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Sexual Orientation and Gender Identity

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This article surveys selected international developments affecting legal issues in sexual orientation and gender identity during 2018.¹ Among other developments described in this article, India repealed its sodomy law, the Supreme Courts of the United States and the United Kingdom each ruled on the rights of bakers who objected to making cakes for same-sex weddings or in support of same-sex marriage, and the number of nations recognizing same-sex marriage increased to twenty-six.² Other countries, such as Italy, have made progress toward equality for same-sex persons but still fall short of full equality.³ But in many other countries, LGBTI persons are still subject to discrimination, harassment, and violence.⁴

I. Equality and Non-Discrimination

A. NATIONAL CONSTITUTIONS

As of the end of 2018, sexual orientation was expressly protected under the national constitutions of nine countries: Bolivia,⁵ Ecuador,⁶ Fiji,⁷

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1. Because of severe space limitations, this article does not include all of the developments in sexual orientation and gender identity law during 2018. The omission of a particular development from 2018 should not be interpreted as suggesting that it was not important.

2. Catherine Pepinster, *Two Cakes, Two Courts, Two Countries: Same Result*, NCR (Oct. 15, 2018), <https://www.ncronline.org/news/politics/two-cakes-two-courts-two-countries-same-result>; Michael Safi, *Campaigners celebrate as India decriminalises homosexuality*, THE GUARDIAN (Sept. 6, 2018), <https://www.theguardian.com/world/2018/sep/06/indian-supreme-court-decriminalises-homosexuality>; Grace Donnelly, Alex Scimecca, *The 26 Countries That Have Legalized Same-Sex Marriage — And Photos of the Celebrations*, FORTUNE (Dec. 7, 2017), <http://fortune.com/2017/12/07/countries-that-legalized-same-sex-marriage/>.

3. *Italy one of the worst countries in Western Europe for gay rights: report*, THE LOCAL (May 17, 2017), <https://www.thelocal.it/20170517/italy-one-of-the-worst-countries-in-western-europe-for-gay-rights-report>.

4. *LGBT people suffer widespread violent abuse, discrimination: new UN report*, THE GUARDIAN (June 2, 2015), <https://www.theguardian.com/world/2015/jun/02/lgbt-people-suffer-widespread-violent-abuse-discrimination-new-un-report>.

5. PLURINATIONAL STATE OF BOLIVIA CONST. art. 14(II) (“The State prohibits and punishes all forms of discrimination based on sex, color, age, sexual orientation, gender identity, origin, culture, nationality, citizenship, language, religious belief, ideology, political affiliation or

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Kosovo,⁸ Malta,⁹ Mexico,¹⁰ Portugal,¹¹ South Africa,¹² and Sweden.¹³ Sexual

philosophy, civil status, economic or social condition, type of occupation, level of education, disability, pregnancy, and any other discrimination that attempts to or results in the annulment of or harm to the equal recognition, enjoyment or exercise of the rights of all people.”)

6. ECUADOR CONST. arts. 11(2) and 83(14). Article 11(2) provides: “No one shall be discriminated against for reasons of ethnic belonging, place of birth, age, sex, gender identity, cultural identity, civil status, language, religion, ideology, political affiliation, legal record, socio-economic condition, migratory status, sexual orientation, health status, HIV carrier, disability, physical difference or any other distinguishing feature, whether personal or collective, temporary or permanent, which might be aimed at or result in the diminishment or annulment of recognition, enjoyment or exercise of rights. All forms of discrimination are punishable by law.” Article 83(14) provides that: “Ecuadorians have the following duties and obligations, without detriment to others provided for by the Constitution or by law . . . To respect and recognize ethnic, national, social, generational, and gender differences and sexual orientation and identity.”

7. FIJI CONST. art. 26(3)(a) (protecting both gender identity and expression) (“A person must not be unfairly discriminated against, directly or indirectly on the grounds of his or her . . . actual or supposed personal characteristics or circumstances, including race, culture, ethnic or social origin, colour, place of origin, sex, gender, sexual orientation, gender identity and expression, birth, primary language, economic or social or health status, disability, age, religion, conscience, marital status or pregnancy . . .”).

8. REPUBLIC OF KOSOVO CONST. art. 24(2) (Art 24(2) stating: “No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.”). Die Morina, *Pacoli Tours Asia Seeking More Kosovo Recognitions*, BALKANINSIGHT (May 4, 2018), <https://balkaninsight.com/2018/05/04/kosovo-s-foreign-minister-on-diplomatic-tour-aiming-support-from-asia-05-03-2018/> (Although not all nations recognize Kosovo as an independent country following its declaration of independence in 2007, as of 2018 the Republic of Kosovo has received 116 diplomatic recognitions as an independent state.).

