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The right to marry as a right to equality:

About same-sex couples, the phrase "men and women", and the *travaux préparatoires* of the Universal Declaration

by Kees Waaldijk [1]

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1. Marriage between sovereignty and rights

There can be tension between national sovereignty and international human rights. One of the challenges to national sovereignty lies in the fact that human rights apply to everyone, or in the terminology of the Sustainable Development Goals, that no one should be left behind. The right to marry and especially the quest for same-sex marriage demonstrate this tension clearly.

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The author is indebted to many people who helped to inspire this chapter, and in particular to a former student from China who first alerted him to the history of the words 'men and women' in Art. 16 UDHR, and to two former researchers at the Grotius Centre for International Legal Studies, Giuseppe Zago and Daniel Damonzé, who assisted in studying the *travaux préparatoires* of Art. 16 UDHR and Art. 23 ICCPR respectively.
Parts of this chapter are also part of the author's draft-chapter ('The gender-neutrality of the international right to marry: Same-sex couples may still be excluded from marriage, but their exclusion – and their foreign marriages – must be recognised') for the forthcoming handbook on *International LGBTI Law* edited by A. R. Ziegler; the 2018 version of that draft-chapter is available at https://ssrn.com/abstract=3218308.

In this chapter I aim to demonstrate that the words 'men and women' in the phrasing of the right to marry in international human rights instruments were never intended to exclude same-sex couples, and that from the start these three words have been there to affirm the non-discriminatory and gender-neutral character of this right.

A right for same-sex couples to marry was first claimed in national courts and legislatures in the late twentieth century, but international human rights have already been invoked early on. The first legislative recognition of same-sex marriage came in 2001 (Netherlands),[2] and the first lasting judicial recognition in 2003 (Ontario, Canada).[3] The first ruling of an international human rights body on the issue of same-sex marriage came in 2002, when the UN Human Rights Committee (UNHRC) denied *Joslin et al.* the right to marry their same-sex partners in New Zealand.[4] In 2010, the European Court of Human Rights ruled on its first case of a same-sex couple wanting to marry, and denied *Schalk and Kopf* the right to marry each other in Austria.[5] In its 2017 *Advisory Opinion,* the Inter-American Court of Human Rights (IACtHR) concluded that States should work towards ensuring same-sex couples access to marriage.[6] In the meantime, same-sex couples have achieved the right to marry in more than 30 countries on all continents of the world,[7] with *some* of the rights and benefits traditionally associated with marriage becoming available to same-sex couples in a growing number of other countries.[8]

The drafters of some human rights treaties have attempted to reduce the general tension between the international right to marry and national sovereignty, by explicitly including a wide margin of appreciation for the countries concerned. Thus Article 12 of the European Convention on Human Rights includes the phrase 'according to the national laws governing the exercise of this right', while Article 17(2) of the American Convention on Human Rights (ACHR) speaks of 'the conditions required by domestic law'.[9] However, such clauses are absent in Article 23 of the International Covenant on Civil and Political Rights (ICCPR) and in Article 16 of the Universal Declaration of Human Rights (UDHR). This makes same-sex marriage claims under these global human rights instruments extra interesting: Is the exclusion in most countries of the world of same-sex couples from marriage, compatible with the international right to marry?

With the proclamation of the UDHR in 1948, the right to marry first gained the status of international human right. Article 16 of the UDHR begins with the words 'men and women', which were later also used in the marriage articles of several human rights treaties. These words have often – wrongly as we

[2] Act on the Opening up of Marriage (Netherlands) (Act of 21 December 2000, *Staatsblad* 2001, nr. 9).

[3] *Halpern* v. *Canada (Attorney General)*, Court of Appeal for Ontario, Judgment of 10 June 2003, 65 O.R. (3d) 161.

[4] *Joslin et al.* v. *New Zealand*, Views of 17 July 2002, UNHRC, UN Doc. CCPR/C/75/D/902/1999.

[5] *Schalk and Kopf* v. *Austria*, Judgment of 24 June 2010, no. 30141/04, [2010] ECHR.

[6] IACtHR, Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples, Advisory Opinion of 24 November 2017, OC-24/17.

[7] See L. R. Mendos, *State-Sponsored Homophobia – Global Legislation Overview Update* (December 2020), at 277-290 (see also the annual updates of this report of the International Lesbian, Gay, Bisexual, Trans and Intersex Association – ILGA World).

