Marriage Overruled? 'Certificate of Non-Impediment' and Impediment to the Right to Same-Sex Marriage

The purpose of this article is to analyse the requirement to provide a certificate of non-impediment from the perspective of international human rights law. This obligation is often imposed on LGBT non-nationals who wish to marry in a country who has legalised same-sex marriage. Authorities in countries without same-sex marriage have refused to issue this certificate under the ground that national law only recognises marriage between a man and a woman. At the same time, excessive bureaucratism in the country that requires the certificate means that LGBT non-nationals cannot enter into a same-sex marriage in that country. In this article, I will argue that both countries have violated the right to marry, the right to private and family life and the right to non-discrimination. I will specifically analyse in abstracto the compatibility of certificate of non-impediment with the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

1. Introduction

As of December 2021, same-sex marriage has been legalised in 30 countries, with most of them being concentrated in Western Europe, North America, South America and Oceania. In an increasingly interconnected world, these states are now home to a plethora of LGBT non-nationals. Many of them found the love of their life and subsequently intended to enter into a same-sex marriage in their new home. There are also citizens from states with same-sex marriage who found their partner abroad and subsequently sought to officially found a family with them. Romantic daydreaming and planning, however, soon turn into a bureaucratic quagmire, as LGBT non-nationals are often asked to provide a 'certificate of non-impediment', 'certificate of no impediment', 'certificate of marital status' or 'certificate of legal capacity to marry'. This document is usually defined as a letter declaring that under the law of the issuing state, there is no impediment to marriage for the person concerned. This letter is particularly required in order to prove that one is still unmarried, and thus it can be considered as an instrument to prevent bigamy.

As an illustration, imagine a homosexual man from Indonesia who has settled in Germany. He wants to marry another man from Poland who is working in Heidelberg thanks to

the freedom of movement within the European Union. In order to marry in Germany, the Indonesian would have to prepare many different documents. Most pertinent for the purpose of this paper is an *Ehefähigkeitszeugnis* (literally means 'certificate of marriage capacity') issued by the competent authority in Indonesia. The legal basis of this requirement is laid down under Section 1309(1) of the German Civil Code:

> A person who, with regard to the requirements for entering into a marriage, is subject to foreign law (…), should not enter into a marriage before he has furnished a certificate of the domestic authority of his home state that there is no impediment to the marriage under the law of that state. A certificate of the domestic authority includes a written confirmation that is issued by another office under a treaty entered into with the home state of the person affected. The certificate becomes ineffective if the marriage is not entered into within six months after it is issued; if the certificate states a shorter period of validity, the latter is conclusive.[1]

Because of the bureaucratic quagmire in Indonesia, it is usually not obvious for many applicants to which authority they should turn to. In the past, they would have to obtain the certificate from the Office of Religious Affairs (if they are officially registered as a Muslim) or the Civil Registry Office (if they are not a Muslim), although new regulations seem to indicate that they have to apply to the city or regency administration. For the Indonesian, however, it is practically impossible to obtain this document. While usually not mentioned in the official website of city or regency authorities,[2] the bureaucrats in charge often asked the applicant to provide a copy of the identity of the spouse together with their picture. This requirement is even explicitly mentioned in the website of the Consulate General of the Republic of Indonesia in Frankfurt.[3]

Why would the requirement to show the identity of the spouse be a hurdle to the right to marry? It is because Indonesia only recognises marriage between a man and a woman as defined under Article 1 of Law No. 1 of 1974 on Marriage.[4] Furthermore, Article 2 of the same law stipulates that "a marriage is valid if it has been performed in accordance with the laws of the respective religious beliefs of the parties concerned."[5] Once the authorities realised that the

---

[1] § 1309 Abs. 1 BGB <www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p4771> accessed 23 November 2021.

[2] See, for instance, 'Persyaratan Surat Keterangan Belum Menikah' (*Disdukcapil Kabupaten Sleman*) <web.archive.org/web/20180201100841/https://dukcapil.slemankab.go.id/persyaratan-surat-keterangan-belum-menikah > accessed 23 November 2021; 'Surat Keterangan Belum Menikah' (*Disdukcapil Kota Pontianak*) <online.disdukcapil.pontianakkota.go.id/pendaftaran/surat-keterangan-belum-menikah> accessed 23 November 2021.

[3] 'Surat Keterangan' (*Konsulat Jenderal Republik Indonesia Frankfurt*) < www.indonesia-frankfurt.de/layanan-konsuler/surat-keterangan/> accessed 23 November 2021.

[4] Article 1 of Law No. 1 of 1974 on Marriage.

[5] ibid. See also Letezia Tobing, 'Hukum Perkawinan Sesama Jenis di Indonesia' (*Hukumonline*, 19 December 2012) <www.hukumonline.com/klinik/detail/ulasan/lt50c9f71e463aa/hukum-perkawinan-sesama-jenis> accessed 23 November 2021.

Indonesian was seeking to contract same-sex marriage abroad, he or she would most likely reject the request to obtain a certificate of non-impediment,[6] since under Indonesian law, marriage is only valid between a man and a woman. The authority could also hold, as commonly believed by many Indonesians, that "all religions prohibit homosexuality",[7] and thus the applicant's intended marriage would not be in line with Article 2 of Law No. 1 of 1974.