9. MALTA CONST. arts. 32, 45(3), and 45(5)(b). Article 32 of the Malta Constitution addresses Fundamental Rights and Freedoms of the Individual: “Whereas every person in Malta is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely: (a) life, liberty, security of the person, the enjoyment of property and the protection of the law; (b) freedom of conscience, of expression and of peaceful assembly and association; and (c) respect for his private and family life, the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.” Article 45 defines the word “discriminatory” as affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.” And article 45(5)(b) provides: “Nothing contained in any law shall be held to be inconsistent with or in contravention of sub-article (1) of this article to the extent that it makes provision . . . with respect to qualifications (not being qualifications specifically relating to sex, sexual orientation

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orientation is also protected under the Human Rights Act of New Zealand,¹⁴ the Northern Ireland Act 1988, as amended,¹⁵ and the Scotland Act 1988, as amended.¹⁶ “Gender identity” is protected as an additional category under the constitutions of Bolivia,¹⁷ Ecuador,¹⁸ and Malta.¹⁹ The Constitution of Fiji was the first to protect explicitly the categories of sexual orientation, gender identity, and gender expression.²⁰

or gender identity) for service as a public officer or for service of a local government authority or a body corporate established for public purposes by any law.”

10. CONSTITUCIÓN POLITICA DE LOS ESTADOS UNIDOS MEXICANOS [C.P.], art. 1 (Political Constitution of the United Mexican States) (“Any form of discrimination, based on ethnic or national origin, gender, age, disabilities, social status, medical conditions, religion, opinions, sexual orientation, marital status, or any other form, which violates the human dignity or seeks to annul or diminish the rights and freedoms of the people, is prohibited.”).

11. PORTUGAL CONST., art. 13(2) (“No one shall be privileged, favoured, prejudiced, deprived of any right or exempted from any duty on the basis of ancestry, sex, race, language, place of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation.”).

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

13. SWEDEN CONST., chap. 1, art. 2 and chap. 2, art. 12. *See also* Freedom of the Press Act, chap. 7, art. 4 (prohibiting agitation against a population group, whereby a person threatens or expresses contempt for a population group or other such group with allusion to race, colour, national or ethnic origin, religious faith or sexual orientation.”).

14. N.Z. HUMAN RIGHTS ACT Part 2, Subpart 3, art. 21(1)(m); Part 2, Subpart 5, art. 27(2); Part 2, Subpart 9, art. 45; and Part 2, Subpart 11, art. 59.

15. NORTHERN IRELAND ACT art. 75(1)(a) (providing that “[a] public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity . . . between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation.”).

16. SCOTLAND ACT section L2 (Interpreting “equal opportunities” to mean “the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions.”).

17. PLURINATIONAL STATE OF BOLIVIA CONST., art. 14(II).

18. ECUADOR CONST., arts. 11(2) and 83(14).

19. Rep. of the U.N. High Comm’n for Human Rights, *Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, ¶ 72, U.N. Doc. A/HRC/29/23 at 19, ¶ 72 (May 4, 2015) [hereinafter A/HRC/29/23].

20. FIJI CONST., art. 26(3)(a) (protecting both gender identity and expression).

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B. GENDER IDENTITY: RECOGNIZING INTERSEXUALITY AND NON-BINARY GENDERS

Several countries, including Australia,²¹ Austria,²² Bangladesh,²³ Canada,²⁴ Chile,²⁵ Denmark,²⁶ India,²⁷ Nepal,²⁸ the Netherlands,²⁹ New Zealand,³⁰ Portugal,³¹ and Uruguay³² afford various levels of legal recognition to a non-

21. See, e.g., *Australian passports to have third gender option; X category aims to counter discrimination against intersex people, while transgender people can pick male or female*, THE GUARDIAN (Sept. 15, 2011), <https://www.theguardian.com/world/2011/sep/15/australian-passports-third-gender-option>; A/HRC/29/23, *supra* note 19, at 19, ¶ 73.

22. Jenny Gesley, *Austria: Court Allows Intersex Individuals to Register Third Gender Other Than Male or Female*, GLOBAL LEGAL MONITOR (July 6, 2018), <http://www.loc.gov/law/foreign-news/article/austria-court-allows-intersex-individuals-to-register-third-gender-other-than-male-or-female>; Verfassungsgerichtshof [VfGH] [Constitutional Court], June 15, 2018, Erkenntnis und Beschlüsse des Verfassungsgerichtshofes [VfSlg] No. 77/2018-9 (Austria) https://www.vfgh.gv.at/downloads/VfGH_Entscheidung_G_77-2018_unbestimmtes_Geschlecht_anonym.pdf; *discussed in* Lena Holzer, *Non-Binary Gender Registration Models in Europe, Report on third gender marker or no gender marker options*, ILRA-EUROPE, 41 (Sept. 2018), https://www.ilga-europe.org/sites/default/files/non-binary_gender_registration_models_in_europe_0.pdf.

23. A/HRC/29/23, *supra* note 19, at 19, ¶ 73.

24. See, e.g., Mythli Sampathkumar, *Canada to add third gender option to next census*, THE INDEP. (May 16, 2018), <https://www.independent.co.uk/news/world/americas/canada-third-gender-census-lgbtq-rights-spectrum-identity-statistics-a8355031.html>; see also Mattha Busby, *Canada introduces gender-neutral 'X' option on passports: LGBT groups welcome change as positive step for rights of non-binary, intersex and transgender people*, THE GUARDIAN (Aug. 31, 2017), <https://www.theguardian.com/world/2017/aug/31/canada-introduces-gender-neutral-x-option-on-passports>.

