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Seventy-fifth session
8-26 July 2002

VIEWS

Communication No. 902/1999

Submitted by:	Ms. Juliet Joslin et al. (represented by counsel Mr. Nigel C. Christie)
Alleged victim:	The authors
State party:	New Zealand
Date of communication:	30 November 1998 (initial submission)
Document references:	Special Rapporteur's rule 91 decision, transmitted to the State party on 15 December 1999 (not issued in document form)
Date of adoption of Views:	17 July 2002

On 17 July 2002 the Human Rights Committee adopted its Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 902/1999. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Seventy-fifth session

concerning

Communication No. 902/1999*

Submitted by: Ms. Juliet Joslin et al. (represented by counsel Mr. Nigel C. Christie)

Alleged victim: The author

State party: New Zealand

Date of communication: 30 November 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 July 2002,

Having concluded its consideration of communication No. 902/1999, submitted to the Human Rights Committee by Ms. Juliet Joslin et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

The text of a concurring individual opinion signed by Mr. Rajsoomer Lallah and Mr. Martin Scheinin is appended to this document.

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Juliet Joslin, Jennifer Rowan, Margaret Pearl and Lindsay Zelf, all of New Zealand nationality, born on 24 October 1950, 27 September 1949, 16 November 1950, and 11 September 1951 respectively. The authors claim to be victims of a violation by New Zealand of articles 16; 17, on its own and in conjunction with article 2, paragraph 1; 23, paragraph 1, in conjunction with article 2, paragraph 1; 23, paragraph 2, in conjunction with article 2, paragraph 1; and 26. The authors are represented by counsel.

The facts as presented by the authors

2.1 Ms. Joslin and Ms. Rowan commenced a lesbian relationship in January 1988. Since that point, they have jointly assumed responsibility for their children out of previous marriages. In living together, they have pooled finances and jointly own their common home. They maintain sexual relations. On 4 December 1995, they applied under the Marriage Act 1955 to the local Registrar of Births, Deaths and Marriages for a marriage licence, by lodging a notice of intended marriage at the local Registry Office. On 14 December 1995, the Deputy Registrar-General rejected the application.

2.2 Similarly, Ms. Zelf and Ms. Pearl commenced a lesbian relationship in April 1993. They also share responsibility for the children of a previous marriage, pool financial resources and maintain sexual relations. On 22 January 1996, the local Registry Office refused to accept a notice of intended marriage. On 2 February 1996, Ms Zelf and Ms Pearl lodged a notice of intended marriage at another Registry Office. On 12 February 1996, the Registrar-General informed them that the notice could not be processed. The Registrar-General indicated that the Registrar was acting lawfully in interpreting the Marriage Act as confined to marriage between a man and a woman.

2.3 All four authors thereupon applied to the High Court for a declaration that, as lesbian couples, they were lawfully entitled to obtain a marriage licence and to marry pursuant to the Marriage Act 1955. On 28 May 1996, the High Court declined the application. Observing inter alia that the text of article 23, paragraph 2, of the Covenant "does not point to same-sex marriages", the Court held that the statutory language of the Marriage Act was clear in applying to marriage between a man and a woman only.

2.4 On 17 December 1997, a Full Bench of the Court of Appeal rejected the authors' appeal. The Court held unanimously that the Marriage Act, in its terms, clearly applied to marriage between a man and a woman only. A majority of the Court further went on to hold that the restriction in the Marriage Act of marriage to a man and a woman did not constitute discrimination. Justice Keith, expressing the majority's views at length, found no support in the scheme and text of the Covenant, the Committee's prior jurisprudence, the *travaux préparatoires* nor scholarly writing[1] for the proposition that a limitation of marriage to a man and a woman violated the Covenant.

