intestacy rights, parental rights, and other benefits, while allowing couples to forge their own intimate agreements.<sup>37</sup>

#### **IV. SAME-SEX MARRIAGE AS A RIGHT**

“[G]ay rights are human rights. Human rights are gay rights.”

—Secretary of State, Hillary Rodham Clinton December 6, 2011<sup>38</sup>

The guiding authority for marriage as a fundamental right in

33. *Id.*

34. Polygamy is a common practice in South Africa. The President of South Africa is a partner in a polygamous marriage.

35. Case, *supra* note 23, at 1765.

36. Noting that the state does not interfere with marriages in most democratic countries.

37. Bernice Napach, *Does Gay Marriage Ruling End a Financial Planning Niche?*, THINK ADVISOR (June 29, 2015), <http://www.think advisor.com/2015/06/29/does-gay-marriage-ruling-end-a-financial-planning>.

38. Johnathan Capehart, *Clinton’s Geneva Accord: ‘Gay Rights are Human Rights.’* WASH. POST (Dec. 7, 2011, 1:15 PM), [http://www.washingtonpost.com/blogs/post-partisan/post/clintons-geneva-accord-gay-rights-are-human-rights/2011/03/04/gIQAPUipcO\\_blog.html](http://www.washingtonpost.com/blogs/post-partisan/post/clintons-geneva-accord-gay-rights-are-human-rights/2011/03/04/gIQAPUipcO_blog.html).

international human rights law can be found in the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR).<sup>39</sup> The United States and all but 7 other Member-States of the United Nations, notably China and Cuba, are signatories.<sup>40</sup> Taken together, the UDHR and the ICCPR provide the basis for roughly 90 state constitutions and even more treaties, grounding a broad range of human rights enactments around the globe.<sup>41</sup>

The ICCPR obliges the signatories to protect “all persons... against discrimination on any ground such as . . . sex.”<sup>42</sup> Significantly, the ICCPR recognizes the fundamental right to marriage.<sup>43</sup> However, the U.N. Human Rights Committee (HRC), a quasi-judicial committee within the United Nations comprised of independent experts that monitors the implementation of the ICCPR, has held that gay marriage is not a human right despite the enumerated fundamental right to marry.<sup>44</sup> Discrimination against LGBT persons is a violation of human rights, and the right to marry is a fundamental right inherent to all human beings, yet according to the HRC combining the right to be equal and the right to marriage does not make same-sex marriage a fundamental human right.

### A. *The Right to Marry in the ICCPR*

The right to marry is a fundamental human right memorialized in Articles 23 and 26 of the ICCPR.<sup>45</sup> Article 23 of the ICCPR states “(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State,” and “(2) [t]he right of men and women . . . to marry and to found a family shall be recognized.”<sup>46</sup> Moreover, Article 23, § 4 states that member nations “[s]hall take appropriate steps to ensure equality of rights and responsibilities of spouses to marriage.”<sup>47</sup>

39. ICCPR, *supra* note 26, at 173; UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

40. *Chapter IV*, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (Listing of signatories and Countries that have ratified the ICCPR), [https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg\\_no=iv-4&lang=en](https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en) [hereinafter ICCPR Accession]; ICCPR, *supra* note 26.

41. H. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT 74 (2007).

42. ICCPR, *supra* note 26.

43. *Id.*

44. *Human Rights Treaty Bodies—Individual Communications*, OFFICE OF U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/petitions/individual.htm> (last visited Oct. 24, 2016); see Toonen v. Australia, Comm. No. 488/1992, U.N. GAOR Hum. Rts. Comm., 49th Sess., Supp. No. 40, vol. II, at 235, U.N. Doc. A/49/40 (Mar. 31, 1994) [hereinafter Toonen]; ICCPR Accession, *supra* note 40, at 37.

45. ICCPR, *supra* note 26.

46. *Id.*

47. *Id.*

### B. The Right to Same-Sex Marriage in the ICCPR

The HCR has commented that Article 23 is broad rather than narrow.<sup>48</sup> The equality provision within Article 23, § 4 is gender-neutral, and it does not specify any characteristics, such as race, religion, or ethnicity, that states are prohibited to use as bases for denying a couple the right to marry. Absent such a list, the meaning of the non-discrimination requirement can be discerned in light of the provisions of Article 26, which states: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law . . . . The law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . sex.”<sup>49</sup> The HCR’s General Comment 19 states that “the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition.”<sup>50</sup> Yet, the HRC does proscribe what a state cannot do to its citizens in General Comment 19. Among the prohibitions are “sex-based discrimination” and other “discriminatory treatment.”<sup>51</sup>

Article 26 of the ICCPR prohibits nation-states from discriminating based on sexual orientation. Article 26 announces that “all persons are equal before the law” and that discrimination by a state cannot be based on sex or “other status.”<sup>52</sup> In General Comment No. 18, the HCR observes that Article 26 prohibits discrimination in “any field.”<sup>53</sup> The HRC is responsible for determining whether or not a state has discriminated in any field by using “reasonable and objective” criteria.<sup>54</sup> The HRC explains that “other status” within Article 26 means that non-discrimination principles are broader than those rights listed in the covenant.<sup>55</sup> In particular, in 1994, the HCR held in *Toonen v. Australia* that prohibition sex discrimination includes a prohibition based on sexual orientation.<sup>56</sup>

Similarly, the HCR has held that the language of the ICCPR does not

48. Comment 19, *infra* note 50.

49. ICCPR, *supra* note 26.

50. General Comment No. 19, HUMAN RIGHTS COMMITTEE U.N. DOC. HRI/GEN/1/REV.1 at 28 (1994), <https://www1.umn.edu/humanrts/gencomm/hrcom19.htm> [hereinafter Comment 19].