25. See, e.g., Sofia Lotto Persio, *Chile approves new gender identity law in 'great victory for trans people'*, PINKNEWS (Sept. 13, 2018), <https://www.pinknews.co.uk/2018/09/13/chile-gender-identity-law-trans-people/>.

26. See, e.g., Emine Saner, *Europe's terrible trans rights record: will Denmark's new law spark change?*, THE GUARDIAN (Sept. 1, 2014), <https://www.theguardian.com/society/shortcuts/2014/sep/01/europe-terrible-trans-rights-record-denmark-new-law>.

27. See Nat'l Legal Servs. Auth. v. Union of India, (2014) 5 SCC 438 (India); see also Mark E. Wojcik, *Male. Female. Other. India Requires Legal Recognition of a Third Gender*, ABA (Nov. 8, 2014), https://www.americanbar.org/groups/international_law/publications/international_law_news/2014/fall/male_female_other_india_requires_legal_recognition_a_third_gender/.

28. See, e.g., Michael Bochenek and Kyle Knight, *Nepal's Third Gender and the Recognition of Gender Identity*, JURIST (Apr. 23, 2012), <https://www.jurist.org/commentary/2012/04/bochenek-knight-gender/>; A/HRC/29/23, *supra* note 19, at 19, ¶ 73.

29. Sabrina Barr, *Netherlands Issues Gender Neutral Passport for First Time in its History*, THE INDEP. (Oct. 19, 2018), <https://www.independent.co.uk/travel/netherlands-gender-neutral-passport-sex-dutch-leonne-zeegers-a8592091.html>.

30. *New Zealand adopts gender marker for non-binary gendered people!*, INTERSEX CAMPAIGN FOR EQUALITY (July 18, 2015), <https://www.intersexequality.com/new-zealand-adopts-gender-marker-for-non-binary-gendered-people>; A/HRC/29/23, *supra* note 19, at 19, ¶ 73.

31. Louisa Wright, *Portugal's parliament approves new gender identity bill*, DEUTSCHE WELLE (July 13, 2018), <https://www.dw.com/en/portugals-parliament-approves-new-gender-identity-bill/a-44655418>. (“From the age of 16, Portuguese citizens will be able to choose their gender without a ‘gender disruption’ diagnosis. The bill also prohibits surgical procedures on inter-sex babies, so they can choose their gender later.”).

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binary third gender (neither male nor female). For example, these jurisdictions may issue gender-neutral birth certificates, passports, and other official documents.³³ Advances were made in the United States, specifically in California, Illinois, and Oregon, in recognizing intersexuality and simplifying one's ability to change his or her gender marker on birth certificates and other documents.³⁴

In *Zzyym v. Pompeo*,³⁵ the federal district court in Colorado ordered the U.S. Department of State to issue a passport to Dana Alix Zzyym, an intersex individual who identified as neither male nor female. Dana was otherwise qualified to receive a passport but was requesting the letter "X" to indicate gender rather than "M" (male) or "F" (female).³⁶ Some other countries and the International Civil Aviation Organization provide for travel documents that use an "X" for gender.³⁷

The State Department refused to issue such a passport.³⁸ The State Department argued that requiring binary gender markers: (1) ensured the accuracy and verifiability of the passport holder's identity; (2) are used to determine a person's eligibility to receive a passport; (3) ensures easy verification of the passport holder's identity in domestic contexts; (4) was necessary because there is no generally-accepted medical consensus on how to define a third sex; and (5) altering the State Department system would be expensive and time-consuming.³⁹ Addressing each of these reasons in its decision, the federal district court found them all to be arbitrary and capricious.⁴⁰ The court found that the denial of Dana's passport exceeded the authority delegated by Congress to the State Department.⁴¹ Recognizing the unreasonable delays that Dana endured in obtaining a passport with an intersex marker, the federal district court enjoined the State Department "from relying upon its binary-only gender marker policy to withhold the requested passport from Dana."⁴²

32. James Besanville, *Trans people in Uruguay can now self-identify their gender, without surgery*, GAY STAR NEWS (Oct. 19, 2018), <https://www.gaystarnews.com/article/uruguay-transgender-rights/#gs.9FRQ3zM>.

33. See, e.g., *Non-binary*, EQUAL RECOGNITION, <http://equalrecognition.scot/non-binary> (last visited Mar. 31, 2019).

34. See 410 Ill. Comp. Stat. 535/1(15); see also 410 Ill. Comp. Stat. 535/17(1)(d); see also Mary Emily O'Hara, *Oregon Becomes First State to Add Third Gender to Driver's Licenses*, NBC NEWS (June 15, 2017), available at <https://www.nbcnews.com/feature/nbc-out/oregon-becomes-first-state-add-third-gender-driver-s-licenses-n772891>; Mary Bowerman, *Female, male or non-binary: California legally recognizes a third gender on identification documents*, USA (Oct. 19, 2017), <https://www.usatoday.com/story/news/nation-now/2017/10/19/female-male-non-binary-california-legally-recognizes-third-gender-identification-documents/779188001/>.