The complaint

3.1 The authors claim a violation of article 26, in that the failure of the Marriage Act to provide for homosexual marriage discriminates against them directly on the basis of sex and indirectly on the basis of sexual orientation. They state that their inability to marry causes them to suffer "a real adverse impact" in several ways: they are denied the ability to marry, a basic civil right, and are excluded from full membership of society; their relationship is stigmatized and there can be detrimental effects on self-worth; and they do not have ability to choose whether or not to marry, like heterosexual couples do.

3.2 The authors contend that the differentiation contained in the Marriage Act cannot be justified on any of a variety of grounds that the State might advance. These are that marriage centres on procreation, and homosexuals are incapable of procreation; that recognition of homosexual marriage would validate a particular "lifestyle"; that marriage is consistent with public morality; that marriage is an institution of longevity; that alternative forms of contractual/private arrangements are available; that an extension of current marriage would open "floodgates" dangers; that marriage is an optimum construct for parenting; and that Parliament's democratic decision should be accorded deference.

3.3 By way of rebuttal of these possible justifications, the authors note, firstly, that procreation does not lie at the heart of marriage, and is not a necessary indicium for marriage in New Zealand law. In any event, lesbians could procreate utilising reproductive technologies, and to allow homosexual marriage would not affect the procreative capacity of heterosexuals. Secondly, there is no such thing as homosexual "lifestyle". In any event, the Marriage Act does not sanction particular lifestyles, and there is no evidence any hypothetical homosexual lifestyle contains elements which would justify an inability to marry. Thirdly, in accordance with the "Siracusa Principles on the Limitation and Derogation Provisions of the ICCPR",[2] public morality cannot justify discrimination contrary to the Covenant. In any event, so argue the authors, New Zealand public morality does not support exclusion of homosexuals from marriage.

3.4 Fourthly, longevity or tradition cannot justify discrimination. In any case, historical research shows that various societies in different parts of the world, have at different times, recognized homosexual unions.[3] Fifthly, if homosexuals should have to enter contractual or other private arrangements to confer upon themselves the benefits that flow from marriage, heterosexuals should be required to bear the same costs. In any event, in New Zealand contractual arrangements would not confer the full benefits of marriage. Sixthly, it would not follow from a permission of homosexual marriage that polygamous or incestuous marriages would also have to be permitted. There are other reasons for not permitting such marriages that are not present in the case of homosexual marriages. Seventhly, the authors contend that North American social science research has demonstrated that the effect of homosexual parenthood on children is not markedly different from that of heterosexual parents, including in the area of sexual identity and mental and emotional well-being.[4] In any event, it is already the case, as with the authors, that homosexual couples are caring for children. Finally, the authors argue that no deference should be shown to democratic will, as expressed by the national authorities, in particular, the legislature, of a State party, as a human rights issue is involved.[5]

3.5 The authors also claim a violation of article 16. They argue that article 16 is aimed at permitting persons to assert their essential dignity, through their recognition as proper subjects of law, both as individuals and as members of a couple. The Marriage Act, in preventing the authors from acquiring the legal attributes and advantages flowing from marriage, including advantages in the law of adoption, succession, matrimonial property, family protection and evidence, deprives the authors of access to a significant institution through which individuals acquire and exercise legal personality.

3.6 The authors further claim a violation of article 17, both on its own and in conjunction with article 2, paragraph 1, in that the restriction of marriage to heterosexual couples violates the authors' rights to family and privacy. The authors contend that their relationships display all the attributes of family life,[6] but are nonetheless denied civil recognition through marriage. This amounts to a failure on the part of the State to discharge its positive obligation to protect family life. Moreover, the failure publicly to respect the fundamental private choice of one's sexual identity and partnerships flowing from that is an interference with the notion of privacy in article 17.[7] This interference is also arbitrary, as it is discriminatory, based upon prejudice and without justification for the reasons set out above.

3.7 The authors further claim a violation of article 23, paragraph 1, in conjunction with article 2, paragraph 1. They state that their relationships exhibit all the criteria by reference to which a heterosexual family is said to exist, with the only criteria missing being legal recognition. The authors submit that article 2, paragraph 1, requires recognition of families to take place in a non-discriminatory manner, which the Marriage Act fails to do.