51. *Id.*

52. ICCPR, *supra* note 26.

53. General Comment No. 18, HUMAN RIGHTS COMMITTEE U.N. DOC. HRI/GEN/1/REV.1 at 28 (1994), <https://www1.umn.edu/humanrts/gencomm/hrcom19.htm> [hereinafter Comment 18].

54. *Id.* at 13.

55. See *Toonen*, *supra* note 44.

56. *Id.*

preclude the recognition of the right to same-sex marriage.<sup>57</sup> While the drafters of the ICCPR chose the phrase “men and women of marriageable age” to address national age restrictions for marriage, the drafters chose the gender-neutral term “spouses,” which cannot reasonably be construed to prohibit the recognition of same-sex marriage as an equal right, in the article that outlines the equality of the individuals who enter into marriage.<sup>58</sup> It is unlikely that the drafters of the ICCPR in 1970 contemplated same-sex marriage.<sup>59</sup> “Men and women of marriageable age” is not exclusionary, but rather synonymous with “persons.”<sup>60</sup> The phrase is not exclusionary because it was a provision concerned with age, and the phrase was not a reaction to the emergence of same-sex marriage as a cultural practice.<sup>61</sup>

While the ICCPR does not preclude recognition by states-parties of the right to same-sex marriage, the HCR held in 2002 that the ICCPR does not require the states-parties to recognize same-sex marriage, either. In *Joslin v. New Zealand*, the HCR held that member nations may refuse to recognize same-sex marriages.<sup>62</sup> The HCR took into account the historical context of the ICCPR, as well as the reference to “men and women” in Article 32.<sup>63</sup> The committee did not conduct a “reasonable and objective” inquiry into denying the right to same-sex marriage because, the Committee argued, gay couples are free to live like committed heterosexual couples.<sup>64</sup> The committee held that Articles 23 and 26 must be read to guarantee opposite-sex marriage only because of the historical context in which the articles were written, and because of

57. See *Joslin v. New Zealand*, U.N. Doc CCPR/C/75/D/902/1999, [8.3], [http://www.bayefsky.com/pdf/newzealand\\_t5\\_iccpr\\_902\\_1999.pdf](http://www.bayefsky.com/pdf/newzealand_t5_iccpr_902_1999.pdf) [hereinafter Joslin].

58. *Id.*

59. *Id.*

60. ICCPR, *supra* note 26.

61. *Id.*

62. *Joslin*, *supra* note 57.

63. *Id.*

64. *Id.*

[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. (b) No such possibility of choice exists for same-sex couples in countries where the law does not allow for same-sex marriage or other type 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.

*Id.*

the language in Article 26.<sup>65</sup>

Significantly, the HRC has reversed previous decisions before, thus treating the ICCPR as a “living document,” or at least a document that is capable of reinterpretation.<sup>66</sup> In 1990, the European Court of HCR concluded in *L.T.K. v. Finland* that the ICCPR did not support the right to conscientious objection.<sup>67</sup> In 2011, the HRC reversed that decision when it recognized the right to conscientious objection in *Bayatyan v. Armenia*. The HCR noted that after the ruling in *L.T.K.* many European countries started to recognize the right to object.<sup>68</sup> The legalization of conscientious objection across Europe doubtless encouraged the HCR’s change of opinion.<sup>69</sup> Other cases where the HCR reversed itself include in *Judge v. Canada* where the HCR held that countries had an obligation to protect a criminal defendant’s right to life, and reject the death penalty.<sup>70</sup> The HCR again pointed to a growing consensus among member countries in favor of the abolition of the death penalty.<sup>71</sup> Because the language of Article 23 does not necessarily preclude same-sex marriage, and because the ICCPR is considered a living document, the right to same-sex marriage may be revisited by the HRC in the future.

## V. SAME-SEX MARRIAGE AS RECOGNIZED BY EMERGING CUSTOMARY LAW

The right to marry whoever one wishes is an elementary human right . . . . Even political rights, like the right to vote, and nearly all other rights enumerated in the Constitution, are secondary to the inalienable human rights to ‘life, liberty and the pursuit of happiness’ proclaimed in the Declaration of Independence; and to this category the right to home and marriage unquestionably belongs.