35. See *Zzyym v. Pompeo*, 341 F. Supp. 3d 1248 (D. Colo. 2018).

36. *Id.* at 1251.

37. *Id.* at 1255.

38. *Id.* at 1252–4. Before 1976, U.S. passports did not indicate gender.

39. *Zzyym*, 341 F. Supp. 3d at 1255–56.

40. *Id.* at 1256–59.

41. *Id.* at 1259–60.

42. *Id.* at 1260.

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Despite this ruling, at various points in 2018, the Trump Administration has attempted to erase civil rights for transgender and intersex persons. As of this writing, those attempts have not been successful.⁴³

In November 2018, the Caribbean Court of Justice ruled in *McEwan v. Attorney General of Guyana* that it was unconstitutional for Guyana to make it a criminal offense for a man or woman to appear in a public place while dressed in clothing of the opposite sex for an “improper purpose.”⁴⁴

C. SAME-SEX MARRIAGE

The number of countries recognizing same-sex marriage continues to increase. As of the end of 2018, same-sex marriage is legal in twenty-five countries: Argentina; Australia; Belgium; Brazil; Canada; Colombia; Denmark (including Greenland, an autonomous Danish dependent territory); Finland; France; Germany; Iceland; Ireland; Luxembourg; Malta; the Netherlands; New Zealand; Norway; Portugal; South Africa; Spain; Sweden; the United States; and Uruguay.⁴⁵ Same-sex marriage will also be legal in Austria as of January 1, 2019.⁴⁶

Following a ruling in January 2018 from the Inter-American Court of Human Rights, a same-sex marriage ban was declared unlawful in August 2018 by the Constitutional Chamber of the Supreme Court of Justice of Costa Rica, but the Court delayed the effective date of its ruling until eighteen months after its publication.⁴⁷ The ruling from the Inter-American Court of Human Rights may lead to the legalization of same-sex marriage in up to fifteen other countries of Central and South America. Additionally, an attempt to ban same-sex marriage failed in Romania in 2018 when not enough voters voted in the referendum.⁴⁸

Mexico has recognized same-sex marriages in thirteen of its thirty-one states at the end of 2018, but the Mexican Supreme Court has required all

43. See, e.g., Emma Pettit, *Federal Proposal to Redefine Gender Creates Uncertainty for Colleges*, CHRONICLE OF HIGHER EDUC. (Nov. 2, 2018), <https://www.chronicle.com/article/Federal-Proposal-to-Redefine/244878>.

44. *Mc Ewan v. Guyana*, [2018] CCJ 30 (AJ) (Nov. 12, 2018), available at <http://www.cj.gov/wp-content/uploads/2018/11/MC-EWAN-et-al-v-AG-OF-GUYANA-Copy.pdf> (Guyana).

45. Rex Wockner, *Marriage Equality Around the World*, WOCKNER (Nov. 24, 2018), <https://wockner.blogspot.com>.

46. See, e.g., Harriet Agerholm, *Austria court legalizes same-sex marriage from start of 2019, ruling all existing laws discriminatory*, INDEP. (Dec. 5, 2017), <https://www.independent.co.uk/news/world/europe/austria-same-sex-gay-marriage-legal-constitutional-court-lgbt-rights-start-date-couples-a8092516.html>.

47. See e.g., Laura Alvarado, *Supreme Court in Costa Rica Pronounced Its Decision on Same Sex Marriage*, THE COSTA RICA STAR (Aug. 9, 2018), <https://news.co.cr/constitutional-chamber-in-costa-rica-pronounced-its-decision-on-same-sex-marriage/75068/>.

48. See e.g., Kit Gillet, *Romania Conservatives Wanted Voters to Limit Definition of ‘Family.’ They Failed.*, N.Y. TIMES, (Oct. 7, 2018), <https://www.nytimes.com/2018/10/07/world/europe/romania-referendum-marriage.html>; Joanna Kakissis, *Romanian Referendum To Ban Same-Sex Marriage Fails*, NPR (Oct. 8, 2018), <https://www.npr.org/2018/10/08/655528971/romanian-referendum-that-would-define-marriage-fails>.

