

Legalizing Same-Sex Marriage: An Obligation Not a Decision

Lindsay Gus

I. INTRODUCTION

Regardless of race, ethnicity, or religion, men and women across the world are guaranteed, under international law, the opportunity to enter into marriage with one another. However, throw sexual orientation into the mix, and the right to marriage is no longer universally applicable. Same-sex marriage, a major source of contention in current U.S. politics, is prohibited by a majority of the world's nations. While state's laws that deny same-sex couples the opportunity to legally marry are discriminatory, does an international human right protecting gay marriage exist? There is an international human right to gay marriage, and denying same-sex couples the right to marry is a violation of international human rights law. In accordance with both treaty law and international customary law, states are obliged to ensure all individuals the fundamental right to marriage. Refusing same-sex couples the right to marry violates the principle of nondiscrimination and the individual's right to privacy, marriage, association, and dignity.

A worldwide trend towards legalization of same-sex marriage indicates the increasing willingness of states to guarantee same-sex couples the right to marry on the basis

of *opinio juris*. In the first section of my paper, I discuss the philosophical arguments behind legalization of same-sex marriage and demonstrate that in denying same sex couples the right to marry, states are essentially denying them access to a number of other basic human rights. The second section of my paper focuses on a number of specific treaty provisions that indicate that a universal right to marriage already exists. Next, I discuss the responsibility states have to allow all couples to marry based on international customary law, beginning with an overview of the sources of international law. I then draw upon a number of articles and cases to demonstrate the increasing willingness of states to incorporate principles of international customary law into their domestic law. The next two sections are devoted to discussing the ten countries that have legalized same-sex marriage and the six¹ U.S. states that have legalized it. In the final section of my paper I discuss the most recent efforts of the international community to recognize the universality of the right to marriage, focusing on the Yogyakarta Principles, which have been crucial in influencing international gender and sexuality laws.

II. THE DEBATE OVER SAME-SEX MARRIAGE

When examining the debate over same-sex marriage outside of the international legal context, one is left with the issue of self-fulfillment. In his article, "Throwing Down the International Gauntlet," Vincent Samar argues that marriage is equally fulfilling for same-sex and opposite-sex couples, and thus there is no moral ground upon which a state can justify denying an individual the right to marry. According to Gewirth's Principles of Generic Consistency, "everyone should have the same freedom as long as it does not interfere with anyone else's similar freedom," (Samar, 24) which marriage certainly does not. Further, proponents of same-sex marriage argue that preventing lesbian, gay, bisexual, and transgender (LGBT) individuals from marrying infringes upon a number of their rights, including rights to housing and social security and often leads to additional acts of violence or discrimination based on sexual orientation and gender

¹ Washington D.C. is included here.

identity (Amnesty International, 2011). Supporters of gay marriage also point out that when homosexual couples are prohibited from legally marrying, they are denied a wide range of rights, "from sharing of health and pension benefits to hospital visitation rights," (The Pew Forum, 2008) that heterosexual couples are privileged to via their marital status.

Despite the injustice associated with denying same-sex couples the right to marry, many individuals argue against the legalization of gay marriage. Opponents believe that allowing same-sex couples to marry undermines the institution of marriage as a cornerstone of society and threatens to destroy the healthy families that heterosexual couples create (The Pew Forum, 2008). Those against gay marriage argue that granting homosexual couples the right to marry will further weaken marriage "at a time when the institution is already in deep trouble due to high divorce rates and the significant number of out-of-wedlock births" (The Pew Forum, 2008). However, their argument is flawed. It acknowledges that the traditional marriage institution is declining, despite the fact that gay couples are barred from marrying. Fear that allowing gay couples to marry will heighten divorce rates or injure the concept of marriage does not justify prohibiting same-sex couples from engaging in a legal marriage; if it did, then the racial and ethnic groups with the highest divorce and out of wedlock birth rates should be denied the right to marriage as well. Regardless of the moral implications of allowing same-sex couples to marry, disallowing same-sex couples to marry for any reason constitutes a human rights violation because, based on the provisions of multiple treaties and norms present in international customary law, an international human right to gay marriage already exists.