3.8 Finally, the authors claim a violation of article 23, paragraph 2, in conjunction with article 2, paragraph 1. They contend that the right of men and women to marry must be interpreted in the light of article 2, paragraph 1, which forbids distinctions of any kind. As the Marriage Act distinguishes on the prohibited ground of sex, which includes within its ambit sexual orientation,[8] the authors' rights in these respects have been violated. While the European Court has held that the corresponding right in the European Convention on Human Rights is limited to marriage between a man and a woman,[9] the Committee should prefer a wider interpretation. Moreover, examining the text of the Covenant, the phrase "men and women" in article 23, paragraph 2, does not mean that only men may marry women, but rather that men as a group and women as a group may marry.

3.9 As to the exhaustion of domestic remedies, the authors contend that a further appeal from the Court of Appeal to the Privy Council would be futile, as the courts cannot refuse to apply primary legislation such as the Marriage Act.

The State party's submissions on admissibility and merits

4.1 As to the exhaustion of domestic remedies, the State party rejects the authors' claims of futility in pursuing a further appeal to the Privy Council, noting that it would be open to the Privy Council to construe the terms of the Marriage Act as permitting a lesbian marriage. The State party notes that the lower courts considered the statutory meaning of the Act clear, and that there was no finding of any inconsistency with the Bill of Rights Act and the right to non-discrimination contained therein. The question before the local courts was one of statutory

interpretation, and the Privy Council would be well able to come to a contrary conclusion as to the proper meaning of the Act. The State party expressly declines, however, to draw a conclusion as to the admissibility of the communication on this or any other grounds.

4.2 As to the merits, the State party rejects the authors' arguments that the Covenant requires States parties to enable homosexual couples to marry, noting that such an approach would require redefinition of a legal institution protected and defined by the Covenant itself, and of an institution reflective of the social and cultural values in the State party which are consistent with the Covenant. The State party's law and policy protects and recognizes homosexual couples in various ways, however recognition through the institution of marriage "goes well beyond the terms of the Covenant". The State party notes that, while various States parties have instituted forms of registration for homosexual couples, none currently permit homosexual marriage.[10] It is the fundamental understanding of marriage in the Covenant, in other international instruments such as the Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as in New Zealand law, as being between a man and a woman.

4.3 The State party's over-arching argument is that the terms of article 23, paragraph 2, of the Covenant clearly envisage that marriage may properly be defined in terms of couples of opposite sexes. The ordinary meaning of the words "to marry" refers to couples of opposite sexes.[11] Significantly, article 23, paragraph 2, is the only substantive right protected under the Covenant expressed in the gender-specific terms of "men and women", with all other rights expressed in gender-neutral terms.[12] This contextual reading is strengthened by the word "spouse", connoting parties to a marriage of opposite sexes, in article 23, paragraphs 3 and 4. The universal consensus of State practice supports this view: no States parties provide for homosexual marriage; nor has any State understood the Covenant to so require and accordingly entered a reservation.

4.4 The State party observes that this reading of article 23, paragraph 2, is consistent with the *travaux préparatoires* of the Covenant. Article 23 was drawn directly from article 16 of the Universal Declaration of Human Rights, which provides, in the only gender-specific reference in the Declaration, to the right of "[m]en and women … to marry". The *travaux préparatoires* of article 23 also contain repeated references to "husband and wife".[13] Such an interpretation is also confirmed by respected academic commentary,[14] and by decisions of the European Court of Human Rights which have repeatedly found that the equivalent provision of the European Convention does not extend to homosexual couples.[15]

4.5 The State party emphasizes that the specific terms of article 23, paragraph 2, in clearly referring to couples of different sex, must influence the interpretation of the other Covenant rights invoked. Following the interpretative maxim *generalia specialibus non derogant*, to the effect that general provisions should not detract from the meaning of specific provisions, the specific meaning of article 23, paragraph 2, excludes a contrary interpretation being derived from other more general provisions of the Covenant.