—Hannah Arendt, “Reflections on Little Rock”<sup>72</sup>

65. *Id.*

66. *Views: Communication*, HUMAN RIGHTS COMMITTEE, U.N. Doc CCPR/C/78/D/829/1998 (Aug. 5, 2002).

67. *L.T.K. v. Finland*, D/185/1984, IHRL 2795 (UNHRC 1985) (July 9, 1985), <http://www1.umn.edu/humanrts/undocs/html/185-1984.htm>.

68. Case of *Bayatyan v. Armenia*, 23459/03, July 7, 2011, European Court of Human Rights,

69. *Id.*

70. *Roger Judge v. Canada*, Comm. No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003), <http://www1.umn.edu/humanrts/undocs/829-1998.html>.

71. *Id.*

72. Hannah Arendt, *Reflections on Little Rock*, DISSENT 49 (Winter 1959),

There have been 22 countries that have accorded legal recognition to same-sex marriage, suggesting that marriage equality is an emerging norm.<sup>73</sup> Customary international law (CIL) is law embodied in established norm rather than treaty obligations.<sup>74</sup> A customary law is created when states act in a “uniform, extensive and representative” manner.<sup>75</sup> CIL is memorialized in Article 38(1)(d) of the International Court of Justice Statute, which states: “[This Court] shall apply . . . international custom, as evidence of a general practice accepted by law” and “the general principles of law recognized by civilized nations.”<sup>76</sup> For a state practice to qualify as a constituent of CIL, the practice must be “extensive and representative,” though it does not need to be universal.<sup>77</sup> States must engage in the practice out of a sense of legal obligation, also called the *Opinio Juris*.<sup>78</sup>

Emerging case law from around the globe suggests same-sex marriage is an emerging Customary International Law. The United Nations has an expert body that determines the exact nature of a CIL.<sup>79</sup> The *Restatement of the Law, Third, Foreign Relations Law of the United States*, published by the American Law Institute in 1987, states that evidence of CIL can be found in judgments and opinions of international judicial and arbitral tribunals; judgments and opinions of national judicial tribunals; the writings of scholars; and, pronouncements by states that undertake to state a rule of international law.<sup>80</sup> At the time of the HCR’s decision in *Joslin v. New Zealand*, the Netherlands was the only country to accord legal recognition to same-sex marriage.<sup>81</sup> Much has changed since 2002, and the recognition of same-sex marriage by governments is occurring at break-neck speed. Only 4 years ago, 10 countries and 6 American states recognized same-sex marriage.<sup>82</sup> While there is much work to be done

[http://learningspaces.org/forgotten/little\\_rock1.pdf](http://learningspaces.org/forgotten/little_rock1.pdf).

73. PEW, *infra* note 87.

74. *Statute of the International Court of Justice*, art. 38, <http://www.icj-cij.org/documents/?p1=4&p2=2>.

75. *Formation of Customary (General) International Law (1984-2000)* INT’L L. ASSOC., <http://www.ila-hq.org/en/committees/index.cfm/cid/30> [hereinafter INT’L L. ASSOC.].

76. Statute of the International Court of Justice, INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/documents/?p1=4&p2=2>.

77. *Id.* at 23.

78. Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 4-5 (Chicago John M. Olin Law & Economics Working Paper No. 63 (2d Series)), <http://www.law.uchicago.edu/files/files/63.Goldsmith-Posner.pdf>.

79. Vaughn Lowe, *INTERNATIONAL LAW* 25 (2015); A. Mark Weisburd, *International Court of Justice and the Concept of State Practice*, 31 U. PA. J. INT’L L. 295 (2009).

80. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1988) [hereinafter RESTATEMENT].

81. PEW, *infra* note 87.

82. Ross Toro, *States Where Gay Marriage Is Legal* (Infographic) LIVE SCI. (Apr. 26,

with regard to the negative rights of LGBT persons living certain parts of the Africa, Asia, and Russia, the focus in much of the world is shifting to the positive right to same-sex marriage.<sup>83</sup> The courts and legislatures of countries that have accorded legal recognition to same-sex marriage have frequently justified their decisions by using or referring to international law.<sup>84</sup> Interestingly, many states that have legally recognized same-sex marriage are not in Europe or North America. South Africa recognizes same-sex marriage as a fundamental right, as do five countries in Latin America.<sup>85</sup>

The following are examples of high court decisions and legislative support for same-sex marriage around the world in a way that is “uniform, extensive and representative” in character.<sup>86</sup> While the recognition of same-sex marriage in twenty-two countries is not enough to make same-sex marriage a CIL, it does suggest “marriage equality is rapidly gaining momentum in much of the world.”<sup>87</sup> One way the United States can encourage the expansion of the positive right to gay marriage is to continue to point to emerging international standards surrounding gay marriage, and predicate aid on steps taken toward positive LGBT rights.

### A. South Africa

The highest court in South Africa held that exclusionary marriage laws and regulations violate the South African constitutional guarantee of “equal rights” as well as “inherent worth and dignity.”<sup>88</sup> Similar to the United States, South Africa is a constitutional democracy with an independent judiciary subject to a Constitution, substantially rewritten and adopted in 1996, as well as statutes and common law.<sup>89</sup> In 2005, the Constitutional Court of South Africa heard a challenge to provincial and local bans on same-sex marriage. The Court held that same-sex marriage

2013), <http://www.livescience.com/29099-states-where-gay-marriage-is-legal-infographic.html>.