[8] See K. Waaldijk, 'Same-Sex Partnership, International Protection', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (online, update 2020, forthcoming); and K. Waaldijk, 'What First, What Later? Patterns in the Legal Recognition of Same-Sex Partners in European Countries', in M. Digoix (ed.), *Same-Sex Families and Legal Recognition in Europe* (2020), 11.

[9] In art. 17(2) ACHR the scope of this clause is limited by the words 'insofar as such conditions do not affect the principle of equality established in this convention'.

will see – been interpreted as signalling the heterosexual character of marriage.[10] Therefore, it is important to take a closer look at the *travaux préparatoires* of the UDHR to trace the textual history of this first international articulation of the right to marry. In the first UDHR draft, the word 'everyone' was used in the right to marry. This word however was not considered strong enough to ensure full and equal marriage rights for women. Therefore, as we will see below, 'everyone' was replaced by 'men and women', and their equality of rights was underlined.

2. When 'everyone' is not enough – the conception of the right to marry in 1947/1948

The textual history of the right to marry in the UDHR, as revealed by its *travaux préparatoires*, is presented in the table below. The most convincing conclusion drawn from this textual history is that the words 'men and women' are used in Article 16 of the UDHR to affirm the equality of men and women as regards marriage.[11] Although this Universal Declaration already provides general equality clauses in its Articles 1, 2 and 7, the mention of equality of rights in Article 16 is not strange, because in this Declaration other specific rights are also phrased with an additional guarantee of equality (see Articles 10, 21, 23, 25 and 26). Furthermore, nothing in the preparatory texts indicates that the drafters of the UDHR were thinking about same-sex partners or about a wish to codify the heterosexual exclusivity of marriage.[12] It would have been very surprising indeed if the drafters had been selecting specific words in the 1940s to deal with an issue (recognition of same-sex relationships) that would only enter public discussion in the 1970s.[13]

[10] For example in the *Joslin* case, *supra* note 4.

[11] The same conclusion has been drawn by W. A. Schabas ('Gay Marriage, the Universal Declaration and a Cardinal', 2012 *PhD in human rights*, http://humanrightsdoctorate.blogspot.nl/2012/03/gay-marriage-universal-declaration-and.html); by P. Gerber, K. Tay and A. Sifris ('Marriage: A Human Rights for All?', (2014) 36 *Sydney Law Review* 643, at 647); by P. Johnson ('"The choice of wording must be regarded as deliberate": same-sex marriage and Article 12 of the European Convention on Human Rights', (2015) 40 *European Law Review* 207, at 214); and by K. Waaldijk (*supra* note 1; and 'Vijftien jaar openstelling huwelijk – Naar een huwelijksrecht ongeacht gerichtheid en geslacht', (2016) 65 *Ars Aequi* 237, at 238-239).

[12] See all pages containing the word 'marry' or 'marriage' of the *travaux préparatoires* of the UDHR (as presented in W. A. Schabas (ed.), *The Universal Declaration of Human Rights – The Travaux Préparatoires* (2013), three volumes).

[13] For accounts of early discussions in Scandinavia, see J. Rydström (*Odd Couples – A History of Gay Marriage in Scandinavia* (2011)) and J. M. Lorenzo Villaverde ('Legal Recogniton of Same-Sex Couples in Denmark: from the First Debates to the Enactment of the Registered Partnership Act of 1989', in H. Petersen, J. M. Lorenzo Villaverde and I. Lund-Andersen (eds.), *Contemporary gender relations and changes in legal cultures* (2013), 147). For Asia, see D. Sanders ('Same-Sex Marriage: An Old and New Issue in Asia', in Petersen et al., *supra* in this note, 211). For accounts of early discussions in the Netherlands, see K. Waaldijk ('Partnerschapsregistratie en huwelijk: toenemende rechtsgelijkheid voor geslachtsgelijke partners en hun kinderen', in H. Lenters et al., *De Familie Geregeld?* (2000), 121 at 126; and 'Beantwoording Rechtsvraag Homohuwelijk', (1987) 36 *Ars Aequi* 644). It seems that one of the very first journal articles on same-sex marriage was written by A. J. Silverstein ('Constitutional Aspects of the Homosexual's Right to a Marriage License', (1972-1973) 12 *Journal of Family Law* 607), following the earliest USA case law on the topic (on this see also W. N. Eskridge, 'A History of Same Sex Marriage', (1993) 79 *Virginia Law Review* 1419).