4.6 As to article 16, the State party contends that this provision confers an individual right. It is not possible to construe article 16 as creating an obligation to recognize particular forms of relationship in a given way, for the legal personality protected by article 16 is of individuals

rather than of a couple or other social grouping. The *travaux préparatoires* and academic commentary both reinforce that article 16 is aimed at preventing a State from denying individuals the ability to enjoy and enforce their legal rights, rather than dealing with an individual's capacity to act.[16] Accordingly, article 16 cannot be understood to confer an entitlement to acquire rights consequent upon any particular legal status or to act in a particular way, such as entering into marriage, under law.

4.7 As to article 17, both on its own and in conjunction with article 2, paragraph 1, the State party refers to the Committee's General Comment 16, which states that article 17 protects against "all such interferences and attacks" on a person's expression of identity. The requirements of the Marriage Act, however, do not constitute an interference or attack on the authors' family or privacy, which are protected by general legislation governing privacy, human rights and family law. Unlike the criminal legislation at issue in *Toonen v. Australia*,[17] the Marriage Act neither authorizes intrusions into personal matters, nor otherwise interferes with the authors' privacy or family life, nor generally targets the authors as members of a social group. The authors are not subject to any restriction on the expression of their identity or their entry into personal relationships, but rather seek the State's conferral of a particular legal status on their relationship.

4.8 As to article 23, paragraph 1, in conjunction with article 2, paragraph 1, the State party states that, contrary to the communication's allegation, it does recognize the authors, with and without their children, as families. The law makes provision for the protection of families in a variety of ways, including law relating to protection of children, protection of family property, dissolution of marriage and so on. While some of those areas do not extend to homosexual couples, certain areas are under review[18] and a number of other measures do apply to homosexual couples,[19] in keeping with social changes and involving careful review and extensive consultation. Such differential treatment is permissible, for the Committee's jurisprudence is clear that conceptions and legal treatments of families vary widely.[20] The Committee's General Comment 19 also recognizes that law and policy relating to families may properly vary from one form of family to another.

4.9 The State party submits therefore that there is clear scope under article 23, paragraph 1, for different treatment of different forms of family. A differential treatment of families that comprise or are headed by a married couple also reflects States parties' obligations under article 23, paragraph 2, to provide for marriage as a separate institution. The State party observes that it is carrying out a programmatic review of law and policy affecting homosexual couples to ensure that social, political and cultural values remain met through its family law and practice.

4.10 As to article 23, paragraph 2, in conjunction with article 2, paragraph 1, the State party refers to its previous submissions that article 23, paragraph 2, cannot be read as extending to a right of homosexual couples to marry. In any event, the inability of homosexual couples to marry under New Zealand law does not follow from a differential treatment of homosexual couples but from the nature of the institution of marriage recognized by article 23, paragraph 2, itself.

4.11 As to article 26, the State party emphasizes that the inability of homosexual couples to marry flows directly from article 23, paragraph 2, of the Covenant and cannot, therefore, constitute discrimination in terms of article 26. Turning to the elements of discrimination under article 26, the State party argues firstly that the inability of homosexuals to marry does not follow from a distinction, exclusion or restriction but rather from the inherent nature of marriage itself. Marriage is at present universally understood as open only to individuals of opposite sexes, and is so recognized in the civil law of all other States parties to the Covenant. While in recent years some States parties have instituted forms of official recognition for homosexual relationships, none of these have been described as marriage or possesses identical legal effect. As such, the clear understanding of marriage, as underscored by the meaning of article 23, paragraph 2, is of individuals of opposite sexes.

