United Nations CCPR/C/133/D/3009/2017

International Covenant on Civil and Political Rights

Distr.: General
20 April 2023
English
Original: French

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3009/2017*, **, ***

Communication submitted by:	Hervé Mariton et al. (represented by counsel, Claire de La Hougue and Pierre Grenier)
Alleged victims:	The authors
State party:	France
Date of communication:	16 December 2016 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 24 July 2017 (not issued in document form)
Date of adoption of Views:	29 October 2021
Subject matter:	Freedom of conscience
Procedural issues:	Exhaustion of domestic remedies; examination by another procedure of international investigation or settlement; victim status
Procedural issues:	Right to an effective remedy; right to a fair trial; freedom of conscience; access to public service
Articles of the Covenant:	2, 14, 18 and 25
Articles of the Optional Protocol:	2, 3 and 5 (2) (b)

* Adopted by the Committee at its 133rd session (11 October-5 November 2021).

** The following members of the Committee participated in the examination of the communication: Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobauyah Tchamdja Kpatcha, Imeru Tamerat Yigezu and Gentian Zyberi. Pursuant to rule 108 of the Committee's rules of procedure, Hélène Tigroudja did not participate in the examination of the communication.

*** Two individual opinions (concurring) of Committee members Arif Bulkan and Gentian Zyberi are annexed to the present Views.

1. The authors of the communication are Hervé Mariton (1958),[1] Anne-Isabelle Colomer (1970), Nicolas de Saint Roman (1978), Pierre Dussurgey (1963), Armelle Josseran (1968), Thibault Bazin (1984), Yannick Moreau (1975), Bénédicte Louis (1956), Caroline Carmantrand (1969), Roch Brancour (1973), Jean-Baptiste Noé (1983), Laurence Trochu (1973), Hortense Callens, Patricia Vielle (1957), Bernard Remise (1943), Vincent Cappe de Baillon (1957), François Blanchon (1963), Floriane Deniau (1966), Michel Abril (1949) and Gilbert Renard (1948); they are all nationals of France. They claim that the State party has violated their rights under articles 2, 14, 18 and 25 of the Covenant. The Optional Protocol entered into force for the State party on 17 May 1984. The authors are represented by counsel.

The facts as presented by the authors

2.1 The authors are mayors, deputy mayors and municipal councillors. In France, mayors are elected by universal, democratic and pluralist suffrage[2] on the basis of their personal and political convictions, which include their concept of man, the family and society. Mayors, deputy mayors and municipal councillors delegated by the mayor act as civil registrars and solemnize civil marriages. On 7 November 2012, a bill opening the institution of marriage to same-sex couples was put before the Council of Ministers. The reform gave rise to popular protest, including three major demonstrations, which were repressed in a totally disproportionate manner, to the point of leading to a resolution being adopted by the Parliamentary Assembly of the Council of Europe deploring the "excessive use of force to disperse demonstrators".[3]

2.2 The authors contend that 20,153 mayors and deputy mayors in France have expressed their opposition to the law opening up marriage to same-sex couples by signing the appeal of the Maires pour l'enfance (Mayors for Children) collective.[4] Many elected officials have also asked for specific procedures to be put in place to allow them to reconcile respect for the law with their personal convictions.

2.3 Act No. 2013-404, opening marriage to same-sex couples, was promulgated on 17 May 2013. According to the authors, the Act does not include any provision relating to the freedom of conscience of local elected officials who serve as civil registrars. On the contrary, on 13 June 2013, the Minister of the Interior sent prefects a circular on the "consequences for a civil registrar of illegally refusing to solemnize a marriage".

2.4 The circular states that an elected official serving as a civil registrar can only refuse to solemnize a marriage in cases provided for in law – notably absence or impediment – and that a refusal to do so on the basis of any other ground must be considered as a manifestly unlawful action. The text specifies that any civil registrar who objects would be liable not only to a claim for damages, but also to disciplinary sanctions, in the form of temporary suspension or revocation of his or her electoral mandate, and criminal sanctions, if the grounds for the refusal are related to the sexual orientation of the spouses.[5]

2.5 Lastly, the circular specifies that the provisions of article L2122-34 of the General Code on Local Authorities,[6] which allows a prefect to deputize for a mayor, would be inapplicable, in that the text would be inoperative because the functions of civil registrar are

[1] The authors' names are followed by their year of birth in parentheses.

[2] Specifically, these are the municipal councillors, who are thus elected and who then appoint the mayor and deputy mayors by internal election.

[3] Parliamentary Assembly of the Council of Europe, "Popular protest and challenges to freedom of assembly, media and speech", resolution 1947 (2013), 27 June 2013.

[4] Created in 2005, the Maires pour l'enfance collective brings together mayors and deputy mayors who are opposed to the marriage of and adoption by same-sex couples.

[5] The circular refers to the possible application of two provisions of the Criminal Code: article 432-1 (unchanged since 2000), on measures intended to thwart the application of the law, and article 432-7 (unchanged since 2012), on discrimination against natural or legal persons. Both provisions lay out penalties of 5 years' imprisonment and a fine of €75,000 for persons acting as a representatives of the public authority or entrusted with a public service mission.

[6] France, General Code of Local Authorities, art. L2122-34: "In the event that the mayor, as an agent of the State, refuses or neglects to carry out one of the acts prescribed by law, the representative of the State in the department may, after having made the request to the mayor, proceed to do so *ex officio*, either him- or herself or through a special delegated representative."

exercised under the authority of the public prosecutor (who has responsibility for civil status records under the Civil Code) and not of the prefect (who has responsibility for local elected officials under the General Code on Local Authorities). However, the role of civil registrar is exercised "on behalf of the State", and it is under that heading in the General Code on Local Authorities that article L2122-34 provides for the prefect to deputize for the mayor if the latter refuses or neglects to carry out any of the duties prescribed in law. The wording of the article does not exclude any duty or ground. The article could provide civil registrars with "a legal loophole to avoid acting against their conscience, while allowing the law to be applied".

2.6 The circular of 13 June 2013 was the subject of an appeal for annulment on grounds of lack of jurisdiction before the Council of State by seven mayors,[7] who were joined by more than 2,200 local elected representatives. The applicants raised the question of the constitutionality of the provisions of Act No. 2013-404, on which the circular was based, and its compatibility with article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and article 18 of the Covenant. The Council of State deemed the issue to be "new and serious" and referred it to the Constitutional Council on 18 September 2013.

2.7 On 18 October 2013, recalling that freedom of conscience was one of the rights and freedoms guaranteed by the Constitution, the Constitutional Council ruled that, by not allowing civil registrars to profess their disagreement with the provisions of Act No. 2013-404 in order to excuse themselves from the duty entrusted to them by law in respect of the solemnization of marriage, the legislature had intended to ensure the application of the law on marriage and thus guarantee the proper functioning and neutrality of the civil registry, which is a public service, and that, in view of the role of the civil registrar in the solemnization of marriage, there had been no infringement of freedom of conscience. On the applications to intervene, the Constitutional Council had ruled that the mere fact that the mayors were called upon in their official capacity to apply provisions that they contested did not justify each of them being joined to the proceedings.

2.8 In 2015, the Marseilles Criminal Court sentenced an elected municipal official to a five-month suspended prison sentence and €2,700 in damages for refusing, out of religious conviction, to marry two women.[8] She was forced to resign. A mayor in the south of France is currently being prosecuted for refusing to marry two people of the same sex.[9] In both cases, the marriage was able to take place. The authors are of the view that conscientious objection does not represent an obstacle.