Meanwhile, the hypothetical Polish spouse is also facing an insurmountable headwind. This difficulty is illustrated in the case of *Szypuła and Others v Poland*, which is yet to be decided by the European Court of Human Rights (ECtHR) at the time when this paper is written. In that case, the Warsaw Civil Status Office refused to issue a certificate of non-impediment because the issuance of this certificate was deemed to be contrary to Polish law, which restricts marriage to a bond between a man and a woman.[8]

The issue of certificate of non-impediment, however, has not yet gained the attention of the existing human rights scholarship. This is despite the potential of this document to negate the effective exercise of right to marry of LGBT non-nationals in a country that has legalised same-sex marriage. Against this backdrop, the purpose of this paper is to analyse *in abstracto* certificate of non-impediment from the perspective of international human rights law. For the analysis, I focus on two major human rights instruments, namely the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). The former is selected given its global scope, whereas the latter is included since the communication of *Szypuła and Others v Poland* has led to the publication of some legal analyses which could enrich the research on the compatibility of certificate of non-impediment with human rights.[9] As for the scope of the states, I will include both states that impose the

---

[6] There are also anecdotal reports that interfaith couples are unable to obtain a certificate of non-impediment to marry in Indonesia or abroad, particularly if the Indonesian side is a Muslim. Under Islam, marriage can only be contracted between a Muslim man and a Muslim woman or between a Muslim man and a non-Muslim woman. There have been reports that the officials preached them instead. From a legal point of view, the official could cite Article 2 of the 1974 Marriage Law to refuse the application.

[7] See, for instance, Ali Mansur, 'ICMI: Kalau LGBT Itu HAM, Mengapa Semua Agama Melarangnya?' (*Republika*, 22 January 2018) <www.republika.co.id/berita/p2xlek330/icmi-kalau-lgbt-itu-ham-mengapa-semua-agama-melarangnya> accessed 23 November 2021; Yose Rizal, 'MUI : LGBT Tidak Dibenarkan Semua Agama' (*Antaranews*, 9 May 2018) <https://www.antaranews.com/berita/708465/mui-lgbt-tidak-dibenarkan-semua-agama> accessed 23 November 2021.

[8] *Tomasz Szypuła v Poland, Jakub Urbanik and Jose Luis Alonso Rodriguez v Poland* App nos 78030/14 and 23669/16 (ECtHR, 20 June 2020).

[9] See, for instance, Claire Poppelwell-Scevak and Sarah Den Haese, 'The Challenges of Saying 'I Do' for Same-Sex Couples: The Human Rights Centre Submits a Third Party Intervention in Transnational Same-Sex Marriage Case' (*Strasbourg Observers*, 20 November 2020) <strasbourgobservers.com/2020/11/20/the-challenges-of-saying-i-do-for-same-sex-couples-the-human-rights-centre-submits-a-third-party-intervention-in-transnational-same-sex-marriage-case/> accessed 23 November 2021.

requirement of certificate of non-impediment for foreigners and states that prevent their nationals from contracting same-sex marriage abroad by refusing the issuance of such a certificate.

This paper will be structured as follows. First, I will argue that the refusal to issue a certificate of non-impediment constitutes a violation of not only the right to private life and the right to marry, but also the right to non-discrimination, as the refusal is grounded solely on sexual orientation. Second, I will extend the analysis to states that have imposed a requirement to furnish a certificate of non-impediment. Finally, I will conclude that certificate of non-impediment is discriminatory, as it creates an insuperable bureaucratic hurdle for LGBT non-nationals. While states may invoke the ground of protection of public orders, the formalistic imposition of the requirement does not satisfy the proportionality test.

2. Refusal to Issue Certificate of Non-Impediment as a Human Rights Violation

In the communicated case of *Szypuła and Others v Poland*, the Warsaw Civil Status Office refused to issue a certificate of non-impediment to the applicants, who intended to marry in Spain, under the ground that the issuance would be contrary to Polish law that restricts marriage to a union between a man and a woman.[10] In Poland, same-sex marriage is explicitly prohibited under Article 18 of the Polish Constitution, which enshrines that "Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland."[11] The applicants had to provide the name and the gender of the future spouse to obtain the certificate, and consequently the Polish authorities became aware of the applicants' intention to contract same-sex marriage abroad.[12]

As the applicants' appeals were dismissed by the Polish courts, the case was brought to the ECtHR. At the time when this paper is written, the case is yet to be decided by the Court. Nevertheless, the applicants have raised pertinent arguments concerning the compatibility of the refusal to issue a certificate of non-impediment with the ECHR. The applicants specifically argued that their right to private and family life under Article 8 of the ECHR has been violated, since the refusal has effectively prevented them from marrying in Spain. Furthermore, the applicants also invoked Article 12 on the right to marry, as they were effectively barred from