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Mexican states to recognize lawful same-sex marriages performed in other Mexican states.⁴⁹ Same-sex couples can seek a writ of *amparo* to have their same-sex marriages recognized in states that do not yet officially recognize same-sex marriage.⁵⁰

Despite the advances for the recognition of same-sex marriage in many countries, other countries define marriage as a union solely between a man and a woman. Constitutions defining marriage as a union of a man and a woman include the constitutions of Belarus,⁵¹ Bolivia,⁵² Bulgaria,⁵³ Burundi,⁵⁴ Honduras,⁵⁵ Hungary,⁵⁶ Latvia,⁵⁷ Lithuania,⁵⁸ Moldova,⁵⁹ Montenegro,⁶⁰ Mozambique,⁶¹ Nicaragua,⁶² Panama,⁶³ Poland,⁶⁴ Rwanda,⁶⁵

49. See Randal C. Archibold & Paulina Villegas, *With Little Fanfare, Mexican Supreme Court Legalizes Same-Sex Marriage*, N.Y. TIMES (June 14, 2015), <https://www.nytimes.com/2015/06/15/world/americas/with-little-fanfare-mexican-supreme-court-effectively-legalizes-same-sex-marriage.html>.

50. See Vincent M. Mallozzi, *A Same-Sex Marriage Under Mexican Law, but Outside Mexico*, N.Y. TIMES (Nov. 28, 2018), <https://www.nytimes.com/2018/11/28/fashion/weddings/a-same-sex-marriage-under-mexican-law-but-outside-mexico.html>.

51. BELARUS CONST. art. 32 (“On reaching the age of consent a woman and a man shall have the right to enter into marriage on a voluntary basis and found a family.”).

52. PLURINATIONAL STATE OF BOLIVIA CONST. art. 63(I) (“The marriage between a man and a woman is formed by legal bond and is based on equality of the rights and duties of the spouses.”).

53. BULGARIA CONST. art. 46(1) (“Matrimony shall be a free union between a man and a woman. Only a civil marriage shall be legal.”).

54. BURUNDI CONST. art. 29 (“Le mariage entre deux personnes de meme sexe est interdit.”).

55. HONDURAS CONST. arts. 112 and 116. Article 112 prohibits the performance or recognition of same-sex marriages in Honduras. HONDURAS CONST. art. 112 (“Marriage and de facto union between persons of the same sex is prohibited. Marriages or de facto unions between persons of the same sex that are celebrated or recognized under the laws of other countries shall not be valid in Honduras.”). Article 116 prohibits adoptions by couples who have a same-sex marriage. HONDURAS CONST. art. 116 (“The giving of children through adoption to persons of the same sex who form marriages or de facto unions is prohibited. The law shall regulate this institution.”).

56. HUNGARY CONST. art. L(1) (“Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation”).

57. LATVIA CONST. art. 110 (“The State shall protect and support marriage – a union between a man and a woman, the family, the rights of parents and rights of the child.”).

58. LITHUANIA CONST. art. 38 (“Marriage shall be concluded upon the free mutual consent of man and woman.”).

59. MOLDOVA CONST. art. 48(2) (“The family shall be founded on a freely consented marriage between a husband and wife”).

60. MONTENEGRO CONST. art. 71 (“Marriage may be entered into only on the basis of a free consent of a woman and a man”).

61. MOZAMBIQUE CONST. art. 14(1) (“Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family”). It should be noted that this provision might also be construed to say that men have the right to marry and that women have the right to marry.

62. NICARAGUA CONST. art. 72 (“Marriage and stable de facto unions are protected by the State; they rest on the voluntary agreement between a man and a woman . . .”).

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Serbia,⁶⁶ the Seychelles,⁶⁷ Slovakia,⁶⁸ Somalia,⁶⁹ South Sudan,⁷⁰ Tajikistan,⁷¹ Uganda,⁷² Ukraine,⁷³ and Vietnam.⁷⁴ The constitutions of Peru⁷⁵ and Venezuela⁷⁶ also provide for common law marriage only between a man and a woman.

**D. RELIGIOUS OBJECTIONS TO SAME-SEX MARRIAGE: WEDDING
CAKE BAKERS**

The previous section shows a continuing increase in the number of jurisdictions recognizing marriage equality. As same-sex couples sought to arrange their wedding ceremonies, some found pockets of resistance that denied them either the right to get married or denied products and services for a same-sex wedding. Because these denials of products and services are infrequent, they tend to have extensive news coverage when they do happen. For example, an elected court clerk in Kentucky, Kim Davis, received

63. PANAMA CONST. art. 58 (“The de facto union of persons of different sex with the legal capacity to enter into marriage which is sustained for five consecutive years in conditions of single partnership and stability shall produce the full effects of a civil marriage.”).

64. POLAND CONST. art. 18 (“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.”).

65. RWANDA CONST. art. 26 (“Civil monogamous marriage between a man and a woman is the only recognized [form of marriage].”).

66. SERBIA CONST. art. 62 (“Marriage shall be entered into based on the free consent of man and woman before the state body.”).

67. SEYCHELLES CONST. art. 32 (“1. The State recognizes that the family is the natural and fundamental element of society and the right of everyone to form a family and undertakes to promote the legal, economic, and social protection of the family. 2. The right contained in clause (1) may be subject to such restrictions as may be prescribed by law and necessary in a democratic society including the prevention of marriage between persons of the same sex or persons within certain family degrees.”).

68. SLOVAKIA CONST. art. 41(1) (“Marriage is a unique union between a man and a woman.”).

69. SOMALIA CONST. art. 28(1) (“No marriage shall be legal without the free consent of both the man and the woman . . .”).