2.9 On 10 December 2015, the Versailles Administrative Court of Appeal annulled the decision of a municipal council permitting the mayor and the deputy mayors not to solemnize a marriage between persons of the same sex and authorizing the referral of the matter to the prefect, who could then solemnize the marriage or instruct a representative to do so, on the basis of article L2122-34 of the General Code on Local Authorities. On 26 September 2016, the Council of State rejected an appeal by the council.

2.10 In a judgment of 18 December 2015, handed down after the question raised regarding constitutionality did not succeed, the Council of State rejected the application against the circular of 13 June 2013. On the question of the infringement of freedom of conscience, it stated that the Constitutional Council had declared the contested provisions to be in

[7] The authors allege that one of their number – Gilbert Renard – was party to the appeal.

[8] Luc Leroux, "*À Marseille, prison avec sursis pour l'élue qui a refusé de marier deux femmes*" ("In Marseille, suspended prison sentence for elected official who refused to marry two women"), *Le Monde*, 29 September 2015. In its comments of 24 January 2018, the State party notes that the authors have not produced the judgment mentioned.

[9] Guillaume Lechat, "*Marie-Claude Bompard poursuivie au pénal pour son refus de marier des couples homos*" ("Marie-Claude Bompard charged under criminal law for refusing to marry gay couples"), Yagg, 5 August 2016. In its observations of 24 January 2018, the State party submits that the complaint lodged by the couple concerned was initially dismissed by the prosecutor of the Carpentras *tribunal de grande instance* (court of major jurisdiction) and, in a judgment of 23 March 2017, the Carpentras Criminal Court subsequently acquitted the mayor, following a complaint lodged by an association.

conformity with the Constitution and had rejected the arguments based on the conventions to which France was a party. It also held that the provisions of article 9 of the European Convention on Human Rights and article 18 of the Covenant allowed the right to freedom of thought, conscience and religion to be subject to such limitations as were prescribed by law and were necessary to protect public safety, order, health or morals or the rights and freedoms of others. No text or principle requires civil registrars to approve the life choices of persons whose marriage they solemnize and to whom they issue civil status certificates, in particular in respect of marriage between persons of the same sex. In view of the public interest and the proper functioning and neutrality of the civil registry, which was a public service, with regard to the sexual orientation of spouses, the Council of State considered that the circular did not disregard the freedom of conscience guaranteed by these provisions. Lastly, it ruled that the authority conferred on the prefect under article L2122-34 of the General Code of Local Authorities to deputize for the registrar was restricted to the competences of mayors in the administrative domain, which fell under the authority or control of the prefect, and, even though mayors acted on behalf of the State, did not extend to duties resulting from the role of civil registrar, which fell under the control of the public prosecutor.

2.11 On 17 June 2016, 146 mayors and local elected officials[10] filed a complaint with the European Court of Human Rights, alleging disregard for their freedom of conscience.

The complaint

3.1 The authors claim that the State party has violated articles 2, 14, 18 and 25 of the Covenant.

3.2 According to the authors, the right to freedom of conscience set out in article 18 of the Covenant has been violated because, in not allowing any provision for conscientious objection and in penalizing any refusal to conduct same-sex marriages, the State party has deprived them of their freedom of conscience. With the circular of 13 June 2013, the Minister of the Interior deprived mayors, deputy mayors or their delegated representatives of the instruments that would have allowed them to be replaced in a flexible and pragmatic way in the event of their conscience being offended. The State has a positive obligation to seek to reconcile the various rights in question and cannot simply give precedence to the rights of some over the rights of others. In the case in question, the State party has clearly not sought to reconcile rights, but has instead sought to disregard the conscience of elected municipal officials who do not agree with its new concept of marriage.

3.3 The State party would have been able to organize for an elected official who had a conscientious objection to solemnizing a marriage between persons of the same sex to be substituted or replaced without penalty. However, the refusal to implement article L2122-18 of the General Code of Local Authorities in a case of moral impediment, which would have allowed for the elected official on duty in the civil registry to be replaced, under article L2122-34 of the Code, which provides for the prefect or a delegated representative of the prefect to deputize for the mayor, implies that a person may be put in a position in which he or she is deprived of the right to choose whether or not to declare his or her conscientiously held beliefs by being under a legal obligation either to break the law or to act against those beliefs.[11]

3.4 The authors recall that the right to freedom of thought, conscience and religion is at the heart of the international protection of human rights and the foundation of democracy. Its importance is underlined by the fact that, according to article 4 of the Covenant, this provision cannot be derogated from, even in time of public emergency which threatens the life of the nation, as the Committee observed in its general comment No. 22 (1993) and regularly recalls in its jurisprudence.

3.5 In *Yoon and Choi v. Republic of Korea*, the Committee recognized that freedom of conscience implied the right not to be prevented from manifesting one's religion and not to be compelled to act against one's conscience.[12] With regard to military service, the

[10] The authors specify that one of their number, Hortense Callens, was party to the complaint.

[11] *Kim et al. v. Republic of Korea* (CCPR/C/106/D/1786/2008), paras. 7.3–7.4.

[12] *Yoon and Choi v. Republic of Korea* (CCPR/C/88/D/1321-1322/2004), para. 8.3.

Committee has also recognized the right to conscientious objection as inherent to the right to freedom of thought, conscience and religion.[13]

3.6 The authors are victims of discrimination under articles 2 and 25 (c) of the Covenant, as they would be barred from holding elected municipal office because of their religious beliefs, which mean that they are de facto opposed to same-sex marriage. That prevents them from having access, on general terms of equality, to public service in their country. Furthermore, the prospect of being forced to act against their conscience has the effect of deterring many people from accepting local elected office, that is, it prevents them from having access to certain roles because of their beliefs, which is contrary to article 25 of the Covenant.

3.7 The authors who participated in the proceedings before the Council of State and the Constitutional Council consider that article 14 of the Covenant has been violated. The President of the Constitutional Council publicly expressed his support for Act No. 2013-404, announcing in advance on television that, in the event of the matter being referred to it, the Council's decision would be to reject it.[14] In addition, two people known to be close to the ruling party were appointed to the Constitutional Council just in time to participate in the review of the law. The organizations of which they were leading members at the time of their appointment had officially taken a position in favour of the Act. Three of the nine members of the Constitutional Council were therefore clearly not impartial. Lastly, the Constitutional Council had, during the course of the proceedings and without any legal basis, shortened the time limits laid down in its rules of procedure, thereby undermining the principle of adversarial proceedings and limiting the possibilities for intervention, which were refused.

3.8 The Constitutional Council did not rule on the standing of the various applicants for intervention and rejected them all, even though several were already involved in proceedings and all were liable to sanctions for having publicly expressed their positions, in contradiction of its usual practice of broadly accepting interventions on the priority question of constitutionality.

3.9 The decision of the Constitutional Council, which is binding on all national courts,[15] and which dictated the direction of all subsequent court rulings on the subject, is clearly arbitrary. The Council did not rule that an infringement had been justified, as the European Court of Human Rights had done in the case of *Eweida and others v. the United Kingdom*[16] – where the registrar was a civil servant, not an elected official – but simply denied the right to freedom of conscience of elected officials.