Table 1: Chronology of the articulation in 1947/1948 of the right to marry, as found in the travaux préparatoires *of the UDHR*

Text proposed for article on marriage	Changes to previous text proposal
Division of Human Rights suggested in June 1947: 'Everyone has the right to contract marriage in accordance with the laws of the State.' [14]	
Working Group adopted in December 1947: 'Men and women shall have the same freedom to contract marriage in accordance with the law. Marriage and the family shall be protected by the State and society.' [15]	Addition of 'same freedom' of 'men and women'.[16] Addition of protection clause.[17]
Commission on the Status of Women proposed amendment in January 1948: 'Men and women shall have equal rights to contract or dissolve marriage in accordance with the law.' [18]	Addition of dissolution.[19] And – presumably as a consequence of that addition – change from 'same freedom' to 'equal rights'.
Drafting Committee adopted in May 1948: '1. Men and women shall have equal rights as to marriage in accordance with the law. Marriage may not be contracted without the full consent of both intending spouses and before the age of puberty. 2. Marriage and the family shall be protected by the State and Society.' [20]	Merging 'to contract or dissolve marriage' into the words 'as to marriage'.[21] Addition of clauses on consent and age.[22]
Commission on Human Rights adopted in June 1948: '1. Men and women of full age have the right to marry and to found a family and are entitled to equal rights as to marriage.	Reinstatement of 'right to marry'.[24]

[14] Draft Outline of International Bill of Rights (prepared by the Division of Human Rights of the UN Secretariat), UN Doc. E/CN.4/AC.1/3 (4 June 1947), as reproduced in Schabas, *supra* note 12, at 283.

[15] Summary Record of the Sixth Meeting of the Working Group on the Declaration of Human Rights, UN Doc. E/CN.4/AC.2/SR.6 (9 December 1947), as reproduced in Schabas, *supra* note 12, at 1202-1205.

[16] As proposed by Mrs. Roosevelt (USA), ibid.

[17] As proposed by Mr. Stepanenko (Byelorussian SSR), ibid.

[18] Draft Report of the Commission on the Status of Women to the Economic and Social Council, UN Doc. E/CN.6/74 (15 January 1948), as reproduced in Schabas, *supra* note 12, at 1363.

[19] As proposed by Mrs. Street (Australia); see Summary Record of the Ninth Meeting of the Commission on the Status of Women, UN Doc. E/CN.6/SR.28 (9 January 1948), as reproduced in Schabas, *supra* note 12, at 1358-1359.

[20] Report of the Drafting Committee to the Commission on Human Rights, Annex A, UN Doc. E/CN.4/95 (21 May 1948), as reproduced in Schabas, *supra* note 12, at 1608.

[21] As proposed by the USA; see Summary Record of the Thirty-Eighth Meeting of the Drafting Committee, Second Session, UN Doc. E/CN.4/AC.1/SR.38 (18 May 1948), as reproduced in Schabas, *supra* note 12, at 1563.

[22] As proposed by the UK; see Comments from Governments on the Draft International Declaration on Human Rights – Communication Received from the United Kingdom, UN Doc. E/CN.4/82/Add.9 (10 May 1948), as reproduced in Schabas, *supra* note 12, at 1513.

[24] As proposed by Mr. Cassin (France); see Summary Record of the Fifty-Eighth Meeting of the Commission on Human Rights, UN Doc. E/CN.4/SR.58 (3 June 1948), as reproduced in Schabas, *supra* note 12, at 1749.

2. Marriage shall be entered into only with the full consent of both intending spouses. 3. The family is the natural and fundamental group unit of society and is entitled to protection.' [23]	Addition of the right to 'found a family',[25] and of a 'unit of society' clause.[26] Equality of 'men and women' is only made explicit for (other?) 'rights as to marriage'.[27] Deletion of the clause 'in accordance with the law'.[28]
Third Committee adopted in November 1948: '1. Without any limitation due to race, nationality or religion, men and women of full age have the right to marry and to found a family and are entitled to equal rights as to marriage. 2. Marriage shall be entered into only with the free and full consent of the intending spouses. Men and women shall enjoy equal rights both during marriage and at its dissolution. 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.' [29]	Addition of a clause on discrimination because of race, nationality or religion.[30] Addition of equal rights of men and women 'during marriage', and reinstatement of such equality at dissolution.[31]
Third Committee adopted in December 1948: '1. 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. 2. Marriage shall be entered into only with the free and full consent of the intending spouses. 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' [32]	Rearrangement of the sentences in the first two paragraphs.[33] The result is that the first sentence of Article 16 starts with 'men and women', but also that this first sentence no longer mentions their equality explicitly. The second sentence now provides such equality 'as to marriage, during marriage and at its dissolution'.
On 10 December 1948 the General Assembly proclaimed the last text as Article 16 of the Universal Declaration of Human Rights.[34]	

[23] *Summary Record of the Sixty-Second Meeting of the Commission on Human Rights*, UN Doc. E/CN.4/SR.62 (7 June 1948), as reproduced in Schabas, *supra* note 12, at 1787-1788.