[10] *Szypuła and Others v Poland* (n 8).
[11] Poland's Constitution of 1997, art. 18 <www.constituteproject.org/constitution/Poland_1997.pdf> accessed 23 November 2021.
[12] *Szypuła and Others v Poland* (n 8).

marrying in Spain because of the decision of the Polish authorities. Finally, they also added that the refusal constitutes a discrimination on the basis of sexual orientation, and thus they contended that there is a breach of Article 14 on the accessory right to non-discrimination in conjunction with Article 8.[13]

In this Section, I shall demonstrate that the applicants' arguments have grounds under international human rights law. In other words, I will argue that refusal to issue a certificate of non-impediment on the ground of sexual orientation violates the right to marry, the right to private and family life and the right to non-discrimination. I will base my arguments not only on the jurisprudence of the ECtHR, but also on the authoritative interpretation of the Human Rights Committee (HRC) as the treaty body of the ICCPR. At the same time, there are also important differences between the jurisprudence of the ECtHR and the HRC, as the latter still has not recognised that the right to marry is applicable to same-sex couples. Nevertheless, I will still conclude that there is a violation given the existence of the right to privacy and the right to non-discrimination.

2.1 Right to Marry

Under the jurisprudence of the HRC, there is no legal obligation to legalise same-sex marriage. The HRC in *Joslin v New Zealand* observed that Article 23(2) of the ICCPR on the right to marry specifically mentions "men and women" instead of "everyone". Thus, the HRC concluded that the objective of the provision was "to recognize as marriage only the union between a man and a woman wishing to marry each other."[14] This statement implies that Article 23(2) is exclusively applicable to opposite-sex couples. As a result, same-sex couples who intend to marry abroad cannot enjoy the protection of this article.[15]

Similarly, the ECtHR in *Schalk and Kopf v Austria* found that the use of the term "men and women" was deliberate to refer to traditional marriage.[16] The Court also held that "marriage has deep-rooted social and cultural connotations which may differ largely from one society to

---

[13] ibid.

[14] *Juliet Joslin, Jennifer Rowan, Margaret Pearl and Lindsay Zelf v New Zealand* (2002) UN Doc CCPR/C/75/D/902/1999, para 8.2.

[15] At the same time, it should be born in mind that *Joslin* was decided in 2002; as observed by Manfred Nowak, "Article 23(2) (…) does not necessarily rule out a broader interpretation in the future, taking into account the rapidly changing views in many societies in this respect." See Manfred Nowak *U.N. Covenant on Civil and Political Rights: CCPR commentary* (NP Engel 2005) 526-27.

[16] *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010) para 54-55.

another", and that it "must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society."[17] In other words, states have a wide margin of appreciation in deciding whether to legalise same-sex marriage.[18]

There is, however, an important difference between the jurisprudence of the HRC and the ECtHR. The Court in the case of *Schalk and Kopf v Austria* (decided in 2010) has explicitly ruled that Article 12 of the ECHR can no longer be regarded as being exclusively applicable to heterosexual couples, since the institution of marriage has undergone "major social changes" in recent years.[19] For the Court, this change was demonstrated by how Article 9 of the Charter of Fundamental Rights of the European Union has deliberately omitted the term "men and women".[20] The Court's red line was only that Article 12 cannot be construed to establish an obligation on Contracting States to grant access to marriage to same-sex couples.[21] In this light, Article 12 of the ECHR would be applicable for homosexual couples who wish to marry in another state that has legalised same-sex marriage.

In response to this assertion, states such as Poland may point to the fine print of Article 12 that the exercise of the right to marry is subject to national laws of Contracting States.[22] They would thus argue that the refusal to issue a certificate of non-impediment was based on a national law which restricts the exercise of the right to marry to opposite-sex couples. Moreover, they could assert that the measure is intended to protect "traditional marriage", which has been recognised by the Court as a "weighty and legitimate interest".[23]

However, the ECtHR has also established that limitations on the right to marry "must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired."[24] While the applicants in *Szypuła* were barred from marrying in Poland, they had the option to do so in Spain. Poland's refusal had effectively prevented them from getting married in a state where same-sex couples are granted access to marriage, which means that the

---

[17] ibid.
[18] Laurence Burgorgue-Larsen, *La Convention européenne des droits de l'homme* (3rd edn, LGDJ 2019) 187-88.
[19] *Schalk and Kopf v Austria* (n 16) para 60-61.
[20] ibid para 60.
[21] ibid para 54-55; *Oliari and Others v Italy* App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015) para 191-192; *Hämäläinen v Finland* App no 37359/09 (ECtHR, 16 July 2014) para 96.
[22] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 12; *Rees v the United Kingdom* App no 9532/81 (ECtHR, 17 October 1986) para 50.
[23] *Fedotova v Russia* App no 73225/01 (ECtHR, 13 April 2006) para 54.
[24] *Rees v the United Kingdom* (n 22) para 50; *F v Switzerland* App no 11329/85 (ECtHR, 18 December 1987) para 32.

very essence of the right to marry of the applicants *in that state* has been impaired.[25] As argued by the Human Rights Centre of Ghent University in its Third-Party Intervention:

> the mere fact that a State does not allow for same-sex marriage does not contradict the possibility of that State nonetheless being subjected to some kind of obligations under Article 12, such as the obligation not to hinder the effective enjoyment by its nationals of their right to marry *in another country*."[26]

Furthermore, the Human Rights Centre also emphasised the importance of analysing the case in light of increasing transnational mobility, particularly within the European Union. Thus, they exhorted the Court to take into account this factor "with a view to ensuring that those human rights which are prerequisite to the effective enjoyment of transnational lives are not unduly hampered by the acts of the States concerned."[27] To rule otherwise "would grant a disproportionate power for rights-restrictive States in transnational situations, a scenario that in our opinion runs counter to the object and purpose of the Convention as an instrument for the protection of individual human beings."[28]

The overreliance on domestic law is also a classic example of 'excessive formalism'. The ECtHR has held in the context of the right to access to a court under Article 6(1) that the practical and effective enjoyment of this right can be impaired by 'excessive formalism'.[29] As argued by the Human Rights Centre, this observation is applicable by analogy to the case of certificate of non-impediment, since 'excessive formalism' with respect to that certificate effectively impairs the enjoyment of the right to marry and the right to private and family life of LGBT non-nationals.[30]

Finally, with regard to the potential argument that states are entitled to protect traditional marriage, this argument is also weak given that granting a certificate of non-impediment is not equal to recognising nor legalising same-sex marriage, particularly in light of the fact that *Schalk and Kopf* still allows states to refuse recognition of same-sex marriage.[31] The Human Rights Centre in its Third-Party intervention has also made an analogy with the case of *Coman*

---

[25] Eva Brems et al, 'European Court of Human Rights, *Szypuła v Poland* and *Urbanik & Alonso Rodriguez v Poland* (Application Nos. 78030/14 and 23669/16), Third Party Intervention by the Human Rights Centre of Ghent University' (*Human Rights Centre*) <hrc.ugent.be/wp-content/uploads/2020/11/Szypula-v.-Poland-TPI.pdf> accessed 23 November 2021, 3-4.
[26] ibid 4.
[27] ibid.
[28] ibid 5.
[29] *Zubac v Croatia* App no 40160/12 (ECtHR, 5 April 2018) para 97; *Inmobilizados y Gestiones S.L. v Spain* App no 79530/17 (ECtHR, 14 September 2021) para 33.
[30] Brems et al. (n 25) 9.
[31] ibid 4.

in the Court of Justice of the European Union (CJEU),[32] which is concerned with the granting of the right of residence to the same-sex spouse of a European Union (EU) citizen based on marriage performed in another EU country.[33] The CJEU in this case ruled that the right to residence "does not undermine the national identity or pose a threat to the public policy of the Member State concerned".[34] The Human Rights Centre then asserted that this dictum is also applicable in the context of certificate of non-impediment, as "the mere granting of a marriage eligibility certificate to a national who wants to contract a same-sex marriage abroad would similarly not undermine national identity or pose a threat to public policy."[35]

2.2 Right to Private and Family Life

Even if it is assumed that the right to marry is not applicable at all to the case of certificate of non-impediment due to the existence of the phrase 'men and women', refusal to issue the document still intervenes with the right to private and family life. Article 8(1) of the ECHR enshrines that "Everyone has the right to respect for his private and family life, his home and his correspondence."[36] Meanwhile, Article 17(1) of the ICCPR is phrased in a slightly different manner: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."[37] Nevertheless, the French version uses the term *vie privée*.[38] As observed by Nowak, "[d]espite the discrepancy in the two authentic English texts, it may be assumed that "private life" under Art. 8 of the ECHR and "privacy" under Art. 17 of the Covenant basically means the same thing (…)."[39]

Under the jurisprudence of the ECtHR, it has been established that "the relationship of a same-sex couple (…) falls within the notion of "private life" within the meaning of Article 8."[40] Furthermore, the Court in *Schalk and Kopf* also ruled that "it artificial to maintain the view

---

[32] ibid 4-5.
[33] Case C-673/16, *Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne* [2018] ECLI:EU:C:2018:385.
[34] ibid para 46.
[35] Brems et al. (n 25) 5.
[36] ECHR (n 22).
[37] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[38] Pacte international relatif aux droits civils et politiques (adopted 16 December 1966, entered into force 23 March 1976) <ohchr.org/FR/ProfessionalInterest/Pages/CCPR.aspx> accessed 23 November 2021.
[39] Nowak (n 15) 385.
[40] *Oliari and Others v Italy* (n 21) para 103.

that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8."[41] Additionally, the Court observed in *Orlandi and Others v Italy* that:

> (…) there is no reason why a State's acknowledgment of the real marital status of a person, be it, *inter alia*, married, single, divorced, widow or widower, should not form part of his or her personal and social identity, and indeed psychological integrity protected by Article 8. Therefore, registration of a marriage, being a recognition of an individual's legal civil status, which undoubtedly concerns both private and family life, comes within the scope of Article 8 § 1.[42]

Thus, the intention of same-sex couples to marry abroad does fall under the ambit of not only private life, but also family life. In this regard, refusal to issue a certificate of non-impediment prevents same-sex couples from enjoying their private and family life with their partner abroad and negates a part of their personal and social identity. Thus, it constitutes an interference with Article 8 of the ECHR.