3.10 Accordingly, there is no possibility of appeal against the circular, as, being itself in conformity with the Constitution, it cannot be struck down as unconstitutional. Some of the authors were not parties to the above proceedings, but those proceedings clearly established the jurisprudence and closed off any possibility of appeal, condemning them to failure. The authors do not invoke a virtual or abstract violation of their freedom of conscience; they maintain that the circular of 13 June 2013, which can no longer be usefully challenged, orders them to act against their conscience on pain of severe criminal penalties. Several elected officials have already been subjected to pressure, prosecution and penalties. Unless the circular is annulled, repealed or amended, the authors are under threat of sanctions at any moment, which in itself constitutes a violation of their right to freedom of conscience. As the

[13] *Jeong et al. v. Republic of Korea* (CCPR/C/101/D/1642-1741/2007), para. 7.3; *Atasoy and Sarkut v. Turkey* (CCPR/C/104/D/1853-1854/2008), para. 10.4; and *Japparow v. Turkmenistan* (CCPR/C/115/D/2223/2012), paras. 7.5–7.7.

[14] According to article 3 (2) of Ordinance No. 58-1067 of 7 November 1958 establishing the organic act on the Constitutional Council, members of the Council swear "not to publicly express any position or give any opinion on matters falling within the Council's jurisdiction".

[15] According to article 62 of the Constitution: "the decisions of the Constitutional Council are not subject to appeal. They are binding on the Government and on all administrative and judicial authorities."

[16] European Court of Human Rights, *Eweida and Others v. the United Kingdom*, applications Nos. 48420/10, 59842/10, 51671/10 and 36516/10, judgment, 15 January 2013.

Committee stated in another case, there is no doubt that they are actually affected by these laws, even in the absence of any individual measure of implementation.[17]

3.11 The authors claim the right not to be subject to obligations that are contrary to their philosophical, anthropological or religious beliefs, which include a commitment to marriage, universally defined as the union of a man and a woman. For the authors, it is not a matter of refusing to fulfil any legal obligation, but of not committing an act that is fundamentally contrary to their deepest convictions, especially when the act affects life, as the Committee has repeatedly recognized, but also the concept of human beings, their nature and their dignity.

State party's observations on admissibility and the merits

4.1 On 26 September 2017 and 24 January 2018, the State party submitted its observations on admissibility and the merits, arguing that the communication should be declared inadmissible on the basis of the authors' lack of victim status, non-exhaustion of domestic remedies and the fact that the same matter was being examined before another international court.

4.2 On the authors' lack of victim status, the State party argues that no individual can in the abstract challenge a law or practice claimed to be contrary to the provisions of the Covenant.[18] While the Committee may recognize, aside from any hypothetical application of the law, that its mere existence confers the status of victim on an individual, that is so on the condition that the alleged victim demonstrates that he or she is at real, and not merely hypothetical, personal risk with regard to the applicability of the law. In the present case, none of the authors has demonstrated that, at the date of the communication, they had been subjected to penalties pursuant to the application of the Act and the circular in question for having refused to solemnize the marriage of a same-sex couple.

4.3 The purpose of the circular is only to avoid any obstacle to the solemnization of a marriage between persons of the same sex; it does not prevent a civil registrar from abstaining from solemnizing it him- or herself, given his or her own beliefs, and being replaced by another civil registrar. The public rapporteur concluded, in respect of the decision of the Council of State on the legality of the circular, that it "specifies not only that a civil registrar may refuse to solemnize a marriage in cases provided for under the law (duly submitted objection to the marriage, impediment to the marriage, absence of administrative formalities required under the Civil Code), but may also be replaced by another civil registrar if he or she so wishes, so long as the situation does not lead to an outright refusal to solemnize a marriage, which would be forbidden under the requirements of good functioning and neutrality of the public service".[19]

4.4 With regard to the failure to exhaust domestic remedies, the State party mentions that, contrary to the authors' assertion, Gilbert Renard – one of their number – did not bring the application before the Council of State. Hence none of the authors has appealed against the circular of 13 June 2013 and thus the remedies available have not been exhausted. The State party is surprised that the authors did not take part in the appeal before the Council of State – which was lodged by more than 2,200 mayors and elected representatives – and considers that they should have joined the appeal, in order to enable national courts to rule on the issue raised.

4.5 Lastly, recalling the reservation it made upon ratification of the Optional Protocol, the State party notes that the same legal issue is being examined by the European Court of Human Rights. The State party recognizes that the parties to the application pending before the Court and the communication before the Committee are not the same. However, as this is not a matter of the concrete application of the law to the authors, but a legal issue relating to a

[17] *Aumeeruddy-Cziffra et al. v. Mauritius* (CCPR/C/12/D/35/1978), para. 9.2 (b) 2.

[18] Ibid., para. 9.2; *Brun v. France* (CCPR/C/88/D/1453/2006), para. 6.3; and *Goyet v. France* (CCPR/C/94/D/1746/2008), para. 6.3.

[19] Council of State, conclusion No. 369834, 18 December 2015, p. 8, available at: https://www.conseil-etat.fr/fr/arianeweb/CRP/conclusion/2015–12-18/369834?download_pdf.

general legal framework, the State party notes that it would be useful, in these very particular circumstances, to focus on the identity of the case.[20]

4.6 On the merits, the State party mentions that amendments aimed at explicitly introducing into the law the possibility for a civil registrar to refuse to solemnize a marriage between two individuals of the same sex were rejected by the National Assembly and the Senate. It recalls that the freedom to manifest one's convictions or beliefs may be subject to limitations, in particular when it is necessary to reconcile that freedom with other conflicting rights or interests, as indicated in article 18 (3) of the Covenant and article 9 (2) of the European Convention on Human Rights. In its general comment No. 22 (1993), the Committee recalls that such limitations are subject to strict conditions: they must be legal in the broad sense of the term, necessary and proportionate in the light of the aims pursued, which are exhaustively set out in the Covenant – public safety, order, health or morals and the fundamental rights and freedoms of others.

4.7 French law governs the obligation of civil registrars to solemnize marriages, including marriages of same-sex couples, which are provided for under article 143 of the Civil Code, as amended by Act No. 2013-404, even if the civil registrars concerned are opposed to them on the basis of their personal convictions. The legislature and the regulatory authority strove to ensure protection of the fundamental rights and freedoms of same-sex couples, a legitimate object under article 18 (3) of the Covenant.

4.8 On the question of the proportionality of the limitations, the State party recalls that civil registrars exercise their powers on behalf of the State and are responsible for applying the rules of law in force. As such, they are responsible for the performance of the civil registry, which is a public service. It was on the basis of the specific characteristics of the role of the civil registrar in solemnizing marriages that the Constitutional Council considered that Act No. 2013-404 could not, without infringing on the Constitution, recognize a "conscience clause", in order to ensure implementation of the Act and guarantee the proper functioning and neutrality of the civil registry, a public service for which the civil registrar is responsible.

4.9 This fundamental point makes it possible to understand why the recognition of a "conscience clause" has been ruled out for civil registrars, whereas it has been granted to medical practitioners in respect of voluntary termination of pregnancy.[21] While the existence of a "conscience clause" is considered as a guarantee safeguarding doctors' freedom of conscience, its extent and scope have been very precisely framed and delimited by the Constitutional Council. Respect for the law is indeed inherent to the role of civil registrar. In this respect, article 432-1 of the Criminal Code prohibits mayors or deputy mayors from obstructing the execution of the law. The principle of neutrality of the public service would be violated if the solemnization of a marriage were to be made impossible because all the elected officials concerned were opposed to the marriage. Moreover, such a refusal would violate the freedom of marriage, which is a freedom that has constitutional status, and the principle of equality before the law.