83. *Where is it Illegal to be Gay?*, BBC (Feb. 10, 2014), <http://www.bbc.com/news/world-25927595> [hereinafter *Illegal*].

84. Sonia Bychokov Green, *Currency of Love: Customary International Law and the Battle for Same-Sex Marriage in the United States*, 14 U. PA. J.L. & SOC. CHANGE 53 (2010).

85. PEW, *infra* note 87.

86. INT'L L. ASSOC., *supra* note 75.

87. *Gay Marriage Around the World*, PEW RESEARCH CENTER (Mar. 9, 2015) <http://www.pewforum.org/2013/12/19/gay-marriage-around-the-world-2013/> [hereinafter PEW]; Michael J. Klarman, *How Same-Sex Marriage Came to Be*, HARV. MAG. (Mar.-Apr. 2013), <http://harvardmagazine.com/2013/03/how-same-sex-marriage-came-to-be>.

88. Minister of Home Affairs v. Fouri, 3 BCLR 355, [P 162] (S. Afr. Const. Ct. Dec. 1, 2005), <http://www.saflii.org/za/cases/ZACC/2005/19.pdf> [hereinafter Fourie]; Bill Keller, *Out in Africa*, N.Y. TIMES (Dec. 23, 2013), <http://www.nytimes.com/2012/12/24/opinion/keller-out-in-africa.html>.

89. See South Africa’s Judiciary, SOUTH AFRICA INFO, <http://www.southafrica.info/about-democracy/judiciary.htm#VTa9PmTBzGc> (last visited May 3, 2015).

rights are fundamental, and not subject to jurisdictional limitations.<sup>90</sup>

Though the South African Constitution and applicable laws do not expressly include the positive right to same-sex marriage, the Constitutional Court held that guarantees to equality and non-discrimination necessarily guarantee the fundamental right to same-sex marriage. Section 9 of South Africa's Bill of Rights states "Everyone is equal before the law and has the right to equal protection . . .".<sup>91</sup> Subsection 3 of the Bill of Rights goes on to specify that equality includes grounds such as gender and sexual orientation.<sup>92</sup> The Court reasoned that the exclusion of same-sex couples from the "entitlements and responsibilities" given to different-sex couples was a denial of equal protection rights. The denial of same-sex marriage benefits, the Court went on to say, was not an oversight but the result of historic homophobia.<sup>93</sup> Therefore, the equal rights section of the Constitution could not merely be read as a provision that protected LGBT persons from discrimination. The provision must also, rather, be understood to include the right to legal recognition of same-sex marriage, because equal rights implicitly include the right to be acknowledged as equals and embraced with dignity under the law.<sup>94</sup>

Significantly, the Court rejected the argument that the UDHR excluded same-sex marriage. It stated:

There is nothing in the international law instruments to suggest that the family which is the fundamental unit of society must be constituted according to any particular model. Indeed, even if the purpose of the instruments was expressly to accord protection to a certain type of family formation, this would not have implied that all other modes of establishing families should for all time lack legal protection.

Finally, the Court found that not recognizing same-sex marriage subverts public policy. "[M]arriage touches on many . . . aspects of law," the Court observed, "including labor law, insurance and tax. These issues are of importance not only to the applicants and the gay and lesbian community but also to society at large."<sup>95</sup>

90. Albie Sachs, *South Africa's Path to Marriage Equality*, L.A. TIMES (JUNE 13, 2013), <http://articles.latimes.com/2013/jun/13/opinion/la-oe-sachs-gay-marriage-south-africa-20130613/2>.

91. Jonathan Capehart, *Nelson Mandela: LGBT Rights Champion*, WASH. POST (Dec. 6, 2013), <http://www.washingtonpost.com/blogs/post-partisan/wp/2013/12/06/nelson-mandela-lgbt-rights-champion/>.

92. *Id.*

93. Fourie, *supra* note 88.

94. *Id.* at 49.

95. *Id.*

It is significant that a country committed to human rights in the wake of apartheid [the TRC is an aspect of the move away from apartheid, after all] would find that same-sex marriage was a fundamental human right. With a constitution that prohibits discrimination on the basis of sexual orientation, it is logical to extend that commitment to equality to include the legal recognition of same-sex marriage.