The HRC has also held in the landmark case of *Toonen v Australia* that consensual sex between adults in private falls under the scope of the term 'privacy' or *vie privée*.[43] Furthermore, it has long been established by the HRC that privacy "refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone."[44] Thus, relationship between persons of the same sex is also covered by this term. As for the meaning of 'family', the HRC observed in General Comment 16 that "the objectives of the Covenant require that for purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood *in the society of the State party concerned*."[45] Subsequently, in *Hopu and Bessert v France*, the HRC reiterated this point and further added that "cultural traditions should be taken into account when defining the term "family" in a specific situation."[46] As a result, in a case concerning refusal to issue a certificate of non-impediment, it would seem that the term 'family' would be interpreted in line with the prevailing understanding and cultural traditions of the refusing state. Nevertheless,

---

[41] *Schalk and Kopf v Austria* (n 16) para 94; ibid; *Chapin and Charpentier v France* App no 40183/07 (ECtHR, 9 June 2016) para 44; *Vallianatos and Others v Greece* App nos 29381/09 and 32684/09 (ECtHR, 7 November 2013) para 73.
[42] *Orlandi and Others v Italy* App nos 26431/12; 26742/12; 44057/12 and 60088/12 (ECtHR, 14 December 2017) para 144.
[43] *Toonen v Australia* (1994) UN Doc CCPR/C/50/D/488/1992, para 8.2.
[44] *Coeriel and Aurik v the Netherlands* (1994) UN Doc CCPR/C/52/D/453/1991, para 10.2; *G v Australia* (2017) UN Doc CCPR/C/119/D/2172/2012, para 7.2.
[45] HRC, 'General Comment 16: Article 17 (Thirty-second session, 1988)' (1994) UN Doc HRI/GEN/1/Rev.1, 22 para 5, emphasis added.
[46] *Francis Hopu and Tepoaitu Bessert v France* (1997) UN Doc CCPR/C/60/D/549/1993/Rev.1, para 10.3.

Article 17(1) is still applicable since the refusal to issue the certificate interferes with the privacy of the couple who intended to marry abroad.

The admissibility of the right to private and/or family life may be contested by the claim that the right to marry is a *lex specialis*, and thus it takes precedence over the two in the matter of same-sex marriage. In the case of *Hämäläinen v. Finland*, the ECtHR explicitly held that "Article 12 of the Convention is a *lex specialis* for the right to marry."[47] Moreover, in *Joslin*, the HRC found that "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."[48] However, this *lex specialis* claim is only valid specifically with regard to recognition and legalisation of same-sex marriage. Refusal to issue a certificate of non-impediment is already concerned with a different matter, namely a state preventing its own citizen form marrying abroad. As a result, the *lex specialis* argument would not hold, and the right to private and/or family life would still apply.

Since there is an interference with Article 8 of the ECHR and Article 17(1) of the ICCPR, the question would be whether the refusal to issue a certificate of non-impediment can be justified by one of the grounds of limitations enshrined in each respective convention, such as protection of (public) morals.[49] A potential argument in this regard is that the refusal reflects the profound moral values of the refusing state's society who is against same-sex marriage. Nevertheless, this argument is rather weak; as has been discussed in the previous Subsection, there is no link between granting a certificate of non-impediment to a few individuals to the destruction of the so-called 'traditional family'. In this light, it is difficult to sustain that refusal to issue a certificate of non-impediment is necessary and proportional to achieve the aim of protecting (public) morals.

2.3 Right to Non-Discrimination

The refusal to issue a certificate of non-impediment to same-sex couples can be considered a violation of the autonomous right to non-discrimination as enshrined under Article 26 of the

[47] *Hämäläinen v Finland* (n 21) para 96.
[48] *Joslin v New Zealand* (n 14) para 8.2.
[49] See ECHR (n 22), art. 8(2). While the right to be free from arbitrary or unlawful interference with one's privacy and family does not contain any limitation clause under the ICCPR, the HRC has interpreted the term 'arbitrary' to mean that the interference must be 'reasonable', which means that it has to be "necessary in the circumstances of any given case" and "proportionate to the end sought". See *Toonen v Australia* (n 43) para 8; General Comment 16 (n 45) para 4; *G v Australia* (n 44) para 7.4.

ICCPR and Article 1 of Protocol No. 12 of the ECHR. Moreover, the refusal is contrary to the accessory right to non-discrimination as found under Article 2(1) of the ICCPR and Article 14 of the ECHR, which are invokable in conjunction with the right to private and family life or the right to marry (depending on whether same-sex relationship falls under the ambit of 'family' and 'marry', as explored in the previous two Subsections). The reason is because the refusal is based on the fact that the applicants do not intend to marry the opposite sex. This means that the refusal is solely grounded on the sexual orientation of the applicants. Opposite-sex couples do not have to face this predicament, as the document would be issued once they show the identity of their opposite-sex spouse. Thus, there is a difference in treatment between same-sex and opposite-sex couples in states where the decision to issue a certificate of non-impediment is linked with heteronormative marriage.