4.10 Both the Covenant and the European Convention on Human Rights absolutely prohibit discrimination based solely on the sexual orientation of the persons concerned. Recognition of a "conscience clause" in this case would amount to discrimination on the basis of sexual orientation, which would have no objective and reasonable grounds, nor a legitimate object, and would most certainly be considered incompatible with the Covenant, in particular its article 26.[22]

4.11 In its judgment in *Eweida and others v. the United Kingdom*, the European Court of Human Rights held that the right of the individual not to act contrary to his or her opinions or beliefs could be limited by the public interest in ensuring equal treatment for all users, in

[20] See, in this connection: European Court of Human Rights, *Folgerø and Others v. Norway*, application No. 15472/02, 29 June 2007, separate opinion of Judges Zupančič and Borrego Borrego.

[21] The Constitutional Council recognized the existence of a "conscience clause" in its decision No. 2001-446 DC of 27 June 2001 on the Act on voluntary termination of pregnancy and contraception.

[22] See *Fedotova v. Russian Federation* (CCPR/C/106/D/1932/2010) and the Committee's general comment No. 18 (1989).

particular with regard to the treatment of same-sex couples. While recalling the margin of discretion left to States and acknowledged by the Committee with regard to the implementation of the principle of secularism in France,[23] and referring to other cases decided by the European Court of Human Rights,[24] the State party notes that the Court has clarified that article 9 of the European Convention on Human Rights does not protect all conduct manifested in public which is dictated by a religious or philosophical belief and that it does not, for example, allow national legislation to be circumvented.

4.12 The State party specifies that a prefect is only competent to deputize for mayors in administrative areas, where he or she supervises mayors' activities; that is not the case with their civil registrar functions, which are exercised under the supervision of public prosecutors. This position was, moreover, reaffirmed in the response published on 10 March 2015 to a parliamentary written question concerning the possibility of a prefect deputizing for an elected civil registrar for the solemnization of a marriage.[25] Consequently, the prefect's power to appoint an agent to deputize for a subordinate cannot legally be implemented in this case and the circular of 13 June 2013, with good reason, does not provide for it.

4.13 Accordingly, the State party considers that the limitation imposed on the authors' freedom to manifest their beliefs or conscience was necessary and proportionate to the aims pursued, and thus fully meets the requirements of article 18 (3) of the Covenant. Even though the law provides for the possibility, the fact of not solemnizing a marriage between two persons of the same sex would constitute real discrimination against homosexual persons.

4.14 With regard to the authors' allegations under article 14 of the Covenant concerning the Constitutional Council's lack of reasoning, the shortening of procedural deadlines and the lack of impartiality, the State party notes that the authors merely put forward assertions, without substantiating their arguments and thus without producing any evidence to support them.

4.15 In the alternative, the State party notes that the authors do not provide any evidence, such as articles or videos, to show that the President of the Constitutional Council has publicly adopted a position in favour of marriage for all.

Authors' comments on the State party's observations

5.1 On 6 April 2018, the authors submitted their comments on the State party's observations. On their status as victims, the authors point out that the contested circular is part of French positive law and can no longer be usefully challenged. While the State party alleged that the circular of 13 June 2013 was intended only to avoid obstruction and suggested that it would not prevent a civil registrar avoiding solemnizing the marriage of the persons concerned on the basis of his or her beliefs, and being replaced by another person, the authors argue that some councillors and mayors had wished to have the interpretation of the French regulations confirmed and that it was those requests that were rejected in the circular.

5.2 With regard to the exhaustion of domestic remedies, the authors point out that one of their number, Pierre Dussurgey, was the 128th applicant in the proceedings before the Council of State, which obviates any need to go further in the list. While some of the authors were not parties thereto, the proceedings in question established case law and shut off the possibility of any appeal by dooming it to failure. It would therefore be absurd to oblige each of the elected representatives concerned to bring the same appeal before the same bodies and to plead the same things in order to have the same decisions against them handed down.

5.3 As to the existence of a case of international *lis alibi pendens*, the authors note that the State party has specified that the complainants in the case concerned are not the same as the authors of the present communication and recall that the Committee has ruled on this issue long ago, stating that the "same matter" should be understood as the same claim

[23] See *Singh v. France* (CCPR/C/108/D/1928/2010).

[24] See, inter alia, European Court of Human Rights, *Pichon and Sajous v. France*, application No. 49853/99, decision of 2 October 2001.

[25] See https://questions.assemblee-nationale.fr/q14/14-8620QE.htm.

concerning the same individual, brought by him or her or by someone else who has the standing to act on his or her behalf before the other international body.[26]

5.4 In respect of the claim of a violation under article 18 of the Covenant, read alone and in conjunction with article 2, the authors emphasize that the right to conscientious objection is inherent to the right to freedom of conscience – which is not subject to derogation even in exceptional circumstances – and relates to its very essence. By definition, the right to conscientious objection relates to matters of a controversial moral nature or which offend norms related to culture, religion or civilization. Despite resistance on the part of the States concerned, the international human rights jurisprudence of both the Committee and the European Court of Human Rights has enshrined this right in several sensitive areas, such as armed military service, abortion, euthanasia, bioethics and hunting.

5.5 The European Court of Human Rights has already recognized conscientious objection for employees and civil servants in relation to same-sex marriage in the *Eweida and others v. the United Kingdom* case; the difference between such persons and civil registrars is that the latter hold their position as the result of a democratic vote, whereas the former do so on the basis of a simple contract or similar, rather than the outcome of an election based on their beliefs. In that case, the Court affirmed the principle of the existence of a right to conscientious objection and the need for States to take the necessary positive measures to ensure that it was respected.[27]

5.6 The authors argue that Act No. 2013-404, which opened marriage to persons of the same sex, in no way decreed that local elected officials must solemnize such marriages even where that was in radical contradiction with their convictions, without the possibility of being deputized by another civil registrar or the prefect. This limitation was enacted indirectly, by a simple circular letter which, under the guise of interpretation, effectively gave a new and restrictive interpretation to an existing text from the General Code on Local Authorities, with very clear instructions to prefects on how to compel elected officials to solemnize such marriages, under penalty of civil, criminal and disciplinary sanctions.

5.7 The authors are of the opinion that the limitation imposed on their right of conscience was not necessary to protect a fundamental right or freedom of other persons within the meaning of article 18 (3) of the Covenant. In principle, the law does not allow a couple to demand to be married by a specific registrar of their choice. It is clear that, as long as one civil registrar agrees to officiate, the civil registry, which is a public service, is fully ensured. Furthermore, the State party's refusal to recognize a right of conscientious objection in this case is particularly serious because it concerns individuals who have been democratically elected on the basis of their convictions and their determination to defend them.

5.8 With regard to the claim of a violation of articles 2 and 25 of the Covenant, the State party has, contrary to its contention, effectively refused, as a matter of principle and to dissuade persons who refuse to concede to the prevailing doctrine, to make any arrangements that could and should have enabled the adoption of legislative or other measures to give effect to the rights recognized under the Covenant.

5.9 Lastly, with regard to the claims made under article 14 of the Covenant, the authors refer to the lack of impartiality on the part of the Constitutional Council. After indicating that he did not wish to express a position on the matter, the President of the Constitutional Council announced publicly in January 2013 that, in the event of a referral, the Council would rule in the sense indicated by the legislator.[28] That statement was contrary to the duty of discretion

[26] *Fanali v. Italy* (CCPR/C/18/D/75/1980), para. 7.2.

[27] More broadly, in 2015, the Parliamentary Assembly of the Council of Europe noted with regret the propensity of some States to limit freedom of thought, conscience and religion through national legislation and policies; see Parliamentary Assembly of the Council of Europe, resolution 2036 (2015) of 29 January 2015 on tackling intolerance and discrimination in Europe, with a special focus on Christians.