[25] As first proposed by Belgium; see Belgium: Amendment to Article 13 of the Draft Declaration of Human Rights, UN Doc. E/CN.4/103 (27 May 1948), as reproduced in Schabas, *supra* note 12, at 1656.

[26] As first proposed by Dr. Malik (Lebanon); see Summary Record of the Thirty-Seventh Meeting of the Commission on Human Rights, UN Doc. E/CN.4/SR.37 (13 December 1947), as reproduced in Schabas, *supra* note 12, at 1283.

[27] As proposed by Mr. Wilson (UK); see Summary Record of the Sixty-Second Meeting of the Commission on Human Rights, UN Doc. E/CN.4/SR.62 (7 June 1948), as reproduced in Schabas, *supra* note 12, at 1787.

[28] As first proposed by India and the UK; see India and the United Kingdom: Proposed Amendments to the Draft Declaration on Human Rights, UN Doc. E/CN.4/99 (24 May 1948), as reproduced in Schabas, *supra* note 12, at 1620.

[29] Text as adopted by the Committee for articles 12 to 14 of the draft Declaration (E/800), UN Doc. A/C.3/326 (8 November 1948), as reproduced in Schabas, *supra* note 12, at 2487.

[30] As first proposed by Mr. Stepanenko (Byelorussian SSR); see Summary Record of the Sixth Meeting of the Working Group on the Declaration of Human Rights, UN Doc. E/CN.4/AC.2/SR.6 (9 December 1947), as reproduced in Schabas, *supra* note 12, at 1202.

[31] As proposed by the USSR; see Report of the Third Session of the Commission on Human Rights (Appendix: Statement Made by the Delegation of the Union of Soviet Socialist Republics, on 18 June 1948, in the Commission on Human Rights on the Results of the Commission's Work), UN Doc. E/800 (28 June 1948), as reproduced in Schabas, *supra* note 12, at 1979.

[32] Draft International Declaration of Human Rights Report of the Third Committee, UN Doc. A/777 (7 December 1948), as reproduced in Schabas, *supra* note 12, at 3007.

[33] As proposed – for technical reasons – by Sub-Committee 4; see Draft Report of Sub-Committee 4 of the Third Committee, UN Doc. A/C.3/400 (4 December 1948), as reproduced in Schabas, *supra* note 12, at 2944-2945 and 2951.

[34] International Bill of Human Rights, Part A: Universal Declaration of Human Rights, UN Doc. A/RES/217(III) (10 December 1948), as reproduced in Schabas, *supra* note 12, at 3094.

The overview in *Table 1* indicates that the words 'men and women' were inserted in the article to make it explicit that women should have the 'same freedom' as men to contract a marriage. When it was decided that the equality of men and women should also be guaranteed regarding dissolution of marriage, the words 'same freedom' were replaced by 'equal rights'. After the equal rights 'to contract or dissolve marriage' had been merged into the blander words 'equal rights as to marriage' (because there was some opposition against mentioning dissolution explicitly), it was felt that the 'right to marry' should be mentioned separately again. Although this separate 'right to marry' was then phrased without an explicit reference to equality, the wording of this separate right still used the words 'men and women'. This can be seen as a drafting mistake, because linguistically the words 'men and women' made sense in relation to 'equal rights', but less so in the absence of the word 'equal'. This mistake became even more confusing when at the very last stage of drafting the 'equal rights as to marriage' were put in a separate second sentence. This meant that the opening sentence of Article 16 now speaks of 'men and women' having the right to marry and to found a family. That men and women are mentioned here to underline their equality only becomes apparent when you also look at the second sentence, beginning with 'They are entitled to equal rights…'. Therefore, it is not surprising that people who only look at the first sentence of Article 16 (and not at its second sentence or at its textual history), may think of heterosexual exclusivity.[35] Nevertheless, the combination of the two sentences, and even more so their textual history, make it abundantly clear that the words 'men and women' are used in order to make it possible to speak of 'equal rights' for men and women.