70. SOUTH SUDAN CONST. art. 15 (“Every person of marriageable age shall have the right to marry a person of the opposite sex . . .”).

71. TAJIKISTAN CONST. art. 33 (“Men and women who have reached the marital age have the right to freely enter into a marriage.”).

72. UGANDA CONST. art. 31(2a) (“Marriage between persons of the same sex is prohibited.”).

73. UKRAINE CONST. art. 51 (“Marriage is based on the free consent of a woman and a man”).

74. VIETNAM CONST. art. 36(1) (“Male and female have the right to marry and divorce. Marriage shall conform to the principles of free consent, progressive union, monogamy and equality between husband and wife, and mutual respect.”).

75. PERU CONST. art. 5 (“The stable union between a man and a woman, free of any impediment to matrimony, who establishes a common-law marriage, creates community property subject to a marital assets regime, where applicable.”).

76. VENEZUELA CONST. art. 77 (“Marriage, which is based on free consent and absolute equality of rights and obligations of the spouses, is protected. A stable de facto union between a man and a woman which meets the requirements established by law shall have the same effects as marriage.”).

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extensive publicity in 2015 when she was jailed after refusing to issue marriage licenses to same-sex couples despite federal court orders to do so.⁷⁷ In 2018, she was voted out of office and replaced by a man to whom she had denied a marriage license.⁷⁸

Two court decisions in 2018 considered whether bakers could refuse to create cakes for same-sex weddings or with political messages supporting or opposing marriage equality. The Supreme Court of the United States and the Supreme Court of the United Kingdom each issued decisions on wedding cakes in 2018.⁷⁹

1. *United States*

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,⁸⁰ the U.S. Supreme Court reviewed a determination by the Colorado Civil Rights Commission that a Christian baker had violated the state anti-discrimination law by refusing to make a wedding cake for a same-sex couple in 2012. Because same-sex marriage was not legal in Colorado in 2012, the couple was going to marry legally in Massachusetts and have a celebration back in Colorado.⁸¹ The baker refused, stating that he would not “create wedding cakes for same-sex weddings because of his religious opposition to same-sex marriage and because Colorado (at that time) did not recognize same-sex marriages.”⁸² The Colorado Civil Rights Commission found the baker had violated the state anti-discrimination law that prohibits discrimination based on sexual orientation in a “place of business engaged in any sales to the public and any place offering services . . . to the public.”⁸³ The Colorado state courts affirmed the Commission’s ruling and its enforcement order.⁸⁴

77. Liam Stack, *Jailed Kentucky Clerk Starts Federal Appeal*, NEW YORK TIMES (Sept. 6, 2015), <https://www.nytimes.com/2015/09/07/us/jailed-kentucky-clerk-starts-federal-appeal.html>.

78. See, e.g., Juliana Rose Pignataro, *Kim Davis Voted Out As Kentucky County Clerk 3 Years After Being Jailed for Refusing to Issue Same-Sex Marriage Licenses*, NEWSWEEK, Nov. 6, 2018, <https://www.newsweek.com/kim-davis-voted-out-kentucky-county-clerk-3-years-after-being-jailed-refusing-1204806>.

79. Catherine Pepinster, *Two Cakes, Two Courts, Two Countries: Same Result*, NCR (Oct. 15, 2018), <https://www.ncronline.org/news/politics/two-cakes-two-courts-two-countries-same-result>.

80. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S.Ct. 1719, 1720 (2018).

81. *Id.* at 1724.

82. *Id.* at 1745. A concurring opinion by Justice Thomas stated that the baker “also refuses to bake cakes containing alcohol, cakes with racist or homophobic messages, cakes criticizing God, and cakes celebrating Halloween — even though Halloween is one of the most lucrative seasons for bakeries

83. *Id.* at 1725.

84. *Id.* at 1723.

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In a 7-2 vote, the U.S. Supreme Court found that the baker had not received a fair hearing before the Commission.⁸⁵ The Court cited two reasons.

First, the Court ruled that the Commission had not treated the baker's religious defense respectfully.⁸⁶ The baker had argued that forcing him to create a wedding cake for a same-sex couple would violate the Free Speech and Free Exercise of Religion Clauses of the First Amendment.⁸⁷ The Court found "hostility" at two public hearings where the Commissioners rejected these defenses and appeared to endorse "the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community."⁸⁸ The Court found that certain statements made showed "lack of due consideration for [the baker's] free exercise rights"⁸⁹ At one hearing, for example, a commissioner stated "we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to — to use their religion to hurt others."⁹⁰ The majority decision stated that the statement "disparage[d] his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical — something insubstantial and even insincere."⁹¹

Second, the Court found discriminatory treatment of the Christian baker as compared to three other cases where the Commission dismissed cases against other bakers who refused to bake cakes with messages opposing same-sex marriage. These dismissals occurred three months after the Administrative Law Judge in Colorado ruled in favor of the same-sex couple.⁹² The three cases stemmed from three Colorado bakeries that

85. *Id.* at 1719. (Justice Kennedy authored the majority opinion. Justice Kagan wrote a concurring opinion in which Justice Breyer joined. Justice Gorsuch wrote a concurring opinion in which Justice Alito joined. Justice Thomas wrote a concurring opinion in which Justice Gorsuch joined. Justices Ginsburg and Sotomayor dissented.)