4.12 The State party contends that the authors' attempt to interpret the principle of non-discrimination so as to redefine the institution of marriage seeks not non-discrimination but identical treatment, which goes well beyond the scope of article 26. The Covenant's *travaux préparatoires* also recognize that the right to non-discrimination does not require identical treatment.[21] The institution of marriage is a clear example where the substance of the law necessarily creates a difference between couples of opposite sexes and other groups or individuals, and therefore the nature of the institution cannot constitute discrimination contrary to article 26.

4.13 Secondly, in any event, the inability of homosexual couples to marry under New Zealand law is not a distinction or differentiation based on sex or sexual orientation. It is the nature of the couple, rather than of that of individual members, that is determinative. The Marriage Act grants all persons equal rights to marriage, regardless of sex or sexual orientation and does not differentiate between persons on any such basis. Rather, the Act is the provision of a defined civil status to a certain defined form of social group. In this connection the State party refers to a recent decision of the European Court of Justice, where it was held that the provision of particular benefits to couples of opposite sexes but not to homosexual couples did not discriminate on the grounds of sex, for the provision applied in the same manner to male and female persons.[22]

4.14 Thirdly, the State party argues that any differentiation is objectively and reasonably justified, for a purpose legitimate under the Covenant. In differentiating between homosexual couples and couples of differing sexes, the Marriage Act relies on clear and historically objective criteria and seeks to achieve the purpose of protecting the institution of marriage and the social and cultural values that that institution represents. This purpose is explicitly recognized as legitimate by article 23, paragraph 2, of the Covenant.

Comments by the authors

5.1 The authors reject the State party's submissions on admissibility and merits. As to admissibility, they contend that if the Courts found that the true meaning of the Marriage Act was nonetheless discriminatory and in violation of the Bill of Rights Act, the Courts would still be obliged to apply the Marriage Act, because primary legislation cannot be set aside on the grounds of inconsistency with the Bill of Rights Act. As to the merits, the authors contend that the Court of Appeal's decision that the Marriage Act was not discriminatory was wrong. They

argue that as (i) homosexuals are treated differently from heterosexuals with respect to marriage, (ii) this differential treatment is based on sex and sexual orientation, and (iii) homosexual couples thereby suffer substantive detriment and stigmatization, the Marriage Act is discriminatory. In support, the authors cite a recent decision of the Supreme Court of British Columbia for the proposition that denial of access to marriage under Canadian law is discriminatory.[23]

5.2 The authors contend that the domestic courts erred, as a matter of New Zealand law, in deciding that under local law homosexual couples could not marry. The authors argue that the Courts failed to heed the injunction of its domestic law that the Marriage Act should be interpreted in accordance with the non-discrimination provision of the Bill of Rights Act 1990. The Courts did not do so despite the Government having failed objectively to justify the distinction of the Marriage Act. The authors go on to argue that the courts wrongly referred to a fixed "traditional" understanding of marriage, contending that past discrimination cannot justify ongoing discrimination and that such a view ignores evolving social constructions. As a social construct, so argue the authors, marriage can accordingly be socially deconstructed, or reconstructed. The authors find the local courts, composed of heterosexual majorities, rooted in "dominant heterosexism". They contend that society and the State have programmed their selective memories to construct marriage as inherently and naturally heterosexual, thereby clearly excluding access by "deviant others" to marriage. The authors emphasize that marriage in New Zealand is a secular act carried out according to secular rules, and others' religious conceptions should not limit the rights of homosexuals.

5.3 According to the authors, their exclusion from the marriage institution fails to recognize the inherent dignity of homosexuals, to recognize their equal and inalienable rights of homosexuals as members of the human family, to provide the foundation of freedom and justice for homosexuals, to protect the human rights of homosexuals, to utilize the rule of law to protect those rights, or to demonstrate that the peoples of the United Nations have reaffirmed their faith in the dignity and worth of lesbian and gay people as human beings.