### B. South America

Of the 22 countries worldwide that recognize same-sex marriage four of them are heavily Roman Catholic countries in Latin America with modern Constitutions that incorporate Human Rights language.<sup>96</sup> The high courts of Brazil, Colombia, and Mexico have interpreted their countries' constitutions as enshrining same-sex marriage rights.<sup>97</sup> Argentina's court was primed to be the first court in Latin America to rule in favor of same-sex marriage, but the court stepped back, allowing the country's president and legislative body to take the lead by approving legislation according recognition to same-sex marriage.<sup>98</sup> Argentina was the first country in South America in which a legally recognized same-sex wedding took place, in 2009.<sup>99</sup>

There are three important considerations to note about marriage in Latin America. First, marriage in Latin America is generally a civil institution that takes place outside a religious context.<sup>100</sup> Second, Latin American Countries have constitutional frameworks where constitutions are routinely updated, thereby providing Latin American countries the opportunity to incorporate contemporary human rights ideas and language.<sup>101</sup> Third, Latin American countries have judiciaries that accept "trans-national legalism," and these judiciaries consider rulings from other countries and from international tribunals in cases that involve human rights.<sup>102</sup> In fact, the Mexican Supreme Court cited *Loving v. Virginia* when it ruled, unanimously, in support of same-sex marriage.<sup>103</sup>

It was Brazil's highest appeals court, the National Council of Justice (CNJ), that as in South Africa, approved the legal recognition of same-

96. PEW, *supra* note 87.

97. Omar G. Encarnación, *Why Latin American Courts Favor Gay Rights*, N.Y. TIMES (Jan. 29, 2014), <http://www.nytimes.com/roomfordebate/2014/01/29/why-is-latin-america-so-progressive-on-gay-rights/why-latin-american-courts-favor-gay-rights>.

98. *Id.*

99. Michael Warren, *Argentina Gay Marriage Law: First Country in Latin America to Approve Same-Sex Marriage*, HUFFINGTON POST (July 15, 2010), [http://www.huffingtonpost.com/2011/10/18/argentina-gay-marriage\\_n\\_1018536.html](http://www.huffingtonpost.com/2011/10/18/argentina-gay-marriage_n_1018536.html).

100. Encarnación, *supra* note 97.

101. *Id.*

102. *Id.*

103. *Id.*

sex marriage.<sup>104</sup> The court held that government officials were prohibited from refusing to authorize or execute civil marriages based on the sexes of the partners. The CNJ also ruled that Brazil must recognize same-sex marriages performed outside of Brazil.<sup>105</sup>

In 2013, Uruguay's Congress voted to grant legal recognition to same-sex marriage. Both leftists and conservatives voted in favor of the change. Fernando Amado of the center-right Colorado party said: "I agree that family is the basis of society but I also believe that love is the basis of family. And love is neither homosexual nor heterosexual."<sup>106</sup> Professor Elisabeth Friedman of the University of San Francisco writes that "[m]ovements for sexual and gender rights are not new to Latin America, but they have developed sophisticated strategies capitalizing on the historical legitimacy of human rights. In a region that experienced decades of authoritarian repression, demands for human rights have powerful resonance."

### C. Europe

#### 1. The European Court of Human Rights

In sharp contrast to South Africa, the European Court of Human Rights ruled that gay marriage was not a fundamental human right. In 2010, an Austrian couple challenged their country's ban on gay marriage at the European Court of Human Rights in the *Case of Schalk and Kopf v. Austria*.<sup>107</sup> In its analysis, the European Court first examined Article 12 of the European Convention on Human Rights (ECHR) and Article 9 of the Charter of Fundamental Rights of the European Union (CFR), both of which protect the right to marry.<sup>108</sup> The Court then examined Article 14 and Article 8 together. Article 8 guarantees the right to a private life and family, while Article 14 prohibits discrimination.

104. Julie Deisher, *Brazil Justice Council Effectively Legalizes Same-Sex Marriage*, JURIST (May 16, 2013), <http://jurist.org/paperchase/2013/05/brazil-justice-council-effectively-legalizes-same-sex-marriage.php>.

105. *Id.*

106. Malena Castaldi & Felipe Llambias, *Uruguay Approves Gay Marriage, Second in Region to Do So*, REUTERS (Apr. 10, 2013), <http://www.reuters.com/article/2013/04/11/us-uruguay-gay-idUSBRE93A00L20130411>.

107. *Case of Schalk & Kopf v. Austria* (June 14, 2010),

108. Article 12 of the ECHR states: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right." Council of Europe, The European Convention on Human Rights, art. 12, HELLENIC RESOURCES NETWORK, <http://www.hri.org/docs/ECHR50.html#C.Art12>. Article 9 states, "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights." Why the EU Charter of Rights Exists, E.U. FUNDAMENTAL RIGHTS, [http://ec.europa.eu/justice/fundamental-rights/charter/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm).