III. SAME-SEX MARRIAGE IS AN INTERNATIONAL HUMAN RIGHT GUARANTEED UNDER TREATY LAW

A. The Right to Marriage

Article XVI of the Universal Declaration of Human Rights (UDHR) states, "Men and women of full age, without any limitation

due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution” (UDHR art. XVI). Although the UDHR does not bind state parties under international law, its stance on marriage has been incorporated into the International Covenant of Civil and Political Rights (ICCPR), one of the two covenants that the Declaration gave rise to, and a number of other treaties and constitutions; “It has been estimated that the Declaration has inspired or served as a model for the rights provisions of some ninety constitutions” (Steiner et al., 74). Is this quote necessary? Because the Declaration guarantees all men and women the right to marry and makes no mention of sexual orientation as warranting an exception to the right, states that do not allow two men or two women to marry are acting in contrast to the Declaration. It is important to take note of the wording in Article XVI. Specifically, “without any limitation due to race, nationality or religion” is separated from the first and third parts of the sentence with commas, indicating that this part of the sentence could be taken out, and the meaning of it would not change. Therefore, when read without the middle piece—“Men and women of full age have the right to marry and found a family”—the provision’s intentions are more easily understood, and it becomes clear that the article offers no grounds for discrimination based on sexual orientation.

State parties to the ICCPR are obliged to follow all of the Covenant’s provisions, including Article XXIII, which states “The right of men and women of marriageable age to marry and to found a family shall be recognized” (ICCPR art. XXIII). Like the UDHR, the ICCPR does not mention sexual orientation, and therefore does not necessarily allow or disallow discrimination. However, because Article XXIII does not go into detail in regard to any immutable characteristics, such as race or religion, that cannot be used to justify denying someone the right to marry, it is implied that there are indeed no grounds for not allowing “men and women of marriageable age” to marry. According to the ICCPR, if a man or women are of marriageable age, a state is not allowed to prevent him from marrying another person of marriageable age. Nothing in the provision says

that the other person must be of a certain sex; therefore, disallowing individuals of the same sex is a violation of the treaty provision.

The Committee on the Elimination of Discrimination against Women (CEDAW) declares that states parties “shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations” (CEDAW pmb1.). The first two provision of Article XVI say that states will “ensure on a basis of equality of men and women the same right to enter into marriage [and] the same right freely to choose a spouse” (CEDAW art. XVI). Prohibiting two women from marrying denies them the equal opportunity to enter into marriage, which violates Article XVI of the treaty. Nowhere in any international treaty is it stated that a man can only marry another man, and so the possibility of two men marrying is left open. Therefore, prohibiting a woman from marrying another woman is placing a limitation on women of which a similar one does not exist for men.

Both the European Convention and the American Convention state that men and women of marriageable age have the right to marry². The language in the two documents is similar to that of the UDHR, in that neither explicitly allows or disallows discrimination based on sexual orientation. Article XVI of the UDHR is mentioned in The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages as the basis for all of the provisions within the Convention. There is no international treaty that specifically guarantees same-sex couples the right to marry, but the marriage provisions present in a vast number of treaties should be seen as applying to homosexual couples as well as heterosexual couples. International law establishes marriage as a universal right, which places states that deny same-sex couples the right to marriage in violation of international treaty law.

2 “Men and women of marriageable age have the right to marry and to found a family” (European Convention art. XII). “The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention” (American Convention art. XVII).

A. The Right to Privacy

Banning same-sex couples from marrying violates the right to privacy that exists in multiple human rights treaties. The choices of a same-sex couple, whether they are to marry, to have a family, or to purchase a home, do not infringe upon the basic human rights of any other individual. Therefore, denying same-sex couples the choice to marry unnecessarily impinges on their right to individual autonomy (Samar, 38). According to both the UDHR's Article XII and the IC-CPR's Article XVII, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence... everyone has the right to the protection of the law against such interference or attacks." A state that prohibits gay men and women from marrying unjustifiably invades the privacy of those individuals and inserts itself into a sphere of life that international law has deemed impenetrable by the state.