5.4 The authors also consider that homosexual couples have a legitimate expectation, derived from the Covenants provision of equality, that the State party would actively pursue legislative measures which promote recognition of homosexual relationships by appropriate legislation. The authors go on to argue, however, that incremental improvements in the legal position of homosexual couples are not an acceptable manner in which to address past discrimination, and in any event the improvements which have taken place do not result in greater equality. The authors contend that the inclusion of homosexual couples in Property (Relationships) Act 1976 (providing equal property rights in the event of a break-up),[24] the Electricity Act 1992, the Domestic Violence Act 1995, the Harassment Act 1992, the Accident Insurance Act 1998 and the Housing Restructuring (Income Related Rents) Amendment Act 2000 is not full recognition of homosexual couples. The authors state that a Civil Union Bill is to be proposed by the Government to Parliament, offering an alternative to marriage for legal recognition of relationships. Such a Bill would be insufficient and perpetuate inequality, however, as it would probably not offer all the legal incidents of marriage. The authors also contend that other future legislative improvements for homosexual couples that are planned in the Human Rights Amendment Bill 2001 are too few in number and generally unsatisfactory.

5.5 Finally, as to State practice, the authors point out that one State party, the Netherlands, opened civil marriage to homosexual couples with effect from 1 April 2001.

Supplementary submissions by the State party

6.1 The State party made supplementary submissions on the following matters, while rejecting the authors' comments and referring to its original submissions on the remaining issues. The State party notes, first, that its Government has not yet elected whether it will adopt the Civil Union Bill currently proposed by a Parliamentary member. Secondly, the State party states that it has continued its programmatic review of law and policy, and, through the passage of the Human Rights Amendment Act, has provided a number of improvements to the legal position of homosexual couples.[25] The Amendment Act also introduces a human rights complaint procedure (with public legal aid available) for the challenge of government policy. The tribunals established, and the courts, will be able to grant substantive remedies. In the case of a challenge to legislation, these bodies will be able to make a declaration of inconsistency requiring a Government response in 120 days, while mandatory orders can issue with respect to policies and practices. In any event, the State party does not accept that a programmatic and incremental approach violates the Covenant.

6.2 As to the authors' interpretation of case law, the State party disagrees with the interpretation thereof advanced by the authors. The State party argues that, contrary to the authors' supposition, the Supreme Court of British Columbia did not find discrimination in the *Shortt*[26] case. The Court considered the infringement of the petitioners' equality rights in that case to be justified, and accordingly that there was no violation of the Canadian Charter of Rights and Freedoms. As to the unspecified case the authors refer to,[27] the State party notes that in the case of *Re an Application of T*,[28] the High Court determined that T's application to adopt one of her lesbian partner's three children would, on the facts, not be in the best interests of the child. No benefit would enure to the child further to what was already provided by guardianship. In *A v. R*,[29] following the break-up of the same couple, the Court made a child support award in favour of the custodial parent in order properly to provide for the children. The State party rejects the contention that these cases illustrate anomalous recognition of the relationship only after it ended, arguing rather that each case was a careful assessment of the needs of the children and the effects on them of the relationship at each point.

6.3 Finally, in response to the authors' assertion that the Covenant legally creates a "legitimate expectation" that homosexual couples are recognized, the State party states that under its constitutional arrangements it is obliged to ensure, as it has done, that its domestic law is consistent with the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a) of the Optional Protocol.

7.3 As to the exhaustion of domestic remedies, the Committee notes the State party's argument that it would have been open to the Privy Council to interpret the Marriage Act, contrary to the approach of the Court of Appeal, in the manner sought by the authors. The Committee notes, however, that the State party expressly declared that it was making "no submission as to the admissibility of the communication under article 5 (2) (b) of the Optional Protocol". In the light of this declaration and in the absence of any other objections to the admissibility of the communication, the Committee decides that the communication is admissible.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

8.2 The authors' essential claim is that the Covenant obligates States parties to confer upon homosexual couples the capacity to marry and that by denying the authors this capacity the State party violates their rights under articles 16, 17, 23, paragraphs 1 and 2, and 26 of the Covenant. The Committee notes that article 23, paragraph 2, of the Covenant expressly addresses the issue of the right to marry.

Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term "men and women", rather than "every human being", "everyone" and "all persons". Use of the term "men and women", rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.

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

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of any provision of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual Report to the General Assembly.]

Notes

[1] Harris, D., Joseph, S.: *The International Covenant on Civil and Political Rights and United Kingdom Law,* Oxford, Oxford University Press, 1995, p. 507 ("It seems clear that the drafters did not envisage homosexual or lesbian marriages as falling within the terms of article 23 (2).")

[2] E/CN.4/1985/4, reprinted in 36 ICJ Review 47 (June 1986).

[3] The authors refer to Pantazis, A.: "An Argument for the Legal Recognition of Gay and Lesbian Marriage", (1996) 113 South African Law Journal 556; and Eskridge, W.: "A History of Same-Sex Marriage", (1993) 79 Virginia Law Review 1419.

[4] The authors refer to Bozett, F.: *Gay and Lesbian Parents* (1987); Schwartz-Gottman, J.: "Children of Gay and Lesbian Parents", (1989) 14 Marriage and Family Review 177; and Patterson, C.: "Children of Lesbian and Gay Parents", (1992) 63 Child Development 1025.

[5] The authors cite, in reliance, *Toonen v. Australia* (Communication 488/1992, Views adopted 31 March 1994, at 9.5) and *Sutherland v. United Kingdom* ((1997) 24 EHRR-CD 22, at 62).

[6] The authors refer to *Aumeeruddy-Cziffra v. Mauritius* (Communication 35/1978) and *Abdulaziz et al. v. United Kingdom* ((1985) 7 EHRR 471).

[7] The authors refer to *Coeriel et al. v. The Netherlands* (Communication 453/1991, Views of 31 October 1994, at 10.2).

[8] *Toonen v. Australia,* op. cit.

[9] *Sheffield & Horsham v. United Kingdom* (31-32/1997/815-816/1018-1019, Judgment of 30 July 1998), interpreting article 12 ("Men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right").

[10] The State party notes that a Bill that would permit homosexual marriage is currently before the Dutch Parliament.

[11] Shorter Oxford English Dictionary, Clarendon (1993), at 1701-2 defines "marry" as "join (two persons, one *person* to another) in marriage; constitute as husband and wife according to law or custom" and "marriage" as "legally recognized personal union entered into by a man and a woman".

[12] Except for the prohibition of the infliction of capital punishment upon pregnant women under article 6, paragraph 5.

[13] Commission on Human Rights, ninth session (1953), A2929, Chap. VI, §155 & §159; Third Committee, ninth session (1954), A/5000, §1.

[14] Ghandi, S.: "Family and Child Rights", in Harris, D., Joseph, S. (eds.): *The International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford, 1995) 491, at 507: "It seems clear that the drafters did not envisage homosexual or lesbian marriages as falling within the terms of article 23 (2), which speaks in terms of the right of 'men and women of marriageable age to marry and found a family'"; and Nowak, M.: *United Nations Covenant on Civil and Political Rights: CCPR Commentary* (Engel, Kehl, 1993) at 407: "The prohibition of *'marriages' between partners of the same sex* is easily upheld by the term 'to marry' ('se marrier') which traditionally refers only to persons of different gender. Moreover, article 23 (2) places particular emphasis, as in comparable provisions in regional conventions, on the right of 'men and women' to marry" [emphasis original].

[15] *Rees v. United Kingdom*, 17 October 1986, Series A No. 106, p. 19, para. 49; *Cossey v. United Kingdom*, 27 September 1990, Series A No. 184, p. 17, para. 43; *Sheffield and Horsham v. United Kingdom*, 30 July 1998, Series A No. 8, p. 2030, para. 66.

[16] A/4625, para. 25, and, Nowak, supra, at 283-284.

[17] Communication No. 488/1992.