Under the jurisprudence of the ICCPR, despite the right to marry being only applicable to opposite-sex couples, states are still not allowed to unlawfully discriminate against same-sex couples, particularly in light of the observation that "the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation."[50] As observed by Rajsoomer Lallah and Martin Scheinin in their individual opinion to *Joslin*, the finding that states do not have to legalise same-sex marriage:

> 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.[51]

Nowak also found that "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."[52] Thus, he argued that "[i]f States uphold unreasonable distinctions between married and same-sex couples in the enjoyment of other rights, such as housing, social security, pension or inheritance rights, while not interfering with the right to marry in Art. 23(2), may nevertheless constitute discrimination in violation of Art.26."[53]

---

[50] *Toonen v Australia* (n 43) para 8.7.
[51] *Individual Opinion of Committee Members Mr. Rajsoomer Lallah and Mr. Martin Scheinin (concurring), Juliet Joslin, Jennifer Rowan, Margaret Pearl and Lindsay Zelf v New Zealand* (2002) UN Doc CCPR/C/75/D/902/1999.
[52] Nowak (n 15) 526.
[53] ibid 527.

The jurisprudence of the HRC further corroborates that states can still be found to be in violation of the right to non-discrimination if they discriminate against same-sex couples. In the case of *X v Colombia*, national courts refused to transfer a deceased man's pension to his lifelong partner, even though this was possible for opposite-sex couples. Similar to how states may defend certificate of non-impediment, Colombia claimed that the purpose of the law "was simply to protect heterosexual unions, not to undermine other unions or cause them any detriment or harm."[54] The HRC was not convinced and held that "the State party has put forward no argument that might demonstrate that such a distinction between same sex partners, who are not entitled to pension benefits, and unmarried heterosexual partners, who are so entitled, is reasonable and objective."[55] Consequently, the HRC found that Article 26 of the ICCPR was violated.

Subsequently, in 2017, the HRC in *C v Australia* had to decide whether states may deny granting divorce to a same-sex person who married abroad.[56] The HRC observed that under Australian law, there are also other forms of opposite-sex marriage that are not recognised in Australia, namely polygamous marriage and marriages involving parties who are between 16 and 18 years. Australians who have contracted such a marriage abroad do have the possibility to obtain a divorce in Australia. Consequently, the HRC found that there is a differential treatment between homosexual and heterosexual couples.[57] Since the HRC ruled that there was a differential treatment, in accordance with its jurisprudence on Article 26, the question was whether this distinction pursues a legitimate aim and is reasonable and objective.[58] The HRC then found that Australia failed to provide a justification on why the exceptions for polygamous and underage marriage were not also applicable for same-sex marriage. The HRC also asserted that "compliance with domestic law does not in and of itself establish the reasonableness, objectiveness or legitimacy of a distinction."[59] Consequently, the HRC concluded that there had been a violation of Article 26.[60]

These two cases demonstrate that even if the right to marry does not impose an obligation to legalise same-sex marriage, states still have to ensure that their existing measures do not create an unlawful distinction between opposite-sex and same-sex couples. As observed

[54] *X v Colombia* (2007) UN Doc CCPR/C/89/D/1361/2005, para 7.1.
[55] ibid 7.2.
[56] *C v Australia* (2017) UN Doc CCPR/C/119/D/2216/2012, para 2.1-2.2.
[57] ibid para 8.3.
[58] ibid para 8.4.
[59] ibid para 8.6.
[60] ibid.

by Aleardo Zanghellini, "under the ICCPR, the interest in founding and cultivating interpersonal relationships in lesbian and gay families is no less valuable than the corresponding interest in heterosexual families."[61] In the context of certificate of non-impediment, the discriminatory treatment was the fact that it was impossible for same-sex couples to obtain such a certificate, while opposite-sex couples who also intended to marry abroad did not have to face this predicament. This implies that the refusal would be contrary to Article 26 of the ICCPR, and also Article 2(1) of the ICCPR in conjunction with the right to privacy.

As for the ECHR, it has long been established under the jurisprudence of the Court that sexual orientation constitutes one of the grounds of non-discrimination under the ECHR.[62] Moreover, since sexual orientation relates to "intimate and vulnerable sphere of an individual's private life", states would have to advance "particularly weighty reasons" in order to justify a differential treatment.[63] Furthermore, the Court observed in *Kozak v Poland* that:

> Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow and in such situations the principle of proportionality does not merely require that the measure chosen is in general suited for realising the aim sought but it must also be shown that it was necessary in the circumstances. **Indeed, if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention.**[64]

Since the refusal to issue a certificate of non-impediment is based solely on sexual orientation, *in abstracto* this decision would infringe Article 14 of the ECHR in conjunction with the right to marry and the right to private and family life, and also Article 1 of Protocol No. 12 of the ECHR (if the state concerned has ratified the protocol).