86. *Id.* at 1729.

87. *Id.* at 1728.

88. *Id.* at 1729.

89. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

90. *Id.*

91. *Id.* (The majority decision also stated: "The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law — a law that protects against discrimination on the basis of religion as well as sexual orientation.") Although the Supreme Court described these references as "inappropriate," it did not disprove that religious beliefs had been invoked to justify slavery, the Holocaust, and other civil rights violations. See, e.g., Bernadette J. Brooten, *Same-gender marriage, slavery, and the Holocaust*, BRANDEIS NOW (June 11, 2018), <http://www.brandeis.edu/now/2018/june/brooten-cake-opinion.html>.

92. *Id.*

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refused to create cakes resembling an open Bible with Biblical verses opposing homosexuality.⁹³

Although the baker won in that case because of perceived hostility before the administrative tribunal, the U.S. Supreme Court's ruling does not grant a license for providers of wedding products and services to deny services to same-sex couples.

First, the majority opinion notes that “[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth” and that “the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights.”⁹⁴ And although “religious and philosophical objections are [also] protected,” the Supreme Court said “it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”⁹⁵

Second, the Court stated that although the anti-discrimination law could not compel clergy to perform a same-sex wedding in violation of their religious beliefs (an exception “that gay persons could recognize and accept without serious diminishment of their own dignity and worth”), that exception is limited.⁹⁶ “If that exception were not confined,” said the Court, “then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.”⁹⁷

And third, because same-sex marriages are now legal throughout the United States following the U.S. Supreme Court's decisions in *Windsor*⁹⁸ and *Obergefell*,⁹⁹ it is no longer a valid argument that the message promotes an unlawful activity.

In finding that the Commission exhibited animus against the Christian baker by later dismissing three other cases against bakers who refused to create cakes with messages opposing same-sex marriage, the U.S. Supreme Court majority decision ignored the fact that the wedding cake was to celebrate a wedding while the other cakes sought purely political messages about same-sex marriage.¹⁰⁰ The distinction was recognized, however, in a case decided by the Supreme Court of the United Kingdom.¹⁰¹

93. *Masterpiece Cakeshop*, 138 S. Ct. at 1749 (Ginsburg, J., dissenting).

94. *Id.*

95. *Id.* at 1727.

96. *Id.*

97. *Id.*

98. *United States v. Windsor*, 570 U.S. 744 (2013).

99. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

100. The dissenting opinion did not overlook this distinction. See *Masterpiece Cakeshop*, 138 S.Ct. at 1749 (Ginsburg, J., dissenting).

101. See *Lee v. Ashers Baking Company*, [2018] UKSC 49.

2. *United Kingdom*

In *Lee v. Asbers Baking Company, Ltd.*,¹⁰² the Supreme Court of the United Kingdom ruled that a bakery in Northern Ireland could not be compelled to create a cake supporting same-sex marriage in violation of the baker's religious beliefs. The bakery had been asked by a gay rights advocate to supply a cake not for a same-sex wedding, but rather a cake iced with the message "Support Gay Marriage" and a colored picture of the Muppet characters Bert and Ernie.¹⁰³ The bakery initially took the order but later refunded the man's money "because they were a Christian business and could not print the slogan requested."¹⁰⁴

The customer complained to the Equality Commission of Northern Ireland, which supported his claim for direct and indirect discrimination based on sexual orientation, religious belief, and political opinion.¹⁰⁵ A district court found that the refusal to fulfill the order was direct discrimination on all three grounds and awarded the customer damages of £500.¹⁰⁶ The appellate court dismissed the bakery's appeal, holding that the refusal to make the cake "was a case of associative direct discrimination on grounds of sexual orientation" without deciding whether it was also political and religious discrimination against the customer.¹⁰⁷ In effect, the district court found that it was enough that the bakery discriminated against the customer on the basis of his actual or perceived sexual orientation.¹⁰⁸ The case was further appealed to the Supreme Court of the United Kingdom, which reversed and found no discrimination based on sexual orientation.¹⁰⁹

The U.K. Supreme Court found that the bakery refused to fulfill the order not because of the customer's sexual orientation, but because of the message on the cake.¹¹⁰ As stated by Lady Hale (the President of the U.K. Supreme Court), "[t]he objection was to the message, not the messenger."¹¹¹ She noted that people of all sexual orientations "can and do support gay marriage" and that "[s]upport for gay marriage is not a proxy for any particular sexual orientation."¹¹² The bakery would have refused the order because of the message, no matter who had placed the order.¹¹³

The U.K. Supreme Court noted that the U.S. Supreme Court had issued its decision in the *Masterpiece Cakeshop* after the U.K. Supreme Court had

102. *Id.*

103. *Id.* at 843.