The textual history of the right to marry in the UDHR also demonstrates how various elements were added during the process of drafting and adopting this right: clauses on full age, on free and full consent, on a right to found a family, on the family as a 'natural and fundamental group unit of society', on the protection of the family, and on discrimination due to race, nationality or religion (see *Table 1*). The fact that the latter clause on non-discrimination does not include the word 'sex', is further proof that the drafters were aware that sex discrimination was already specifically prohibited by the words 'equal rights' for 'men and women'.

At the same time, many aspects of marriage have not been explicitly included in the text of the right to marry: parental consent to marriage, role of religion in regulating marriage, role of religion in celebrating marriage, legal consequences of marriage, possibility of prenuptial contracts, of polygamy, of divorce, of remarriage, and so on. It seems that the drafters of this right were aware of the great many differences between the marriage laws of different countries. Article 16 uses the term 'marriage' without giving a definition, and without stipulating what variations in marriage law are permissible, and without listing all aspects of marriage to which individuals are entitled. It seems fair to say that heterosexual exclusivity of marriage (i.e. its gender composition) is also something that has not been specified in the Universal Declaration.

All this means that the word 'marriage' is used in a wide and flexible sense,[36] and that countries have a wide discretion in regulating marriage.[37] Article 16 may not provide a *right to gender-neutral marriage*, but it can and should be read as providing a *gender-neutral right to marriage*. This

[35] This seems to have happened in the *Joslin* case, *supra* note 4.

[36] See also M. Langford 'Same-sex marriage in polarized times: revisiting *Joslin v New Zealand* (HRC)', in E. Brems and E. Desmet (eds.), *Integrated Human Rights in Practice – Rewriting Human Rights Decisions* (2017), 119 at 130-131.

[37] It therefore seems that the words 'in accordance with the law' (that were dropped during the drafting process, see *Table 1*) are implied in the words 'to marry'.

international human right simply does not specify to what sort of marriage *everyone* of full age is entitled, with the word 'everyone' not considered strong enough. Article 16 therefore speaks of 'men and women', requires their equal treatment regarding marriage, and also prohibits marriage discrimination on grounds of race, nationality and religion. From the start, the right to marry was conceived as a right to equality.

3. Application of the international right to marry in same-sex cases

The phrasing in the UDHR of the right to marry as a right of 'men and women' has served as a model for three human rights treaties:

- Art. 12 of the European Convention on Human Rights (1950): '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.'
- Art. 23(2) of the ICCPR (1966): 'The right of men and women of marriageable age to marry and to found a family shall be recognized.'[38]
- Art. 17(2) of the ACHR (1969): '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 non-discrimination established in this Convention.'[39]

The *travaux préparatoires* of the European Convention,[40] the ICCPR,[41] and the ACHR,[42] do not seem to include any indication that these or any other words were specifically intended to exclude same-sex couples from the right to marry (or to include them).

Other (mostly younger) human rights treaties either only contain provisions on 'family',[43] or they mention the right to marry without calling it a right of 'men and women':

- Art. 5(d)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination (1965): 'The right to marriage and choice of spouse'.

[38] According to art. 23(4) ICCPR, States Parties 'shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution'.

[39] According to art. 17(4) of the American Convention, States Parties 'shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution'.

[40] See the detailed analysis of the *travaux préparatoires* by Johnson, *supra* note 11, at 217-222.

[41] See the documents presented by M.J. Bossuyt, *Guide to the 'travaux préparatoires' of the International Covenant on Civil and Political Rights* (1987), at 441-454.

[42] See the documents of the *Conferencia Especializada Interamericana sobre Derechos Humanos* (San José, Costa Rica 7-22 November 1969), published by Secretariat General OAS, Washington DC, OEA/Ser.K/XVI/1.2, available at http://www.oas.org/es/cidh/mandato/Basicos/Actas-Conferencia-Interamericana-Derechos-Humanos-1969.pdf.

[43] African Charter of Human and Peoples's Rights (Art. 18); European Social Charter (Art . I(16) and II(16)); International Covenant on Economic, Social and Cultural Rights (Art. 10); Convention on the Rights of the Child (various articles). For a discussion of the potential of the latter two treaties in regard to the heterosexual exclusivity of marriage, see Gerber et al. (*supra* note 11), as well as K. L. Walker ('United Nations Human Rights Law and Same-Sex Relationships: Where to from Here?' in R. Wintemute and M. Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships – A Study of National, European and International Law* (2001), 743) who also discusses the potential of the CEDAW.