The European Convention on Human Rights and the American Convention both confirm the existence of a universal right to privacy. Article VIII of the European Convention states, "Everyone has the right to respect for his private and family life, his home and his correspondence," (European Convention art. VIII) whereas Article XII of the American Convention states, "No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation" (American Convention art. XII). Both provisions prohibit interference into an individual's private or family life, and as marriage is a crucial aspect of both one's private life, denying two people the opportunity to engage in marriage unquestionably violates their right to privacy.

B. Nondiscrimination

Despite the notorious absence of any mention of "sexual orientation" as a basis for nondiscrimination in any of the major human rights treaties, the wording of the nondiscrimination clauses in a number of treaties implies that sexual orientation is included among the factors that cannot be used to justify discrimination against a certain group of people. Article II of the UDHR states that "Everyone

is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (UDHR art. II). In addition to arguably qualifying as both “sex” and “other opinion,” sexual orientation is implicitly included among the factors listed in the UDHR because of the provision’s intentions. “Although the Universal Declaration of Human Rights and the other principal human rights instruments drafted by the United Nations do not explicitly mention sexual orientation or same-sex marriage, they have created a comprehensive body of human rights law that protects all people” (Green, 2010). No introduction to quote or argument following

The ICCPR says, in Articles II and XVI, that discrimination is not allowed on the basis of “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The American Convention adds “economic status” to the list (Article I) and the European Convention specifically mentions “association with a national minority” (Article XIV). Still, none of the treaties explicitly reference sexual orientation. However, because the intention of the discrimination clauses is to ensure fundamental rights³ are not denied to certain groups within a society, denying individuals the fundamental right to marry based on sexual orientation defies the provisions’ intentions.

C. Dignity

The preamble of the UDHR mentions dignity as one of the principles upon which the Declaration was created to uphold⁴. In disallowing same-sex couples the opportunity to legally marry, states are infringing upon the dignity of those individuals. In the case of South

3 According to U.S. constitutional law, the right to marry is a fundamental right. In the Supreme Court case of *Zablocki v. Redhail*, “the Court reaffirm[ed] the fundamental character of the right to marry” (Samar, 12).

4 “Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger” (UDHR prmb).)

Africa, the first country to incorporate sexual orientation into its constitution, dignity was a prominent factor in the country's decision to legalize gay marriage. The government declared that, "whatever material rights 'civil unions' may entail, the persistent imputation that lesbian and gay couples do not deserve the full dignity of marriage is an offense to their own dignity, as well as to their equality before the law" (HRW, 2006). Allowing gay couples to partake in civil unions but not marriage forces them to endure a kind of second-class citizenship, which can have a demeaning effect and therefore "is a serious violation of human rights" (Samar, 39). Further, because the rewards of marriage are the same for same-sex couples and opposite-sex couples, the marriage of two gay individuals does not hinder anyone else's human rights, "the performance of the activity [same-sex marriage] is consistent with human dignity" (Samar, 35).

While the UDHR's mention of dignity does not constitute a binding principle, both of the international conventions as well as a number of other treaties share the UDHR's goal of guaranteeing respect for human dignity. The American Convention specifically states, "every person has the right to have his life respected," (Article IV) "every person has the right to have his physical, mental, and moral integrity respected," (Article V), and "everyone has the right to have his honor respected and his dignity recognized" (Article XI). Because denying same-sex couples the same right to marriage as opposite-sex couples impedes upon their dignity, states that disallow gay marriage are violating the articles of the American Convention, as well as the basic intentions of the UDHR and the human rights treaties that sprung from it.

D. Freedom of Association

Banning gay marriage denies gay men and women the right to freely associate with one another. As a form of intimate association, marriage should be protected under the international right that exists to freedom of association, yet "very few commentators have considered freedom of association as an independent...source for protection of same-sex marriage, [and] even fewer scholars have examined the fundamental rights to marriage, privacy, and association in tan-

dem” (Fair, 2008). However, because marriage is an aspect of association⁵, same-sex marriage should be protected under the ICCPR’s Article XXII, which states, “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests” (ICCPR art. XXII). Therefore, States that ban gay marriage are in violation of Article XXII of the ICCPR.