In *Schalk*, the European Court found that a right to same-sex marriage was not enumerated in the ECHR or the CFR. Article 12 of the ECHR guarantees the right to marry and found a family, and thus echoes the language of Article 16 of the DHR.<sup>109</sup> Unlike the DHR, however, the ECHR limits the right to marriage by subjecting it to the governing law of each European country.<sup>110</sup> Prior to *Schalk*, the European Court had ruled against the right to marry for transsexual persons because “Article 12 enshrined the traditional concept of marriage as being between a man and a woman.”<sup>111</sup> The Court in *Schalk* went on to state: “Contracting States had extended marriage to same-sex partners . . . this reflected their own vision of the role of marriage in their societies and did not flow from an interpretation of the fundamental right as laid down by the Convention.”<sup>112</sup>

The Court also noted that the wording in Article 12 was the result of the “historical context” in which the Convention was written in 1950.<sup>113</sup> “[M]arriage was clearly understood in the traditional sense as being a union between partners of different sex.”<sup>114</sup> The Court then looked to the CFR. Article 9 of the CFR guarantees the right to marry without referencing gender, but with a reference to national law. The European Court concluded marriage is not “limited to . . . two persons of the opposite sex,” but “same-sex marriage is left to regulation by the national law of the Contracting State.”<sup>115</sup>

Next, the Court examined Articles 8 and 14 of the ECHR together. Here, the court recognized that relational stability and the cohabitation of same-sex couples are aspects of “family life.”<sup>116</sup> However, the Court noted that “same-sex couples are just as capable as different-sex couples of entering into stable committed relationships” in Austria.<sup>117</sup> The Court reasoned that no “need for legal recognition and protection of their relationship” existed because same-sex couples were free to form domestic partnerships.<sup>118</sup> The existence of same-sex families without the presence of discrimination is, therefore, not enough to overcome the

109. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810, art. 16 (1948), <http://www.un.org/en/documents/udhr/> (last visited May 3, 2015).

110. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) (last visited May 3, 2015).

111. *Schalk*, *supra* note 107.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

limitations placed on marriage by Article 12 of the ECHR.<sup>119</sup>

The Court declined to rule on whether the presence of discriminatory limits on entry into legally recognized civil unions would constitute a violation of a human rights because Austria allows for such domestic partnerships on a non-discriminatory basis.<sup>120</sup> Additionally, the Court declined to address the disparity in rights guaranteed to marriage partners and those guaranteed to participants in civil unions in Austria.<sup>121</sup> Civil unions in Austria are void of many of the rights and privileges provided to married couples, including the right to adopt and access to fertility treatments.<sup>122</sup> There are 70 differences in the legally protected rights and privileges accorded to participants in civil unions and those accorded to marriage partners in Austria.<sup>123</sup>

## 2. Individual European Union Members

Regardless of the ruling by the ECHR, many countries in Europe have continued on the path to marriage equality. Since the ruling by the ECHR, 8 European states have recognized same-sex marriage, bringing the total of states recognizing same-sex marriage to 12.<sup>124</sup>

The Netherlands was the first country in Europe to accord legal recognition to same-sex marriage, in 2000. The Netherlands passed national legislation codifying the right by a 3-to-1 majority. However, same-sex marriage in the Netherlands did not necessarily include all of the rights that opposite-sex couples had in marriage, specifically automatic parental rights for any child born within a same-sex marriage.<sup>125</sup> Belgium followed the Netherlands 3 years later, in 2003, with legislation that allowed for same-sex marriage, giving LGBT spouses inheritance rights and tax privileges.<sup>126</sup> Then, 3 years after that, Belgium added to the rights of married same-sex couples with the right to adopt children.<sup>127</sup> In 2005, Spain passed legislation recognizing same-

119. *Id.*

120. *Id.*

121. *Id.*

122. Phil Cain, *Austrian Seek Right to Partnership Created for Gays*, BBC (May 17, 2010), <http://news.bbc.co.uk/2/hi/europe/8687064.stm>.

123. *Id.* (Interestingly, one right afforded under civil unions is the right to work for non-Austrian partners.).

124. PEW, *supra* note 87 (At this time, countries in Europe that allow same-sex marriage include Denmark since 2012, England and Wales since 2013, Finland since 2015, France since 2013, Iceland since 2010, Luxembourg since 2014, the Netherlands since 2000, Norway 2009, Portugal since 2010, Scotland since 2014, Spain since 2005, and Sweden since 2009.).

125. Lisa Belkin, *Dutch Views on Same-Sex Marriage*, N.Y. TIMES, (Nov. 9, 2009, 3:16 PM), [http://parenting.blogs.nytimes.com/2009/11/09/how-the-dutch-work-same-sex-marriage/?\\_r=0](http://parenting.blogs.nytimes.com/2009/11/09/how-the-dutch-work-same-sex-marriage/?_r=0).

126. *Id.*

127. *Id.*

sex marriage and granting same-sex spouses rights identical to those available to different-sex spouses.

When Scotland granted legal recognition to same-sex marriage, the Cabinet Secretary for Health and Wellbeing said the new law was an “important signal that our nation is absolutely committed to the same rights for all our citizens”<sup>128</sup> Expressing similar commitments, Denmark, Sweden, Iceland, and Norway have eliminated separate systems for same-sex partnerships because such systems were inadequate and unequal with regard to economic and parental privileges. In Denmark, the parliament voted by a large majority to make it mandatory for all churches established by the state of Denmark to conduct gay marriages.<sup>129</sup> An individual priest can refuse to officiate at a same-sex wedding, but the bishop in the priest’s diocese must make arrangements for a replacement priest.