[28] AFP, "*Debré écarte la censure du mariage gay*" ("Debré rules out a ban on gay marriage", January 2013; see also: Judith Silberfeld, "*Mariage pour tous : le Conseil constitutionnel ne devrait pas intervenir, selon Jean-Louis Debré*" ("Marriage for all: Jean-Louis Debré thinks that the Constitutional Council should not intervene"), Yagg, 24 January 2013.

inherent in the role of the President of the Council, who subsequently tried to minimize the significance of his statement.

5.10 As for the two other persons known to be close to the party in power and who, prior to their appointment to the Constitutional Council, were leading members of organizations that had officially taken a position in favour of the law, the authors indicate that they are Nicole Belloubet[29] and Nicole Maestracci.[30]

State party's additional observations

6.1 On 6 June 2018, the State party argued that, contrary to the authors' assertion, the limitation on manifesting one's freedom of conscience is provided for in Act No. 2013-404, as clarified in the circular of 13 June 2013. The concept of legality is to be understood in a broad sense, not as encompassing only "formal" laws.

6.2 The State party recalls that, in its ruling in *Eweida and others v. the United Kingdom*, the European Court of Human Rights balanced the freedom to manifest one's beliefs against other rights and freedoms that may be at stake. The Court held that the United Kingdom, which enjoyed a wide margin of discretion, had struck a fair balance between the freedom to manifest one's belief and the rights of others, in this case those of homosexual couples.

6.3 Furthermore, the "arrangements" called for by the authors would amount to allowing an elected official to not solemnize a marriage for the sole reason that it concerned two persons of the same sex. Such a situation would constitute discrimination, which the Committee condemns.

6.4 On 1 November 2018, the State party drew the Committee's attention to a decision of inadmissibility handed down by the European Court of Human Rights – sitting in a single-judge formation – on 11 October 2018 in a case submitted by several mayors and elected officials concerning the circular of 13 June 2013 and the consequences for an elected official of illegally refusing to solemnize a marriage between persons of the same sex. The Court declared the application incompatible *ratione personae* with the provisions of the European Convention on Human Rights on the ground that the applicants, insofar as they exercised their powers on behalf of the State, did not constitute a group of individuals within the meaning of article 34 of the Convention.

6.5 The State party contends that the same admissibility requirement applies to communications submitted to the Committee, and thus the authors cannot be considered as individuals within the meaning of article 2 of the Optional Protocol.

Authors' comments on the State party's additional observations

7. On 17 January 2019, the authors challenged the belated and artificial nature of the State party's *ratione personae* argument, given that it had not been raised previously. It would be absurd to deny a natural person the status of an "individual" and access to an international human rights court on the pretext that he or she was also acting for the State, a governmental organization or a similar legal person. The authors are "personally affected" and directly targeted in their personal and real capacity, as understood by the Committee in its practice.[31] They are therefore "individuals", acting as natural persons to obtain respect for their individual rights, and victims within the meaning of the Optional Protocol.

[29] Nicole Belloubet, Minister of Justice at the time and previously an elected member of the Socialist Party for the Midi-Pyrénées region, had called for demonstrations in support of gay marriage.

[30] A leading figure in the Syndicat de la Magistrature (Association of Judges), Nicole Maestracci denounced François Hollande's "worrying statements on the 'freedom of conscience' of mayors" in a press release of 12 December 2012 supporting the call by the Inter-LGBT movement to demonstrate in favour of so-called "marriage for all".

[31] See *Hartikainen v. Finland* (CCPR/C/12/D/40/1978); *Leirvåg et al. v. Norway* (CCPR/C/82/D/1155/2003); and *Sanila-Aikio v. Finland* (CCPR/C/124/D/2668/2015).

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

8.2 The Committee must ascertain, as required under article 5 (2) (a) of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the State party refers to a similar complaint (No. 35136/16) which was declared inadmissible by the European Court of Human Rights. The Committee reiterates its jurisprudence that the term "the same matter" within the meaning of article 5 (2) (a) of the Optional Protocol must be understood as referring to one and the same claim concerning one and the same person, as submitted by that individual, or by some other person empowered to act on his or her behalf, to another international body.[32] The State party accepts that the parties who submitted the complaint to the European Court of Human Rights are different from the authors. The Committee also recalls that, upon its acceptance of the Optional Protocol, the State party entered a reservation to article 5 (2) (a) of the Optional Protocol, specifying that the Committee "shall not have competence to consider a communication from an individual if the same matter is being examined or has already been considered under another procedure of international investigation or settlement". The Committee notes, however, that the European Court has not "examined" the case in the sense of article 5 (2) (a) of the Optional Protocol, inasmuch as its decision pertained only to an issue of procedure.[33] Accordingly, article 5 (2) (a) of the Optional Protocol, interpreted in the light of the State party's reservation, does not constitute an obstacle to the Committee's consideration of the communication.

8.3 The Committee notes that the State party contests the admissibility of the communication on the grounds that domestic remedies have not been exhausted within the meaning of article 5 (2) (b) of the Optional Protocol, as none of the authors appealed against the circular of 13 June 2013. The Committee also takes note of the authors' argument that no remedy is available against the circular, since, having itself been declared in conformity with the Constitution by a decision of the Constitutional Council, which has binding force on any national court, it cannot be annulled on the grounds of unconstitutionality. The Committee recalls its jurisprudence to the effect that, for the purpose of article 5 (2) (b) of the Optional Protocol, the author of a communication must make use of all administrative or judicial avenues that offer a reasonable prospect of redress.[34] The State party, on the other hand, has failed to demonstrate, including through national jurisprudence, that, following the Constitutional Council's decision of 18 October 2013, the authors had access to effective remedies to challenge the compatibility of the circular of 13 June 2013 with the provisions of the Covenant, in particular article 18 thereof. The Committee considers that, insofar as the State party's constitutional body has already ruled on the constitutionality of the circular, the constitutional route prevents the authors from asserting their rights alleging the same violation before the domestic courts with a reasonable chance of success. Accordingly, the Committee finds that the remedy is neither effective nor useful, and that the provisions of article 5 (2) (b) of the Optional Protocol do not preclude it from examining the present communication.

8.4 The Committee further notes that the State party invokes the authors' lack of victim status. According to the State party, the authors claim that the circular of 13 June 2013 restricts their freedom of conscience in the abstract, by requiring them to solemnize marriages of same-sex couples, although they have neither been compelled to solemnize such marriages nor have they been subject to any disciplinary and/or criminal sanction or prosecution. The Committee recalls that no person can in the abstract, by way of *actio popularis*, challenge a

[32] *Leirvåg et al. v. Norway*, para. 13.3.

[33] *Bertelli Gálvez v. Spain* (CCPR/C/84/D/1389/2005), para. 4.3; and *Ory v. France* (CCPR/C/110/D/1960/2010), para. 7.2.

[34] *Patiño v. Panama* (CCPR/C/52/D/437/1990), para. 5.2.

law or practice claimed to be contrary to the Covenant.[35] Accordingly, any person claiming to be a victim of a violation of a right protected under the Covenant must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of that right, or that such an effect is imminent, for example on the basis of existing law and/or judicial or administrative decision or practice.[36] In the present case, the Committee considers that the authors have demonstrated that the concrete effects of the circular of 13 June 2013, based on Act No. 2013-404 and declared to be in conformity with the Constitution by a decision of the Constitutional Council – a ruling subsequently confirmed by the Council of State in a ruling of 18 December 2015 – are personal and imminent. The Committee therefore considers that the authors have established that they are victims under the provisions of the Covenant.