According to Article XVII of the UDHR, “Everyone has the right to own property alone as well as in association with others” (UDHR art. XVII). When same-sex couples are prevented from legally marrying, they are denied the opportunity to own property with one another, in the same way that opposite-sex couples can. Further, when barred from marrying, same-sex couples are denied additional rights that come with a legally binding marriage agreement, such as the opportunity to make decisions for one another, certain real estate commitments, and specific child-rearing responsibilities (Samar, 33). The wording of Article XI of the European Convention, which protects the individual’s right to freedom of association, is similar to that of the UDHR, and Article XVI of the American Convention specifies individual’s have the right to freely associate for “ideological, religious, political, economic, labor, social, cultural, sports, or other purposes” (American Convention art. XVI). Marriage falls under both the social and economic categories listed in Article XVI, as well as the broad term “other purposes,” and because the article does not mention any exceptions that exist in regard to the right to freely associate, but rather, says “everyone has the right to freely associate,” disallowing gay marriage is a clear violation of the Convention’s provision.

5 In the U.S. Supreme Court case *Roberts v. United States Jaycees*, Justice Brennan wrote “examples of protected acts of intimate association included: marriage; childbirth; the raising and education of children; and cohabitation with one’s relatives” (Fair, 2008).

IV. INTERNATIONAL CUSTOMARY LAW AS A BASIS FOR SAME-SEX MARRIAGE

A. Background on International Customary Law

Due to the international community's growing tendency to recognize the universality of marriage, same-sex marriage should be protected not only under treaty law but under *opinio juris* as well. Article 38 of the Statute of the International Court of Justice lists "international custom, as evidence of a general practice accepted as law," (Statute of the ICJ Art. 38). Thus, the movement over the past decade of a number of states towards legalization of same-sex marriage is enough to force all states to recognize the right of gay couples to marry. Worldwide, judicial bodies "are increasingly recognizing that sexual orientation discrimination is incompatible with national and international human rights standards," which partially explains the international trend towards legalization of gay marriage (Amnesty International, 2011). Globalization and the increasing connectedness of today's world also fuel the incorporation of same-sex marriage into states' civil law. Because countries are beginning to recognize that an international solution is the best way to solve common problems, states are more willing than ever to comply with rights that have been determined indisputable by other countries (Samar, 3).

Although no global consensus on the right of gay couples to marry has emerged, "a solution worked out among many states should be considered relevant or persuasive for the development of a customary law setting standards for all countries" (Steiner et al., 74). Indeed, many states have concluded that legalizing same-sex marriage in effect helps to eliminate unprecedented discrimination of LGBT individuals. According to the *Restatement (Third), Foreign Relations Law of the United States* there is no set number of states that must adopt a practice for it to be considered international custom. Rather, the law says that for a rule to become a part of international custom, states that follow the practice must do so out of a sense of legal obligation (Steiner et al., 73). Those states that have chosen to legalize gay marriage have done so under the impression that they are required to under international human rights law. Because "the main evidence of

customary law is to be found in the actual practices of states, and a rough idea of state's practices can be gathered from...state's laws and judicial decisions," (Steiner et al., 75) I chose to examine the laws and judicial rulings of the ten countries in which gay marriage is legal.

B. Same-Sex Marriage Legal in Ten Countries

The debate regarding the recognition of marriage as an international human right guaranteed to all individuals by law has intensified over the past decade. In the last ten years, ten countries from across the globe have incorporated same-sex marriage into their domestic law. "Many of the countries that have allowed same-sex marriage have either justified the decision by relying on international law, or have at least referred to international law in the explanation of why same-sex marriages were allowed" (Green, 2010). By basing their decisions to recognize the universality of marriage on principles of treaty law, states have transplanted the issue of gay marriage into the realm of international customary law as well. Although ten out of 195 countries is not a majority, international customary law does not require all states adopt a practice for it to qualify as custom. For a rule to constitute as international custom it must be established as a general practice by a number of states, and because "general practice does not require the unanimous practice of all states or other international subjects... a state can be bound by the general practice of other states even against its wishes" (Steiner et al., 76). Additionally, while only ten states have yet to legalize same-sex marriage, a number of others have taken steps in that direction by formally recognizing civil unions or domestic partnerships between same-sex couples⁶.