- Art. 16(1)(a) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979): 'States Parties … shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage'.[44]
- Art. 9 of the Charter of Fundamental Rights of the European Union (EU Charter, 2000): '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.' [45]
- Art. 23(1)(a) of the Convention on the Rights of Persons with Disabilities (2006): 'The right of all persons with disabilities who are of marriageable age to marry …'.

The UNHRC in 2002 was the first international human rights body having to decide on a same-sex marriage claim (the *Joslin* case), and did so as follows:

> 8.2 … 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.[46]

This rejection of the same-sex marriage claim was 'perhaps more of a disappointment than a surprise'.[47] One of the disappointing aspects is that the UNHRC only advanced one argument for its rejection: the supposedly consistent and uniform understanding of the words 'men and women' as limiting the scope of the right to marry to 'a man and a woman'. This understanding of the words 'men and women' was, however, not shared by the people responsible for drafting and adopting UDHR and ICCPR (as I have demonstrated above). The words 'men and women' were introduced into this article with a very different intention: ensuring equality between women and men. It is possible that in later years (when same-sex marriage became a topic of debate) the words 'men and women' came to be a read as indicating the exclusively heterosexual character of Article 23 of the ICCPR, but it is clearly incorrect to say that this had been 'consistently and uniformly understood'.

[44] In the CEDAW, marriage is also mentioned in Arts. 9 and 11, and in the remainder of Art. 16.

[45] This EU Charter is legally binding since 2009.

[46] *Joslin* case, *supra* note 4.

[47] Langford, *supra* note 36, at 119.

The European Court of Human Rights first fully dealt with the issue of same-sex marriage in 2010 in the case of *Schalk and Kopf*.[48] In this case the Court embraced a contextual approach to the interpretation of Article 12 of the European Convention on Human Rights. Having conceded that 'looked at in isolation, the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women', the Court invoked the 'historical context in which the Convention was adopted' and that in 'the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex'.[49] But that is not the end of the Court's analysis:

> 58. … Although … the institution of marriage has undergone major social changes since the adoption of the Convention, the Court notes that there is no European consensus regarding same-sex marriage. At present no more than six out of forty-seven Convention States allow same-sex marriage. …
>
> 60. Turning to the comparison between Article 12 of the Convention and Article 9 of the Charter of Fundamental Rights of the European Union (the Charter), the Court has already noted that the latter has deliberately dropped the reference to men and women … . By referring to national law, Article 9 of the Charter leaves the decision whether or not to allow same-sex marriage to the States. …
>
> 61. Regard being had to Article 9 of the Charter, therefore, the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article 12 is inapplicable to the applicants' complaint. However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State.
>
> 62. In that connection the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. …[50]

In this case, the Court found that there was no violation of Article 12, but using phrases such as 'at present' and 'as matters stand',[51] it pointed to several contextual elements that have started to change (absence of 'men and women' in the EU provision; six countries that had opened up marriage) and might lead to a different outcome in future cases. Most remarkably, it conceded that the right to marry 'no longer' must be seen as 'in all circumstances' limited to persons of the opposite sex.[52] In line with this contextual approach the Court did not base its final conclusion on the traditional meaning of the word 'marry' (let alone on the words 'men and women'), but on the wide discretion offered by the words 'according to the national laws governing the exercise of this right' in Article 12.

The Court's approach is contextual, because it uses the deliberate absence of 'men and women' in Article 9 of the EU charter to interpret Article 12 of the European Convention as (somewhat) applicable to same-sex couples. This approach has been analysed by Pustorino as 'evolutive interpretation', because the Court 'overruled its previous interpretation' by considering Article 12 no

[48] *Schalk and Kopf* case, *supra* note 5.

[49] Ibid., para. 55.

[50] Ibid., paras. 58-62.

[51] Ibid., paras. 58 and 61 respectively.