Iceland is the only country with an openly gay head of government, Prime Minister Johanna Sigurdardottir. “The attitude in Iceland is fairly pragmatic,” observes University of Iceland political scientist Gunnar Helgi Kristinsson. Gay marriage “has not been controversial.”<sup>130</sup> Prime Minister Sigurdardottir married her partner on the day same-sex marriage became available.<sup>131</sup>

In France, President François Hollande made equal marriage legislation the biggest priority among his socialist reform efforts, while conservative leader Nicolas Sarkozy proclaimed marriage equality was “humiliating” to straight families.<sup>132</sup> The French Constitutional Counsel ultimately ruled that gay marriage “did not run contrary to any constitutional principles” and did not infringe on “basic rights or liberties or national sovereignty.”<sup>133</sup> Same-sex marriage has been legally recognized in France since 2013.<sup>134</sup>

In the United Kingdom, unlike France, legal recognition for same-sex marriage had significant support among conservatives, who opined that

128. Richard Orange, *Date Set for First Same-Sex Marriages in Scotland*, BBC (Oct. 13, 2010), <http://www.bbc.com/news/uk-scotland-scotland-politics-29595701>.

129. *Gay Danish Couples Win Right to Marry in Church*, TELEGRAPH, (June 7, 2012, 5:06 PM), <http://www.telegraph.co.uk/news/worldnews/europe/denmark/9317447/Gay-Danish-couples-win-right-to-marry-in-church.html>.

130. Birna Bjornsdottir et al., *Iceland Passes Gay Marriage Law in Unanimous Vote*, REUTERS (June 11, 2010), <http://www.reuters.com/article/2010/06/11/us-iceland-gaymarriage-idUSTRE65A3V020100611>.

131. *Gay Marriage Around the World*, BBC (July 5, 2013), <http://www.bbc.com/news/world-21321731>.

132. Marc Naimark, *Would a Second Sarkozy Presidency End Marriage Equality in France?*, SLATE (July 5, 2013), [http://www.slate.com/blogs/outward/2014/09/23/sarkozy\\_and\\_gay\\_marriage\\_would\\_he\\_end\\_marriage\\_equality\\_in\\_france.html](http://www.slate.com/blogs/outward/2014/09/23/sarkozy_and_gay_marriage_would_he_end_marriage_equality_in_france.html).

133. *Id.*

134. PEW, *supra* note at 87.

same-sex marriage was evolutionary rather than revolutionary, and saw same-sex marriage as bolstering rather than undermining marriage. Maria Miller, the Conservative cabinet member who introduced the marriage-equality bill for England and Wales, maintained: “Marriage is not static; it has evolved and parliament has chosen to act over the centuries to make it fairer and more equal. We now face another such moment—another such chance in this new century.”<sup>135</sup> According to Conservative Prime Minister David Cameron, the law “says we are a country that will continue to honor its proud traditions of respect, tolerance and equal worth.”<sup>136</sup>

## D. South Asia

### 1. India

Marriage in India can be a civil or religious arrangement, though the vast majority of marriages in India are religious. In India, 90% of the marriages are arranged by parents of the members of marrying couples in accordance with families’ religious traditions.<sup>137</sup> Gay rights activists have yet to gain significant attention for same-sex marriage rights. In 2009, a Delhi High Court rejected sodomy laws that came into effect during the British Colonial Period.<sup>138</sup> For 4 years, same sex couples began to freely associate and live together.<sup>139</sup> However, in 2013 the Indian Supreme Court reversed the ruling, leaving India 1 of 3 countries to criminalize same-sex sexual relations in the last 40 years.<sup>140</sup>

Though the law criminalizing same-sex sexual relations is rarely invoked, the law reflects a culture that does not accept gay relationships as legitimate.<sup>141</sup> Gay sex acts in themselves are not necessarily frowned upon. Sex between men, especially young men, is not regarded as equivalent to heterosexual sex but is instead seen as a kind of “erotic playfulness,” a way to satisfy an “urgent bodily need.”<sup>142</sup> But the

135. Patrick Wintour, *Gay Marriage Plans Offer ‘Quadruple Lock’ for Opposed Religious Groups*, GUARDIAN (Dec. 11, 2012), <http://www.theguardian.com/society/2012/dec/11/gay-marriage-quadruple-lock-religious-groups>.

136. *Same-Sex Marriage Now Legal as First Couples Wed*, BBC (Mar. 29, 2014), <http://www.bbc.com/news/uk-26793127>.

137. Myrna Toledo, *First Comes Marriage, Then Comes Love*, ABC NEWS (Jan. 30, 2009), <http://abcnews.go.com/2020/story?id=6762309>.

138. J. Venkatesan, *Supreme Court Sets Aside Delhi HC Verdict Decriminalising Gay Sex*, HINDU NAT'L (Dec. 12, 2013), <http://www.thehindu.com/news/national/supreme-court-sets-aside-delhi-hc-verdict-decriminalising-gay-sex/article5446939.ece?homepage=true>.

139. *Id.*

140. *Illegal*, *supra* note 83.