The Netherlands became the first country to legalize gay marriage on April 1, 2001. A number of events in the preceding decade led up to the Dutch Parliament's 107-33 vote in favor of the same-sex marriage bill (BBC, 2000). Movement towards legalization began in 1992, when the Netherlands outlawed discrimination based

6 Andorra, the Czech Republic, Denmark, Finland, France, Germany, Iceland, Luxembourg, New Zealand, Slovenia, Sweden, Switzerland, the UK, and Uruguay have recognized civil unions or domestic partnerships (Amnesty International, 2011).

on sexual orientation in the Equal Treatment Act. Four years later, Parliament called for a gay marriage bill, but drafting a bill on same-sex marriage did not become part of the government's agenda until 1998, when a new labor-led party took power. In 1999, the Dutch Cabinet proposed a bill that would legalize same-sex marriage and both Chambers of Parliament approved the bill the following year (Coolidge, 2001). As the first country to legalize gay marriage, the Netherlands set an important precedent, which nine other states have chosen to embrace. However, while gay marriage has been legal in the Netherlands for over ten years, the majority of the world's countries remain obstinate to follow the country's example.

Unlike in the other countries that have legalized gay marriage, pressure from the LGBT population was not a factor that influenced the legalization of same-sex marriage in Belgium. Rather, gay marriage was legalized in Belgium when the population voted for a liberal party to replace the Christian Democrats in government in 1999. Voted into power because of the country's economic crisis, the liberal party implemented socialist reforms and outlawed discrimination, which included that based on sexual orientation, thus legalizing gay marriage (PBS, 2005). Same-sex marriage was officially legalized in 2003, by a parliamentary vote of 91-22. Like many of the states that have chosen to legalize gay marriage, Belgium is a predominantly Christian state. The country's willingness to accept the government's decision to legalize gay marriage demonstrates that state religion is not an excuse for a nation to deny same-sex couples the right to marry. Catholic countries like Argentina, Spain, Portugal, and Belgium have placed the international human right to marriage above their population's religious beliefs, indicating that other countries can do the same without upsetting their religious institutions.

Spain was the next country, following Belgium, to legalize gay marriage nationwide. The Roman Catholic Church and conservative groups largely opposed the 2004 bill, arguing that homosexual rights should be protected, but not at the expense of societal institutions (BBC, 2004). However, the socialist government won out over the opposition, and in 2005 Spain legalized gay marriage with a vote of 187 to 149 by the Congress of Deputies (Lagorio, 2005). The bill

stated, "Matrimony shall have the same requirements and effects regardless of whether the persons involved are of the same or different sex" (Lagorio, 2005). The wording of the Spanish government's bill is in accordance with Samar's argument of marriage being about self-fulfillment, that "it is a stretch to say allowing two men or two women to marry somehow endangers the well-being of their opposite-sex married neighbors" (Samar, 24). States across the world are obliged under international customary law to adopt Spain's position on gay marriage, recognizing that the benefits of marriage are the same for heterosexual couples as they are for homosexual couples.