Having established that the right to non-discrimination is infringed, the question would be whether the refusal is justified; in other words, whether it is based on 'reasonable and objective' criteria for the purpose of the ICCPR, or whether it is grounded on 'particularly serious reasons' under the jurisprudence of the ECtHR. In this regard, the onus is on the state to prove that the refusal satisfies these criteria. Nevertheless, given that the refusal itself is based

---

[61] Aleardo Zanghellini, 'To What Extent Does the ICCPR Support Procreation and Parenting by Lesbians and Gay Men?' Melbourne Journal of International Law' (2008) 9 Melbourne Journal of International Law 125, 149.
[62] *Salgueiro da Silva Mouta v Portugal* App no 33290/96 (ECtHR, 21 December 1999) para 28; *Karner v Austria* App no 40016/98 (ECtHR, 24 July 2003) para 37; *Kozak v Poland* App no 13102/02 (ECtHR, 2 March 2010) para 92. See also Jens M. Scherpe, 'Same-Sex Couples Have Family Life' (2010) 69 Cambridge Law Journal 463, 464-65.
[63] *Kozak v Poland* (n 62) para 92.
[64] ibid, emphasis added.

solely on the sexual orientation of the applicants, it would be rather difficult for states to uphold the legality of this discriminatory treatment.[65]

Table 1: Summary of the Compatibility of the Refusal to Issue a Certificate of Non-Impediment with International Human Rights Law

	ICCPR	ECHR
Right to Marry	Right to marry not applicable	Violation of Article 12
Right to Private and Family Life	Right to family life not applicable, but violation of right to privacy/*vie privée*	Violation of Article 8
Right to Non-Discrimination	Violation of Article 2(1) in conjunction with the right to privacy, and Article 26	Violation of Article 14 in conjunction with the right to marry and the right to private and family life, and Article 1 of Protocol No. 12 (if the state concerned has ratified this protocol)

3. Requirement to Provide Certificate of Non-Impediment as a Human Rights Violation

On the other side of the coin, the issue of certificate of non-impediment would not have arisen in the first place if the country where same-sex marriage is legalised does not require this document. As observed by the Human Rights Centre in its Third-Party Intervention to the case of *Szypuła*, "it is only because Spanish private international law referred to Polish family law that the Polish authorities were placed in a position in which they could take a decision to deny granting the applicants the required certificate."[66] Thus, one may ask whether states who have legalised same-sex marriage can also be found to be in violation of the right to marry, the right to private and family life and the right to non-discrimination if they insist that this certificate is a prerequisite for same-sex marriage.

[65] Brems et al. (n 25) 6.
[66] Brems et al. (n 25) 7.

I argue that the findings of the previous Subsection are also applicable in this case, because by requiring same-sex couples to furnish a certificate of non-impediment in an 'excessively formalist' manner, the state concerned has effectively impaired the enjoyment of the applicants' right to marry and right to private and family life. A major difference is that under the ICCPR, the right to marry under Article 23(2) and the right to protection of family from arbitrary or unlawful interference under Article 17(1) are also applicable, since the country who imposed the requirement has recognised that same-sex couples enjoy these rights.

Moreover, as has been argued above, this bureaucratic hurdle only affects same-sex couples, and thus it also constitutes a violation of the right to non-discrimination on the ground of sexual orientation. It is true that in several countries, there is usually a possibility to request for an exemption. In Germany, for instance, Section 1309(2) of the German Civil Code stipulates that the president of the higher regional court may grant exemption from the requirement of certificate of no impediment.[67] However, this would create an extra burden for LGBT non-nationals who must expect to wait between four and eight weeks for a decision, and also to spend between 10 to 300 euros to cover for the court fee, with no guarantee that an exemption will be granted.[68] Furthermore, the burden is also on the applicant to prove that the certificate is impossible to obtain, which would be onerous given that the problem usually occurs in practice. Heterosexual non-nationals do not face this obstacle, which means that the application of the requirements of certificate of no impediment as found under Section 1309 of the German Civil Code leads to a discriminatory effect towards LGBT people.

Furthermore, as convincingly argued by the Human Rights Centre in its Third-Party Intervention, there is also a discrimination based on nationality:

> If a Contracting State, for example Spain, allows same-sex marriages, a non-national leading a genuine family life should in principle also be able to exercise the right to contract a same-sex marriage in that State. The fact that access to same-sex marriage is made dependent on the legislation of the State of nationality of the spouses (including by requiring the submission of documents providing information on the marital status or capacity to marry), amounts to a difference of treatment on the ground of nationality for which 'very weighty reasons' would have to be put forward. The mere fact that private international law often uses nationality as a connecting factor to determine which law applies to a particular situation with an international dimension (i.e. the designated law), does not in itself justify such discriminatory treatment. In the past, the Court has made clear

[67] ibid

[68] 'Befreiungsverfahren bei ausländischen Verlobten' (*Stadt Heidelberg*) <www.heidelberg.de/hd/HD/Rathaus/Befreiungsverfahren.html> accessed 23 November 2021.

that Contracting States can freely determine the appropriate connecting factor, on condition, however, that the result obtained after having applied the designated law does not contravene the rights enshrined in the ECHR.[69]

Consequently, states would have to furnish 'very weighty reasons' to justify the differential treatment under the ECHR, or the treatment has to be based on 'objective and reasonable criteria' under the ICCPR.