[52] Ibid., para. 61.

longer inapplicable to the situation of a same-sex couple, and because this 'is likely to be taken up and developed in future cases'.[53]

Interestingly, the Court also used the *Schalk and Kopf* case to distance itself from its earlier case law regarding the right to respect for family life. The Court now 'considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8'.[54] This very probably means that the word 'family' in Article 12 (right 'to found a family') should also be read as including same-sex couples.[55] And such an interpretation of the right to found a family in turn would reinforce what the Court has said about the other right in Article 12: the right to marry is not (always) 'inapplicable' to same-sex couples.[56]

Compared to this *half empty* interpretation of the right to marry by the European Court of Human Rights in *Schalk and Kopf*, the recent interpretation given by the Inter-American Court of Human Rigths seems *half full*. Not in a binding judgment in a concrete case, but in an *Advisory Opinion*,[57] the latter Court concludes that:

> States must ensure full access to all the mechanisms that exist in their domestic laws, including the right to marriage, to ensure the protection of the rights of families formed by same-sex couples, without discrimination in relation to those that are formed by heterosexual couples …[58]

To support its conclusion the IACtHR refers to several articles of the ACHR, including Article 17 in general, but not specifically to the right to marry provided in Article 17(2).[59] In fact, the Court suggests that Article 17(2) only applies to the 'specific model' of marriage between a man and a woman.[60] Instead, the Court derives the right for same-sex couples to get access to marriage mainly from the rights to respect for and protection of family (Articles 11 and 17) and from the rights to non-discrimination (Articles 1 and 24). Relying on the right to non-discrimination, 'the Court deems

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[53] P. Pustorino, 'Same-Sex Couples Before the ECtHR: The Right to Marriage', in D. Gallo, L. Paladini and P. Pustorino (eds.), *Same-Sex Couples before National, Supranational and International Jurisdictions* (2014), 399 at 402-403.
For a similar analysis, see L. Hodson, 'A Marriage by Any Other Name? *Schalk and Kopf v Austria*', (2011) 11 *Human Rights Law Review* 170; and S. Davis, *Conflicts of Law and the Mutual Recognition of Same-Sex Unions in the EU* (2015, PhD thesis, University of Reading, http://centaur.reading.ac.uk/58783/1/19026795_Davis_thesis.pdf), at 240-243. In a much more critical analysis, Johnson (*supra* note 11, at 222) calls the Court's interpretation 'textual'. However, the latter qualification only seems fitting for *one* of the arguments the Court used (i.e. the indeed incorrect argument that considers it relevant that Art. 12 is the only provision that speaks of 'men and women'), and misses the point that the Court changed its interpretation because of a changing context.

[54] *Schalk and Kopf* case, *supra* note 5, para. 94.

[55] See also *Atala Riffo and daughters* v. *Chile*, Judgment of 24 February 2012, IACtHR, paras. 174-177 (about the interpretation of the word 'family' in Arts. 11 and 17 of the ACHR).

[56] *Schalk and Kopf* case, *supra* note 5, para. 61.

[57] It is not quite clear from Art. 64 of the ACHR if this Advisory Opinion is binding, but the Court emphasises its own role as 'ultimate interpreter of the American Convention'. IACtHR Advisory Opinion, *supra* note 6, para. 16.

[58] Ibid., para. 229, point 8.

[59] Ibid.

[60] Ibid., paras. 181-182.

inadmissible the existence of two types of formal unions to legally constitute the heterosexual and homosexual cohabiting community'.[61]

Despite the Inter-American Court's emphasis on full marriage equality for same-sex couples, it nuances its conclusion by stating that it:

> cannot ignore the possibility that some States must overcome institutional difficulties to adapt their domestic law and extend the right of access to the institution of marriage to same-sex couples, especially when there are rigorous procedures for legislative reform, which may demand a process that is politically complex and requires time. … States that do not yet ensure the right of access to marriage to same-sex couples are obliged not to violate the provisions that prohibit discriminating against them and must, consequently, ensure them the same rights derived from marriage in the understanding that this is a transitional situation.[62]

This seems to indicate that also under the ACHR, countries still have a certain margin of appreciation – but only as regards their decision as to *when* to open up marriage to same-sex couples.

4. A gender-neutral right to marry that demands equality

The conclusion from the previous paragraphs has to be that there is no international human rights instrument that excludes same-sex couples from the right to marry. This is clear in the *text* of this right in the International Convention on the Elimination of All Forms of Racial Discrimination, in the Convention on the Rights of Persons with Disabilities, in the CEDAW, and in the EU Charter. It is also clear in the *travaux préparatoires* of the UDHR, of the ICCPR and of the European and American conventions on human rights.