In 2005, Canada became the fourth country to legalize same-sex marriage. Following three 2003 court cases—*Halpern v. Canada*, *Hendricks v. Quebec*, and *Barbeau v. British Columbia*—in which the court ruled in favor of gay marriage, the Canadian government chose not to appeal the rulings and instead drafted a bill that would legalize gay marriage across the country. In the first case, *Halpern v. Canada*, the Ontario Court of Appeals justified their ruling by stating "the dignity of persons in same-sex relationships is violated by the exclusion of same-sex couples from the institution of marriage" (Halpern v. Canada, 2003). Their decision reaffirmed that denying same-sex couples the right to marry is a violation of their right to dignity. Additionally, the court ruled that Canada's common-law definition of marriage, which defined marriage as a union between one man and one woman, was a violation of the Canadian Charter of Rights and Freedoms (Halpern v. Canada, 2003). In the same year, the Quebec and British Columbia Courts of Appeals also ruled to legalize gay marriage in their respective territories. After three of its territories legalized same-sex marriage, the Canadian government decided, based on the "principles of human dignity and anti-discrimination," (Michaels, 2003) to draft a bill that would legalize the practice throughout the country.

South Africa is the only African country that is a member of "the elite group of progressive democracies that have legalized same-sex marriage" (Alexander, 2006). As the first country in the world to include sexual orientation in its constitution's nondiscrimination

clause⁷, (HRW, 2006) South Africa is far ahead of all other African nations, as well as a majority of the world's nations, in terms of its views on the rights of homosexuals. In 2005, The Constitutional Court ruled that South Africa's current position on gay marriage—allowing gay couples to engage in civil unions but not marriage—implied that “lesbian and gay couples [did] not deserve the full dignity of marriage, (HRW, 2006) which was a position contradictory to the intentions of the post-apartheid constitution. Defense Minister Mosiuoa Lekota referred to South Africa's previous attitude towards homosexual individuals as “backward, timeworn prejudices that have no basis,” (Alexander, 2006) and Judge Sachs, a member of the South African Constitutional Court, said denying same-sex couples the right to marry “represents a harsh, if oblique, statement by the law that same-sex couples are outsiders and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples” (Alexander, 2006). The Court's views are applicable to individuals worldwide and refer to marriage as a universal human right, not one that simply applies to a select group of individuals.

In 2009, Norway became the sixth country to legalize same-sex marriage. Support for gay marriage had been building in Norway since 2003, when an opinion poll found that 61% of the population favored allowing gay couples to marry (Ontario Consultants on Religious Tolerance, 2010). The government introduced the same-sex marriage bill in 2008, and it came into effect on January 1, 2009 (MSNBC, 2008). Rather than require clergy and congregations to perform marriage ceremonies for same-sex couples, the law leaves it up to individual churches to decide whether or not they want to perform marriage ceremonies for gay couples. Norway's law gives countries that refuse to legalize gay marriage for religious reasons another alternative—to legalize the practice and leave it up to individual churches

7 “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth” (South Africa Constitution sect. 9 (3)).

to choose whether to perform the ceremonies. Because close to fifty percent of the states that have legalized gay marriage are predominantly Catholic countries, the religious beliefs of nations cannot be used to justify their failure to adhere to *opinio juris* and recognize the right of same-sex couples to marry.

Portugal, another predominantly Catholic country, granted gay men and women the right to marry in 2010. As recently as 1982, homosexuality was illegal in Portugal (BBC, 2010). The country's rapid progression in terms of the rights of LGBT individuals demonstrates that all states, regardless of their current stance on gay marriage, have the power to steer their country towards legalization in a timely manner. Prime minister Jose Socrates said that Portugal's legalization of same-sex marriage "is a step that will seem completely natural in the near future, in the same way that gender equality, abortion rights and unmarried couples living together are normal now" (Aljazeera, 2010). Socrates' prediction underscores the growing tendency of states to recognize marriage as a universal right guaranteed under both treaty and customary law.

Iceland, the first country to have an openly LGBT head of state—Jóhanna Sigurðardóttir—had been moving towards formal recognition of the right of same-sex couples to marry for about fifteen years prior to their official legalization of gay marriage in 2010 (Jones, 2010). Like many of the states that have recognized the right of homosexual couples to marry, Iceland does not require the church to perform marriage ceremonies, but leaves the decision up to each individual clergy (Reykjavik, 2010). However, opposition to the gay marriage bill, which changed the wording of Iceland's law to include "matrimony between 'man and man, woman and woman,' in addition to unions between men and women," was relatively small and the bill passed through parliament unanimously (Reykjavik, 2010). Each country that chooses to legalize gay marriage "adds to the global momentum of marriage equality," (Jones, 2010) and serves as an additional indicator to the rest of the world that same-sex marriage is an important part of human rights law and should be viewed as such.