[18] The State party's Government has introduced legislation into Parliament proposing uniform standards for property rights for established unmarried couples, whether homosexual or heterosexual, and married couples in the event of a relationship breakdown.

[19] These include the provision of accident compensation under the Accident Insurance Act 1998, the Domestic Violence Act 1995 and immigration to New Zealand.

[20] *Hopu v. France* (Communication No. 549/1993) and *Aumeeruddy-Cziffra v. Mauritius* (Communication No. 35/1978).

[21] Fifth session (1949), sixth session (1950), eighth session (1952), A/2929, Chap. VI, §179.

[22] *Grant v. South-West Trains Ltd.* (Case C-249/96, Judgement of 17 February 1998).

[23] *Egale Canada Inc., Shortt et al. v. Attorney-General of Canada et al.* (Unreported, 2001 BCSC 1365, 2 October 2001).

[24] The authors also refer in this connection to an unspecified case in the High Court where a court made a child support award against a non-custodial lesbian parent who had earlier had an adoption application denied. They contend that a relationship recognized after its break-up should also be recognized before.

[25] This includes provision in the Crimes Act 1961 and Judicature Act 1908 (partners of jury members), Electoral Act 1993 and Referenda (Postal Voting) Act 2000 (electoral enrolment), Holidays Act 1981 (eligibility for carers' and bereavement leave), Alcoholism and Drug Addiction Act 1966 (applications by relatives for compulsory treatment), Human Tissue Act 1964 (consent to donation of internal organs or other tissue after death), Life Insurance

Act 1908 (statutory regulation of couples' insurance arrangements), Protection of Personal and Property Rights Act 1988 (protection of individuals unable to administer their own affairs), Sale of Liquor Act 1989 (administration of licensed premises), Summary Proceedings Act 1957 (service of court documents) and War Pensions Act 1954 (pension eligibility).

26 Op. cit.

27 Supra, note 23.

28 [1998] NZFLR 769.

29 (1999) 17 FRNZ 647.

Appendix

Individual opinion of Committee members Mr. Rajsoomer Lallah and Mr. Martin Scheinin (concurring)

We found no difficulty in joining the Committee's consensus on the interpretation of the right to marry under article 23, paragraph 2. This provision entails an obligation for States to recognize as marriage the union of one adult man and one adult woman who wish to marry each other. The provision in no way limits the liberty of States, pursuant to article 5, paragraph 2, to recognize, in the form of marriage or in some other comparable form, the companionship between two men or between two women. However, no support can be drawn from this provision for practices that violate the human rights or dignity of individuals, such as child marriages or forced marriages.

As to the Committee's unanimous view that it cannot find a violation of article 26, either, in the non-recognition as marriage of the same-sex relationships between the authors, we wish to add a few observations. 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 supports the position that such differentiation may very well, depending on the circumstances of a concrete case, amount to prohibited discrimination.

Contrary to what was asserted by the State party (para. 4.12), it is the established view of the Committee that the prohibition against discrimination on grounds of "sex" in article 26 comprises also discrimination based on sexual orientation.[a] And when 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.

However, in the current case we find that the authors failed, perhaps intentionally, to demonstrate that they were personally affected in relation to certain rights not necessarily related to the institution of marriage, by any such distinction between married and unmarried persons that would amount to discrimination under article 26. Their references to differences in treatment between married couples and same-sex unions were either repetitious of the refusal of

the State party to recognize same-sex unions in the specific form of "marriage" (para. 3.1), an issue decided by the Committee under article 23, or remained unsubstantiated as to if and how the authors were so personally affected (para. 3.5). Taking into account the assertion by the State party that it does recognize the authors, with and without their children, as families (para. 4.8), we are confident in joining the Committee's consensus that there was no violation of article 26.

(signed) Rajsoomer Lallah

(signed) Martin Scheinin

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[a] *Toonen v. Australia*, Communication No. 488/1992.

[b] *Danning v. the Netherlands*, Communication No. 180/1984.