In particular, the preparatory documents to the Universal Declaration of Human Rights show that the words 'men and women' in the right to marry were not inserted in order to exclude same-sex marriages, but in order to emphasize the equality of women and men. The European Court of Human Rights has indicated that the right to marry is not (always) inapplicable to same-sex couples.[63] Furthermore, the Inter-American Court of Human Rights has acknowledged an obligation of countries to work towards ensuring same-sex couples access to marriage.[64]

The above analysis of the text and textual history of the international human right to marry, and of the emerging international case law on same-sex marriage, suggests that the international human right to marry is gender-neutral: it does not exclude same-sex couples, and it specifically prohibits discrimination between women and men. However, it also became clear that, according to current interpretations of international human rights law, countries are still free to continue excluding same-sex couples from marriage – although in the Americas only 'on a transitional basis'.[65]

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[61] Ibid., para. 224.

[62] Ibid., paras. 226-227.

[63] *Schalk and Kopf* case, *supra* note 5, para. 61.

[64] IACtHR Advisory Opinion, *supra* note 6, paras. 217-228.

[65] Ibid., para. 229.

It may still take quite some time, before there will be more international consensus that the international right to marry also applies to same-sex couples. It should be noted, however, that in the meantime already a new international rule is emerging both in international human rights law and in international staff law. This new rule acknowledges the existence of same-sex marriages and requires transnational legal recognition – in a growing number of contexts – of same-sex marriages from countries where they have been made possible.[66] And in several ways international staff law and international human rights law now also acknowledge that in many countries same-sex partners do *not* have access to marriage, and that this fact must be legally compensated to some degree.[67]

Further developments towards marriage equality for same-sex couples can of course be based on the right (contained in every major human rights instrument) not to be discriminated in the enjoyment of any human right. This has played an important role in the ground breaking Advisory Opinion of the IACtHR (see above), and has been recommended as a useful avenue by several authors.[68] However, the gender-neutral and non-discriminatory character of the right to marry can also play an important role on its own. In the first place, a correct and historically sound reading of the treaty texts of the right to marry (as advanced above), means that it is no longer possible to deny a same-sex marriage claim by simply referring to the use of the words 'men and women' in the treaty text. Secondly, the prohibition of sex discrimination in the wording of the right to marry,[69] makes it possible to use the argument, already accepted in 1994 by the UNHRC,[70] and in 2020 also embraced by the USA Supreme Court,[71] that sexual orientation discrimination is a form of sex discrimination. On that basis it can more readily be argued that the complete exclusion of same-sex partners from the right to marry amounts to a violation of the right to marry.

[66] The leading cases are: *C* v. *Australia*, Views of 28 March 2017, UNHRC, UN Doc. CCPR/C/119/D/2216/2012; *Orlandi and Others* v. *Italy*, Judgment of 14 December 2017, no. 26431/12, [2017] ECHR; and Case C-673/16, *Coman and Others*, Judgment of 5 June 2018, ECLI:EU:C:2018:385. See also G. Biagioni, 'On Recognition of Foreign Same-Sex Marriages and Partnerships', in Gallo et al., *supra* note 54, 359; D. Gallo, 'International Administrative Tribunals and their *Non-Originalist* Jurisprudence on Same-Sex Couples: "Spouse" and "Marriage" in Context, Between Social Changes and the Doctrine of *Renvoi*', in Gallo et al., *supra* note 54, 511; and see Waaldijk, *supra* notes 1 and 8.

[67] *Oliari and Others* v. *Italy*, Judgment of 21 July 2015, nos. 18766/11 and 36030/11, [2015] ECHR; *Taddeucci and McCall* v. *Italy*, Judgment of 30 June 2016, no. 51362/09, [2016] ECHR; and see Waaldijk, *supra* note 1.

[68] L. R. Helfer, 'Will the United Nations Human Rights Committee Require Recognition of Same-Sex Marriage?', in Wintemute and Andenaes, *supra* note 43, 733 at 737-739; G. Zukaite, 'Does the Prohibition of Same-Sex Marriages Violate Fundamental Human Rights and Freedoms', (2005) 2(4) *International Journal of Baltic Law* 1. See also M. Y. K. Lee, *Equality, dignity, and same-sex marriage: a rights disagreement in democratic societies* (2010).

[69] As shown above, this prohibition is explicit in the text of Art. 16 UDHR and Art. 16 CEDAW, and implicit in the texts of Art. 23 ICCPR, Art. 17 ACHR, and Art. 12 of the European Convention.

[70] *Toonen* v. *Austalia*, Views of 31 March 1994, UNHRC, UN Doc. CCPR/C/50/D/488/1992, para. 8.7.

[71] *Bostock* v. *Clayton County*, 590 U.S.___(Sup.Ct. 2020).