In 2010, Argentina became the first Latin American country to legalize gay marriage. Although a predominately Christian nation,

Argentina's ruling party is characterized as center-left, and President Cristina Fernandez's support for the gay marriage bill helped it to pass narrowly through the senate (BBC, 2010). In addition to the government's pro-gay marriage position, the tendency of the country to rely on transnational legalism helped the bill to pass. Transnational legalism "refers to the ease with which a country's legal system borrows from international cases to set legal precedents domestically" (Corrales & Pecheny, 2010). As Argentina often does not hesitate to incorporate the legal doctrines of other states into its own domestic law, "Argentina's pro-LGBT forces were quite comfortable emulating norms from abroad, even borrowing verbatim wording and arguments from actors fighting elsewhere to approve LGBT rights" (Corrales & Pecheny, 2010). Argentina's decision to legalize gay marriage was partly due to the country's view that the right of same-sex couples to marry is protected under international customary law. Other countries have a legal obligation, therefore, to heed Argentina's example and incorporate gay marriage into their domestic law as well.

C. Same-Sex Marriage Legal in Six U.S. States

While six U.S. states, (including Washington D.C.), have proven capable of recognizing the injustice associated with denying same-sex couples the right to marry, the rest of the country remains tragically behind and out of step with the global movement towards legalization of same-sex marriage. In his article "Human Rights Around the World," Richard Schneider points out that "the U.S. movement is something of an exception for its relative lack of emphasis on human rights as the moral foundation for gay equality" (Schneider, 1999). Instead of viewing LGBT rights as a matter of human rights, the U.S. tendency has been to look at gay rights as a civil rights issue, which has led the country to focus on the legality of gay marriage, "rather than a broad concept of marriage that would let anyone marry whomever they wanted" (Schneider, 1999). Because the U.S., for the most part, has failed to recognize the human rights implications associated with the institution of marriage, it has not legalized same-sex marriage nationwide and thus continues to violate principles of international treaty and customary law.

Those states that have moved forward and incorporated gay marriage into their law should serve as examples for the rest of the nation, just as the legalization of gay marriage by three Canadian territories led the Canadian government to legalize the practice across the country. Because in the U.S., gender does not determine one's marital obligations as strongly as it once did, individual states are moving towards viewing marriage "as an institution that is 'free from state-mandated gender roles,'" and therefore applicable to all couples regardless of their sex (HRW, 2010). Massachusetts began the trend in the U.S. by legalizing gay marriage in 2004. Like the majority of U.S. states that have recognized the right of same-sex couples to marry, Massachusetts's decision was based on a state Supreme Court case. In 2003, the Massachusetts Supreme Court ruled, in regard to *Goodridge v. Department of Public Health*, that denying same-sex couples the right to marry violated the state constitution, which "affirms the dignity and equality of all individuals...and forbids the creation of second-class citizens" (*Goodridge v. Department of Public Health*, 2003). Similarly, in 2008 the Connecticut Supreme Court ruled "a ban against same-sex marriage was in violation of the equal protection clause in the state constitution⁸," (NCSL, 2011) prompting Connecticut to become the second U.S. state to grant civil marriages to same-sex couples.

Iowa and Vermont both legalized gay marriage in 2009. Iowa legalized same-sex marriage as a result of the Supreme Court's ruling in *Varnum, et al. v. Brien*, and Vermont legalized gay marriage through state legislation (NPR, 2011). Although Vermont did not officially legalize same-sex marriage until 2009, it recognized civil unions between gay couples in 2000. In the case of *Baker v. State of Vermont* the Vermont Supreme Court ruled that extending the Common Benefits Clause to gay couples, "who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship... is a recognition of our common humanity" (*Baker v. State*, 1999). Following the ruling, Vermont allowed for civil unions between same-sex couples, which gave them all the basic privileges of marriage (NCSL, 2011), and updated the law

8 *Kerrigan v. Commissioner of Public Health* (2008)

nine years later to allow same-sex couples to legally marry.