8.5 The Committee notes that the State party also challenges the authors' status as victims on the basis of their roles as civil registrars with public authority. In the Committee's view, the authors have demonstrated that they are individually affected by the law and practice of the State party. Accordingly, the Committee sees no reason to declare the communication inadmissible under article 1 of the Optional Protocol.

8.6 With regard to the authors' claims under article 2 of the Covenant, in conjunction with article 18, the Committee observes that this issue was first raised in the authors' comments of 6 April 2018 and accordingly did not form part of the arguments to which the State party had been invited to respond in relation to the admissibility and merits of the case. The authors have not shown why these claims could not have been raised at an earlier stage of the proceedings. These claims are therefore inadmissible under article 3 of the Optional Protocol.[37]

8.7 The Committee notes the authors' claim under articles 2 and 25 (c) of the Covenant that they are victims of discrimination because they are allegedly barred from holding elected municipal office on the basis of their religious beliefs, which make them de facto opposed to same-sex marriage. The Committee observes, however, that this allegation has not been raised before the State party's courts. The Committee recalls that, according to its jurisprudence, authors must avail themselves of all judicial remedies in order to meet the requirement of article 5 (2) (b) of the Optional Protocol, insofar as such remedies appear to be effective and available to the authors.[38] Consequently, this part of the communication must be declared inadmissible under article 5 (2) (b) of the Optional Protocol.

8.8 The Committee notes the claims under article 14 of the Covenant that the authors who participated in the proceedings before the Council of State and the Constitutional Council consider that the proceedings before the courts were not fair. However, the authors only explain the alleged violations in relation to the proceedings before the Constitutional Council. The Committee notes that none of the authors are among the seven mayors who filed an appeal for annulment of the circular of 13 June 2013 and none of them was a party to the proceedings before the Constitutional Council.[39]

8.9 The Committee finds that the authors do not explain how the proceedings before the Council of State constituted a violation of the right enshrined in article 14 of the Covenant of the author who took part, and considers that the claim is insufficiently substantiated for the purposes of admissibility. Furthermore, the authors do not show that the author who was an auxiliary party to the proceedings before the Council of State was also an auxiliary party to the proceedings before the Constitutional Council. But, even if that had been the case, the Committee notes that the rejection by the Constitutional Council of the applications to intervene relates to the application of national law by the State party's courts. The Committee recalls that it is generally for the courts of States parties to review facts and evidence, or the

[35] *E.P. et al. v. Colombia* (CCPR/C/39/D/318/1988), para. 8.2; and *Brun v. France*, para. 6.3.

[36] *Beydon et al. v. France* (CCPR/C/85/D/1400/2005), para. 4.3; *Aalbersberg et al. v. the Netherlands* (CCPR/C/87/D/1440/2005), para. 6.3; and *Brun v. France*, para. 6.3.

[37] *Jazairi v. Canada* (CCPR/C/82/D/958/2000), para. 7.2.

[38] *P.L. v. Germany* (CCPR/C/79/D/1003/2001), para. 6.5; and *Akwanga v. Cameroon* (CCPR/C/101/D/1813/2008), para. 6.4.

[39] While it is true that at least one of the authors was an auxiliary party to the proceedings before the Council of State – which allowed interventions in the proceedings – the Committee notes that the Constitutional Council did not allow applications to be joined to the proceedings.

application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.[40] Accordingly, the Committee declares this part of the communication inadmissible under articles 1 and 2 of the Optional Protocol.

8.10 However, the Committee finds that the authors have sufficiently substantiated their other allegations for the purposes of admissibility and proceeds to consider the merits of the claims made under article 18 of the Covenant.

Consideration of the merits

9.1 The Committee has considered the present communication in the light of all the written information made available to it by the parties, as provided for in article 5 (1) of the Optional Protocol.

9.2 The Committee recalls that article 18 (3) of the Covenant provides that the freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.[41] In the present case, the Committee notes that the authors act as public servants and that the nature of their function implies respect for certain fundamental requirements such as neutrality, non-discrimination and respect for the principle of equality before the law. The Committee therefore is of the view that conscientious objection does not apply to elected persons who are acting as agents of the State, as depositaries of public authority, in the same way as to private persons.

9.3 The Committee notes that the State party's legislation regulates the duty of civil registrars to solemnize marriages, including marriages between same-sex couples, even if the registrar is opposed to such marriages. They are responsible for carrying out the public service of civil registration for any person entitled to benefit from such a service, in complete neutrality and in a non-discriminatory manner, while respecting the equality of all before the law. In carrying out such services, they are under the authority of the public prosecutor, who alone may oppose the solemnization of a marriage, as the final decision on whether to solemnize a marriage is the responsibility of the judicial authority, that is, the civil courts. The Committee is therefore of the view that the aim of the State party's legislation, to ensure that the fundamental rights and freedoms of same-sex couples are upheld, including the right to non-discrimination on the basis of sexual orientation or gender, which is a protected characteristic under article 26 of the Covenant, is a legitimate object under article 18 (3) of the Covenant.

9.4 The Committee must then consider whether the restrictions on the authors' right to manifest their beliefs were necessary and proportionate. It notes that civil registrars exercise their functions on behalf of the State and are responsible for applying the legal norms and obligations in force. As such, they are responsible for providing public services, such as solemnizing marriages and issuing civil status documents in line with the legal norms and obligations that the State party is required to respect. In that respect, the Committee considers that recognizing, a conscience clause for civil registrars could have direct consequences on the very application of the law concerning same-sex couples, which would be detrimental to the proper functioning and the neutrality of the public service for which civil registrar are responsible. Furthermore, the existence of a conscience clause for civil registrars, which would allow them to invoke personal reasons for not applying the law, would undermine the freedom of marriage and the principle of equality of all before the law. The Committee recalls its jurisprudence, according to which the prohibition of discrimination set out in article 26 of the Covenant also covers discrimination based on sexual orientation.[42]

[40] *Schedko v. Belarus* (CCPR/C/77/D/886/1999), para. 9.3; *Arenz et al. v. Germany* (CCPR/C/80/D/1138/2002), para. 8.6; and *Riedl-Riedenstein et al. v. Germany* (CCPR/C/82/D/1188/2003), para. 7.3.

[41] *Geller v. Kazakhstan* (CCPR/C/126/D/2417/2014), para. 10.2.

[42] *Young v. Australia* (CCPR/C/78/D/941/2000), para. 10.4.

9.5 The Committee notes that the circular of 13 June 2013 mentions the fact that the duties of a civil registrar, as concerns the solemnization of a marriage, may be performed either by the mayor or by a deputy mayor and may also be delegated to a municipal councillor in the event of the absence or impediment of the mayor and the deputy mayors, which therefore does not exclude the possibility for the authors to be replaced, if they so wish. In addition, the sanctions provided for in the circular apply to all public officials under existing provisions of the Criminal Code concerning obstruction of the execution of a law or failure to respect the principle of non-discrimination, and are not specifically aimed at the authors. Lastly, the Committee notes that the State party concedes that the purpose of the circular is only to avoid any obstacle to the solemnization of a marriage between persons of the same sex; it does not prevent a civil registrar from abstaining from solemnizing such a marriage him- or herself and being replaced by another civil registrar.

9.6 In the light of the foregoing, and considering that a person who holds public authority has the responsibility of applying the law, the Committee is of the view that the situation described by the authors does not disclose a violation of their right to freedom of conscience within the meaning of article 18 of the Covenant, in that the restriction imposed on their freedom to manifest their beliefs or conscience is provided for in law, is necessary and is in conformity with a legitimate object within the meaning of article 18 (3) of the Covenant.

10. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it do not permit it to conclude a violation by the State party of article 18 of the Covenant.

Annex I

[English only]

Individual opinion by Committee member Arif Bulkan (concurring)

1. There is no doubt that the Committee has reached the right decision in this case, and I fully concur with the finding that the authors' rights under the Covenant were not violated. I am less persuaded by its analysis, however, for reasons that I outline below, in brief. In particular, the Committee's resort to a standard limitations analysis is problematic insofar as it rests on the premise that the authors had a "right" to discriminate on the basis of sexual orientation (but which right was justifiably restricted in pursuit of a legitimate aim). Left unanswered also is the authors' complaint (para. 3.2) that the State party gave precedence to the rights of LGBT+ persons without any effort at reconciling them with the right of elected municipal officials to manifest their freedom of conscience.

2. The authors are deeply opposed to Law 2013-404, which ushered in marriage equality by opening up the institution to same-sex couples. They assert for themselves, as elected officials required to solemnize marriages, a right to not to perform this function for same-sex couples as doing so would conflict with their religious beliefs. While the Committee implicitly accepts this assertion, although ultimately rejecting the claim on the basis that their right to do so is justifiably limited, it is questionable, in the first place, whether the authors possess a right to refuse to serve others on the basis of who they are. As the European Court of Human Rights clarified in the case of *Leyla Şahin v. Turkey*, article 9 of the European Convention on Human Rights (the equivalent of article 18 of the Covenant) "does not protect every act motivated or inspired by a religion or belief".[1] This position is mirrored in a variety of domestic decisions. For example, the opinion of the House of Lords of the United Kingdom of Great Britain and Northern Ireland, in the case of *Regina v. Secretary of State for Education and Employment and others (Respondents) ex parte Williamson (Appellant) and others*, upheld a universal ban on corporal punishment in all schools, rejecting the right claimed by teachers and parents in independent schools to administer physical chastisement on children as part of their Christian beliefs.[2] Expounding generally on the protection afforded to claimed beliefs, Lord Nicholls stated the following:

> "Everyone, therefore, is entitled to hold whatever beliefs he wishes. But when questions of 'manifestation' arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements. These threshold requirements are implicit in article 9 of the European Convention and comparable guarantees in other human rights instruments. *The belief must be consistent with basic standards of human dignity or integrity*."[3]

3. Viewed from this perspective, it ought to be clear why characterizing the authors' claim to differentiate between opposite-sex and same-sex couples as a right is suspect. Sexual orientation is an immutable personal characteristic, as central to an individual's identity and personhood as their ethnicity or gender, and to treat people differently on this basis is hurtful and morally repugnant. Any attempt to differentiate and prejudice another on this basis would undermine human dignity and thus fall far short of the minimum requirements articulated by Lord Nicholls to qualify as a protected belief.

4. Further, permitting conscientious objection where the protected status is sexual orientation would inevitably threaten other minority groups. Once a religious "belief" that

[1] European Court of Human Rights, *Leyla Şahin v. Turkey*, Application No. 44774/98, Judgment, 10 November 2005, para. 105.

[2] United Kingdom of Great Britain and Northern Ireland, House of Lords, Opinions of the Lords of Appeal for Judgment in the Cause, *Regina v. Secretary of State for Education and Employment and others (Respondents) ex parte Williamson (Appellant) and others*, [2005] UKHL 15.

[3] Ibid., para. 23 [emphasis supplied].

runs counter to non-discrimination norms is legitimized or sanctioned in one instance, there is no principled way to resist its extension to others. Drawing upon actual litigated controversies from around the world, a variety of exceptions beyond LGBT+ persons can be envisioned. For instance, would a male taxi driver or bus driver asserting his religious views be entitled to refuse to carry an unaccompanied woman? What about a pharmacist refusing to sell contraceptive pills or devices to an unmarried person on the grounds that doing so would make her a party to sinful fornication? Or what if a marriage officiant were to refuse to officiate at an interracial union? These are not outlandish scenarios, and they serve as warnings of the difficulties of religious exceptionalism. The assertion of Lord Nicholls that a claimed belief must be consistent with basic standards of human dignity is therefore apposite; any weaker position would eviscerate anti-discrimination law and its underlying rationale of protecting difference and respecting human dignity.

5. In the alternative, and assuming that the authors could simply be allowed to "opt out" of the law's requirements, their complaint that the State party prioritized the rights of same-sex couples over the religious beliefs of others is not addressed satisfactorily. The standard limitation analysis applied by the Committee overlooks that what is at stake here are competing individual claims, as distinct from the more common scenario where an individual right is restricted in pursuit of some general public interest goal (such as health and security, and related issues). In the present scenario, the authors could well ask why the rights of same-sex couples were not restricted in pursuit of the right of others to manifest deeply held religious beliefs. A more direct way of addressing such an objection would therefore be to examine whether these competing individual rights can be reconciled (as the authors allege the State party failed to do). In this regard, Robert Wintemute's accommodation analysis provides a useful framework. In brief, Wintemute posits that the accommodation of religious beliefs, which would involve discrimination on the basis of some protected status, should only be allowed where to do so would not cause any harm – whether direct or indirect – assuming it could be achieved at minimal cost or disruption.[4] As I argue below, that is not a threshold that could be attained in the present case.

6. Refusing to officiate a same-sex marriage ceremony by permitting conscientious objection would unquestionably cause harm, as there is no inoffensive or discreet way of doing so that would avoid insult and friction. Any public system of shunting same-sex couples towards or away from specific counters or registrars is humiliating and deeply hurtful and would be directly harmful to the persons refused service. This should not require elaboration but, if necessary, one could consider how insulted one would feel if told, "Sorry, kindly proceed to the next counter as I do not serve [Black people/Jews/women]". Doing so surreptitiously is even worse, assuming that it is even possible to implement a covert system whereby members of the public would not realize that some registrars are off-limits to same-sex couples. Even if such behaviour could be hidden from the public, co-workers would know, as occurred in the identical situation in England, contested by Lillian Ladele, and it could eventually result in friction in the workplace.[5] Indeed, the mere fact of secrecy reinforces the illegitimacy of any such accommodation for, as noted by Wintemute, standard measures for other protected statuses (such as pregnancy or disability) are transparently implemented.[6]

7. More fundamentally, institutionalizing a system of separate registrars for same-sex couples would reinforce the "otherness" of persons on the basis of their sexual orientation. For a group that has historically been (and in places continues to be) criminalized, persecuted

[4] Robert Wintemute, "Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others", *Modern Law Review*, vol. 22, No. 2, (March 2014) p. 223.

[5] England and Wales Court of Appeal (Civil Division) Decisions, *Lillian Ladele v. The London Borough of Islington* (2009), Case No. A2/2009/0518, para. 8; upheld in European Court of Human Rights, *Case of Eweida and others v. United Kingdom*, Applications Nos. 48420/10, 59842/10, 51671/10 and 36516/10, Judgment, 15 January 2013. Lillian Ladele was a Registrar who objected to performing same-sex civil partnership registrations because of her Christian beliefs, but whose complaint of discrimination failed both in the Court of Appeal and before the European Court. Interestingly, it was two LGBT+ co-workers who disclosed her refusal to officiate at civil partnerships, complaining that her homophobic stance left them feeling victimized.