In this regard, states are likely to argue that the certificate is intended to protect public order, specifically to prevent bigamy, and thus the requirement is imposed on all non-nationals irrespective of their sexual orientation. However, I would submit here that the measure is disproportionate to achieve this aim. If the certificate must be furnished at all cost without any possibility of exception, this requirement will constitute a perpetual restraint on LGBT non-nationals from being able to enter into same-sex marriage. This effectively impairs the enjoyment of their rights. Moreover, there are also less intrusive means available to fulfil this aim, such as the possibility to confirm by signature under criminal liability that one is unmarried.[70] In fact, many states have also criminalised bigamy,[71] and thus the aim of preventing bigamy can already be pursued with these means without having to impose a perpetual restraint on LGBT non-nationals. In case when applying for an exemption is possible, the requirement would still impose an onerous burden on LGBT non-nationals, and with the availability of a less intrusive means, this measure also cannot be regarded as proportionate.

Table 2: Summary of the Compatibility of the Requirement to Provide a Certificate of Non-Impediment with International Human Rights Law

	ICCPR	ECHR
Right to Marry	Violation of Article 23(2)	Violation of Article 12
Right to Private and Family Life	Violation of Article 17(1)	Violation of Article 8

[69] Brems et al. (n 25) 8.

[70] See, for instance, 'If You Wish to Get Married in Denmark' (*Familieretshuset*) <familieretshuset.dk/en/your-life-situation/your-life-situation/international-marriages/if-you-wish-to-get-married-in-denmark> accessed 23 November 2021: "If you do not include a certificate of marital status in your application, you confirm under criminal liability with your signature that you are both unmarried."

[71] See, for instance, Art. 391 Strafwetboek <www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=1867060801> accessed 23 November 2021; § 172 StGB <www.lewik.org/term/15657/bigamy-section-172-german-criminal-code/> accessed 23 November 2021; Section 57 Offences Against The Person Act, 1861 <www.irishstatutebook.ie/eli/1861/act/100/section/57/enacted/en/html> accessed 23 November 2021.

Right to Non-Discrimination	Violation of Article 2(1) in conjunction with Article 23(2) and 17(1), and Article 26	Violation of Article 14 in conjunction with Article 12 and 8, and Article 1 of Protocol No. 12 (if the state concerned has ratified this protocol)

4. Conclusion

This paper has analysed certificate of non-impediment from the perspective of international human rights law. This bureaucratic requirement was initially intended to prevent bigamy, and yet its excessively formalist application has led to a discriminatory outcome against LGBT non-nationals, specifically those who hail from homophobic countries. The imposition of this requirement also effectively hampers the right of LGBT non-nationals to marry and enjoy their private and family life, and thus the requirement to provide a certificate of non-impediment constitutes a human rights violation.

The case study of certificate of non-impediment has also highlighted how the scope of the right to marry and the right to family life can determine which right is applicable. Under the jurisprudence of the HRC, these rights are only applicable to opposite-sex couples, and thus same-sex couples could only benefit from the protection of the right to non-discrimination and the right to privacy. Meanwhile, under the ECHR, the Court has recognised that the right to marry and the right to family life are no longer exclusively applicable to opposite-sex couples, and thus same-sex couples can invoke these rights in the case of certificate of non-impediment. These differences could perhaps dissipate one day if the HRC decides to 'update' its jurisprudence on the right to marry and the right to protection of family from arbitrary or unlawful interference.

At the same time, this study has not delved into the issue of certificate of non-impediment *in practice*. Despite the right to marriage equality being guaranteed at the national level, bureaucrats and judges often decide to construe regulations concerning certificate of non-impediment in an excessively formalist manner, which prevents LGBT non-nationals from exercising their rights. Furthermore, they are often unaware of the existing international human rights standards. As observed by Sarah Den Haese in her research;

> In the online survey distributed among Belgian and Dutch public servants (…), no less than 124 participants (or 80% of the respondents who answered this question) disclosed that they are not aware of the case law of the ECtHR regarding the recognition of a personal status obtained abroad. Only 31 participants stated that they are familiar with the ECtHR's case law of which only 20 indicated that they also apply this case law in practice. At the level of the courts, the situation is not different. Only a handful of cases referred to the case law of the ECtHR and the rights and guarantees enshrined in the ECHR.[72]

More studies are needed in order to understand the extent to which certificate of non-impediment has impeded the right to marry *in practice*; the results could be pertinent to design a program to increase awareness among civil servants and judges. Nevertheless, this research has fulfilled its role by demonstrating how the requirement to provide a certificate of non-impediment is not in line with human rights, and thus states should abolish this requirement in order to ensure that the rights of LGBT non-nationals are not further trampled in a country where hard-earned marriage equality is already a reality for nationals.

[72] Sarah Den Haese, 'Crossing Borders: Proving Your Personal Status, Interactions between Private International Law and Human Rights Law' (DPhil thesis, Ghent University 2021) 315 para 544.