Last year, both New Hampshire and Washington D.C. passed laws legalizing same-sex marriage. Religious groups in New Hampshire were adamant about including “conscience protections” in the law, which would exempt religious institutions from having to participate in the marriage ceremonies (Goodnough, 2009). Nonetheless, the government of New Hampshire has recognized that allowing gay couples to engage in civil unions, but not legal marriages, is discriminatory, and that “a separate system is not an equal system” (Governor John Lynch quoted in Goodnough, 2009). The D.C. law also does not require clergy to provide services for gay couples to marry, but leaves individual organizations to decide whether or not they want to perform marriage ceremonies. Approved by a wide margin, the D.C. law “reinforces the nationwide trend towards gay marriage in legislatures and at the courthouse” (Gorman, 2009). Both Maine and California are a part of the growing gay marriage movement, as same-sex marriage was legal within their borders for a short time⁹. Much like the civil rights movement of the 1950s and 60s, periodic ebbs and flows have characterized the fight for LGBT equality in the U.S. The increased media attention and turmoil surrounding the gay marriage issue indicates the issue is of growing importance to Americans and is likely to be discussed by additional states within the next few years.

V. CONCLUSION

In 2006, an international group of LGBT experts, motivated by the clear presence of treaty provisions and international customs that protect the rights of LGBT individuals, developed the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. In addition to defining the terms “sexual orientation” and “gender identity,” the principles “clarify State obligations under existing international human rights law, in order to promote and protect all human rights for all persons on the basis of equality and without discrimination”

9 Maine legalized same-sex marriage in 2009 and voters overturned the law later that year. Similarly, same-sex marriage was legalized in California in 2008, but was banned a few months later when Proposition 8 passed.

(Corrêa et al., 2007). While allowing same-sex couples to marry is not mentioned in the document, Principle 24 states that states that recognize same-sex marriage or registered partnerships must ensure that these couples receive the same rights and privileges as opposite-sex couples. The experts that created the principles have recognized that the document is a work in progress (O'Flaherty & Fisher, 2008). Therefore, the absence of a specific principle highlighting the right of same-sex couples to marry is not reason enough to disregard the document as relevant to the struggle for worldwide recognition of gay marriage.

Rather, the principles cite a number of specific international human rights, such as the right to privacy, association, expression, and dignity, as justification for there being an international human right protecting LGBT individuals from discrimination. In addition to resulting in gay couples being denied the opportunity to marry, states' violations of the treaty provisions I discussed lead to a number of other human rights abuses of the LGBT community, including "extra-judicial killings, torture and ill-treatment, sexual assault and rape, arbitrary detention, [and] denial of employment and education opportunities" (Corrêa et al., 2007). The principles represent an ideal towards which states should strive to achieve, in terms of the provisions they must incorporate into their domestic laws to eliminate discrimination against gay and lesbian individuals. Within days of the Principles' release, "more than 30 states made positive interventions on sexual orientation and gender identity issues, with seven states specifically referring to the Yogyakarta Principles," (O'Flaherty & Fisher, 2008), but much remains to be done in regard to adjusting states' laws to ensure the equal treatment of LGBT individuals, and specifically the right of all people, regardless of sexual orientation or gender, to marry.

Disallowing same-sex marriage is a clear violation of the rights to marriage, privacy, dignity, association, and nondiscrimination that are guaranteed under international human rights law. Further, the global trend towards recognition of the equal rights of LGBT individuals and the growing number of states that have officially legalized gay marriage, obliges states to revamp their domestic laws to allow same-sex couples

to marry. For those states that continue to violate the international human right to gay marriage, the Yogyakarta Principles, in addition to the laws of the ten countries that have legalized same-sex marriage, serve as a starting point from which states can base new legislation that will allow same-sex couples within their borders to marry.

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