141. *India Top Court Reinstates Gay Sex Ban*, BBC (Dec. 11, 2013), <http://www.bbc.com/news/world-asia-india-25329065>.

142. Sudhir Kakar, *Homosexuality and the Indian*, INDIAN (Aug. 17, 2007), <http://www.little>

paradigm case of morally ideal sex is sex in which partners in a different-sex marriage engage in order to procreate.<sup>143</sup>

Despite cultural barriers, activists continue to fight for marriage equality in India. Delhi's nascent but vocal Common People Party gained 28 of the 70 seats in the Delhi Legislative Assembly in 2013.<sup>144</sup> The party supports the legal recognition of same-sex marriage, and maintains that the criminalization of same-sex sexual relations is an encroachment on the sexual rights of minorities.<sup>145</sup>

## 2. Nepal

The government of Nepal became the first in South Asia, as the result of a 2007 Supreme Court ruling, seriously to investigate the possibility of same-sex marriage.<sup>146</sup> The Supreme Court ordered the government to guarantee sexual rights and end discrimination; however, laws effecting marriage equality have been stalled in the legislature.<sup>147</sup> Marriage in Nepal is a religious and cultural institution rather than a civil one.<sup>148</sup> As in India, same-sex partnerships are not considered legitimate. However, also as in India, sexual identities are fluid as are sexual practices. Men who have sex with men are frequently also married to women, and a procreative marriage is considered a successful one, whatever the sexual desires of the partners.<sup>149</sup>

### E. Emerging Customary International Law

While the legal recognition of gay marriage in 22 countries may not qualify marriage equality as sufficiently "uniform, extensive and representative"<sup>150</sup> to ground the claim that legal recognition for same-sex marriage is a requirements of CIL, there is an emerging right to same-sex marriage in most regions of the globe. While the international community needs to place continued pressure on Russia, as well as some African and

[india.com/life/1835-homosexuality-and-the-indian.html](http://india.com/life/1835-homosexuality-and-the-indian.html).

143. *Id.*

144. Joe Morgan, *India 'Party of the People' Promises to Legalize Gay Sex, Marriage*, GAY STAR NEWS (Apr. 11, 2014), <http://www.gaystarnews.com/article/india-party-people-promises-legalize-gay-sex-marriage110414>.

145. *Id.*

146. *Being Gay in Asia: Nepal Country Report*, at 3, USAID, [http://www.usaid.gov/sites/default/files/documents/1861/Being\\_LGBT\\_in\\_Asia\\_Nepal\\_Country\\_Report.pdf](http://www.usaid.gov/sites/default/files/documents/1861/Being_LGBT_in_Asia_Nepal_Country_Report.pdf) (last visited May 3, 2013) [hereinafter Nepal USAID].

147. *Nepal's 'First Gay Wedding' Held*, BBC (June 20, 2011), <http://www.bbc.com/news/world-south-asia-13847299>.

148. Nepal USAID, *supra* note 146.

149. *Id.*

150. INT'L L. ASSOC., *supra* note 75.

Asian countries, to protect LGBT persons from violence and discrimination, the global discussion about LGBT rights is increasingly focused on same-sex marriage. Judicial, legislative, and political comments made in the aggregate point to a growing global acceptance of same-sex marriage. In fact, the rate of change is breathtaking. The influence of the judicial, legislative and political changes that have taken place in South Africa, Latin America and Europe can be felt around the globe. In countries like India where gay sex is illegal, minor political parties have begun to talk about according legal recognition to gay marriage while also securing negative LGBT rights. Neighboring Nepal is considering legislation to recognize gay marriage at the prompting of its Supreme Court. The United States can bolster this momentum by including the right to marry in the rubric it uses to report on the status of LGBT persons around the world, a rubric that will then be used to confer aid through the World Bank.

## VI. CONCLUSION: PROMOTING POSITIVE LGBT RIGHTS

“[Protecting the] rights of LGBT people [is] an inseparable part of America’s promotion of human rights around the world.”

—Vice President of the United States Joe Biden<sup>151</sup>

The United States should promote positive as well as negative LGBT rights. Marriage is associated with rights and privileges that are not typically granted outside of marriage. These rights can include automatic rights under intestacy, tax privileges, and rights to children, among many others. Additionally, same-sex marriage has a basis in international human rights law, specifically ICCPR Articles 23 and 26. Emerging jurisprudence around the globe also points to a sea change in national laws regarding same-sex marriage. This change is evident not only in North America and Europe but also in Latin American countries and South Africa as well. If, as former Secretary of State Hillary Clinton asserted, “Gay rights are human rights. Human rights are gay rights,” then the fundamental human right to marry must also be extended to LGBT persons. The United States and the Obama Administration should work toward international acceptance of the new political, judicial and legislative same-sex marriage norm.

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151. Jeff Prescott, *Standing Up for LGBT Rights Around the World*, THE WHITE HOUSE (Mar. 25, 2014, 10:08 AM), <https://www.whitehouse.gov/blog/2014/03/25/standing-lgbt-rights-around-world>.