[6] Wintemute, "Accommodating Religious Beliefs", p. 242.

and disadvantaged, this would be disastrous. It would officially legitimize claims that LGBT+ persons are not worthy of protection. The claimed exemption is therefore unquestionably harmful, and for this reason accommodation of such a religious belief ought not to be entertained. This is not to prioritize the rights of LGBT+ persons or to disregard the religious beliefs of others, rather it is about securing neutrality in the provision of goods and services and consistently adhering to the standard position that impermissible (and ultimately harmful) distinctions are not to be tolerated.

8. In support of their claim, the authors also argue that conscientious objection should be allowed in relation to morally controversial issues, citing its application in international human rights law to the areas of military service, abortion, euthanasia, bioethics and hunting (para. 5.4). It appears that the authors equate sexual identity and expression with war and death, a manifestly inapt analogy, so little needs to be said about that argument. It is enough to note that all the areas cited by the authors touch upon the right to life and/or involve killing of some sort, so it is understandable to carve out an exception that aims to reconcile competing views on the sanctity of life. This has no relevance to a personal characteristic, whose expression causes no external harm, but the denial of which can lead to tremendous internal anguish. The situations are simply not comparable, and there is no way to accommodate religious belief where the result would be to wreak such harm on others.

9. Ultimately, the authors form part of the public infrastructure and the entirely justifiable stance of the State party is that they must offer the service to all on a neutral and non-discriminatory basis. In yet another case of a claimed religious exemption, the Constitutional Court of South Africa upheld the constitutionality of a law prohibiting corporal punishment in schools, despite the latter being Biblically ordained. In that case, Judge Sachs had this to say:

> "The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land."[7]

10. The common thread in these diverse decisions is the binding nature of certain "basic norms". At its core, providing separate registrars for same-sex couples would reinforce the marginalization of LGBT+ persons and institutionalize a system of apartheid, thereby violating the most basic of all democratic norms, that of human dignity. For these reasons, the religious exception claimed by the authors simply cannot be allowed.

[7] South Africa, Constitutional Court of South Africa, *Christian Education South Africa v. Minister of Education*, Case CCT 4/00, Judgment, 18 August 2000, para. 35.

Annex II

[English only]

Individual opinion by Committee member Gentian Zyberi (concurring)

1. I agree with the finding of the Committee in the present case that there is no violation of article 18 of the Covenant.

2. The issue of same-sex marriage is regulated differently in various countries, but it must be noted, regrettably, that a total ban on it remains compliant with the Convention for the Protection of Human Rights and Fundamental Freedom (European Convention on Human Rights).[1] Pointedly, the European Court has reiterated that neither article 12 (Right to marry) nor article 14 (Prohibition of discrimination), read in conjunction with article 8 (Right to respect for private and family life), which was more general in purpose and scope, could be interpreted as imposing an obligation on the contracting States to open marriage to same-sex couples.[2] The Committee seems to have taken a similar position concerning the Covenant.[3]

3. In May 2013, France recognized the right of same-sex couples to marry. The duty to solemnize same-sex marriages may deprive certain mayors, deputy mayors and municipal councilors of their freedom of conscience. Effecting a marriage forms part of the tasks assigned to civil registrars, which they carry out on behalf of the State. The authors have argued that the State has a positive obligation to seek to reconcile the various rights involved and cannot confine itself to giving precedence to the rights of one over those of the other (para. 3.2).[4]

4. The main question before the Committee was whether under the Covenant the authors are allowed not to solemnize a same-sex marriage based on the grounds of conscientious objection. After a brief introduction regarding the subject of conscientious objection,[5] I will try to address the requirement of proportionality under article 18 in greater detail.

5. The freedom to live and act in harmony with one's conscience enjoys the absolute protection of (private) freedom of conscience so long as such actions do not affect the rights and freedoms of others.[6] At the same time, it is obvious that the laws governing societal coexistence will hardly ever be fully in line with each and every individual's religious or moral convictions and that obedience to legitimately enacted general laws cannot be rendered dependent on every individual's full approval of those laws.[7] Conscientious objection occurs in cases where law and morality or religion might point an individual in different directions. Under such circumstances, it is necessary to establish certain criteria for qualifying conscientious objection[8] that would warrant exemption from lawful obligations.

[1] European Court of Human Rights: Guide on the case-law of the European Convention on Human Rights: Rights of LGBTI persons (31 August 2022), paras. 73–77; Guide on Article 12 of the European Convention on Human Rights: Right to marry (31 August 2022), paras. 30–32.

[2] European Court of Human Rights: *Chapin and Charpentier v. France*, Application No. 40183/07, Judgment of 9 June 2016; see also, Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention (31 August 2022), para. 164.

[3] See CCPR/C/75/D/902/1999 (*Joslin et al. v. New Zealand*), para. 8.3.

[4] European Court of Human Rights, *Case of Eweida and Others v. the United Kingdom* (Applications Nos. 48420/10, 59842/10, 51671/10 and 36516/10), Judgment of 15 January 2013, see, inter alia, Joint Partly Dissenting Opinion of Judges Vučinić and De Gaetano.

[5] See Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary* (Oxford, Oxford University Press, 2016), pp. 258–305.

[6] William A Schabas (Author), Manfred Nowak, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary*, 3rd revised edition (Kehl am Rhein, N.P. Engel Publisher, 2019), p. 503.

[7] Bielefeldt, Ghanea and Wiener, *Freedom of Religion or Belief*, p. 294.

[8] For a model in this regard, see Bielefeldt, Ghanea and Wiener, *Freedom of Religion or Belief*, p. 294: the authors suggest a combination of five criteria for qualifying conscientious objections that warrant

6. The Committee does not directly address why the restriction imposed would be proportional. Instead, in a more circumspect manner, the Committee noted the argument of the State party that the circular is intended only to avoid any obstruction of the solemnization of a marriage between persons of the same sex, but in no way prevents a registrar from refraining from solemnizing it himself or from being replaced by another registrar (para. 9.5). To me, this argumentation seems to contradict the Committee's own findings (para. 8.4), since, if the authors could avoid performing the task, they would arguably lack victim status and the case should have been declared inadmissible.

7. As the Committee has pointed out, recognizing a conscience clause for civil registrars could have direct consequences for the application of the law for the benefit of persons of the same sex, thus undermining the proper functioning and the neutrality of public services for which the civil registrar is responsible (para. 9.4). Moreover, the existence of a conscience clause for registrars, which would allow them to invoke personal reasons for not applying the law, would undermine the freedom of marriage and the principle of equality of all before the law (para. 9.4). While these findings address the requirement of necessity,[9] the requirement of proportionality is also reflected therein. Given the high potential for the conscience clause for civil registrars to undermine the proper functioning and the neutrality of public services, and the State obligation to ensure respect for the fundamental right of same-sex couples to have their marriage officiated, the measures taken by the State are proportional.

8. This is a very important case for the rights of same-sex couples. More generally, it is incumbent upon elected State representatives who are custodians of public authority to exercise their best efforts to ensure the proper functioning and the neutrality of public services. Their dedication to ensuring universal access to public services is tested, especially when conscientious objection matters come before them. While practical arrangements that provide respect for various conscientious objections are preferable, they might not always be possible.

exemptions from lawful obligations: (a) the gravity of the moral concern; (b) the situation of a conscientious veto; (c) the connectedness to an identity-shaping principled conviction; (d) the level of complicity in the requested involvement; and (e) the willingness to perform an alternative service.

[9] General comment No. 22 (1993) on the right to freedom of thought, conscience and religion, para. 8, in which the Committee noted, inter alia, that, "In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26".