104. *Id.* at 848.

105. *Id.*

106. *Lee*, [2018] UKSC 49 at 848.

107. *Id.*

108. *Id.* at 855.

109. *Id.* at 843.

110. *Id.* at 844.

111. *Lee*, [2018] UKSC 49 at 849.

112. *Id.* at 850.

113. *Id.*

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heard oral argument but before it made its own ruling.¹¹⁴ Stating simply that “[t]he facts are not the same,” the U.K. Supreme Court wrote that in the *Masterpiece Cakeshop* case: “a Christian baker refused to create a wedding cake for a gay couple because of his opposition to same sex marriage. There is nothing in the reported facts to suggest that the couple wanted a particular message or decoration on their cake.”¹¹⁵

The U.K. Supreme Court wrote that the U.S. Supreme Court had recognized that businesses could not generally refuse to supply products and services for gay weddings, but that the baker in this case “saw creating a wedding cake as an expressive statement involving his First Amendment rights.”¹¹⁶

“The important message from the *Masterpiece Bakery* case,” wrote the U.K. Supreme Court, is “a clear distinction between refusing to produce a cake conveying a particular message, for any customer who wants such a cake, and refusing to produce a cake for the particular customer who wants it because of that customer’s characteristics.”¹¹⁷ Because the bakery’s objection was to the message rather than the messenger, there was no discrimination based on the sexual orientation of the customer.¹¹⁸ Under this reasoning, the Court may have reached a different result if a wedding cake was denied to a same-sex couple because they were a same-sex couple.

E. CIVIL UNIONS AND OTHER FORMS OF LEGAL RECOGNITION OF
SAME-SEX RELATIONSHIPS FALLING SHORT OF MARRIAGE
EQUALITY

Some jurisdictions that do not yet recognize same-sex marriage may nonetheless provide for civil unions or similar forms of legal recognition such as registered partnerships, domestic partnerships, reciprocal beneficiary relationships, civil solidarity pacts, and similar relationships.¹¹⁹ Some of these legal creations falling short of marriage may be open to both same-sex and opposite-sex couples,¹²⁰ although some jurisdictions may limit civil unions to same-sex couples.

The lack of legal recognition for same-sex couples can result in mistreatment by state actors, private actors (including health care-providers),

114. *Id.* at 858.

115. *Id.*

116. Lee, [2018] UKSC 49 at 858.

117. *Id.* at 858–59.

118. *Id.* at 849.

119. See e.g., *Italy one of the worst countries in Western Europe for gay rights: report*, THE LOCAL (May 17, 2017), <https://www.thelocal.it/20170517/italy-one-of-the-worst-countries-in-western-europe-for-gay-rights-report>.

120. See e.g., 750 ILL. COMP. STAT. 75/10 (2011). (defining civil unions to include “a legal relationship between 2 persons, of either the same or opposite sex . . .”). Illinois recognizes same-sex marriage but also continues to offer civil unions.

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and insurance companies.¹²¹ Countries that do not protect same-sex couples may see political and legal challenges to provide legal recognition of relationships.

In 2015, the European Court of Human Rights (“ECHR”) ruled in favor of three same-sex couples in *Oliari and Others v. Italy*,¹²² where it held that the Italian Government failed to fulfill its “positive obligation to ensure” that same-sex couples in Italy “have available a specific legal framework providing for the recognition and protection of their same-sex unions.”¹²³ The ECHR held that Italy’s failure to protect same-sex couples violated Article 8 of the European Convention on Human Rights.¹²⁴ In the same year, the Italian Court of Cassation ruled that the Italian Constitution did not require Italy to recognize same-sex marriages as such, but the court also stated that same-sex couples in Italy had a right to some form of legal recognition for their relationships.¹²⁵

After a provision allowing stepchild adoption was removed, legislation allowing same-sex civil unions was passed by the Italian parliament in 2016, signed by the President Sergio Mattarella, and published in the Official Gazette (*Gazzetta Ufficiale*) on May 21, 2016.¹²⁶ After the Ministry of the Interior published implementing regulations in July 2016,¹²⁷ the first civil unions could be performed in Italy as of July 29, 2016.

The Italian Civil Union Law creates civil unions as a “specific social formation” (*specifica formazione sociale*) in the spirit of Articles Two and Three of the Italian Constitution.¹²⁸ Article Two of the Italian Constitution

121. Shabab Mirza and Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, CENTER FOR AMERICAN PROGRESS (Jan. 18, 2018), <https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/>.

122. Case of *Oliari and Others v. Italy*, 2015-65 Eur. Ct. H.R. 26 (2015).

123. *Id.* at ¶¶ 110, 185; see also Jim Yardley, *Italy Divided Over Allowing Civil Unions: An Outlier in the West Moves on Gay Rights*, N.Y. TIMES (Jan. 25, 2016), <https://www.nytimes.com/2016/01/25/world/europe/italy-divided-over-effort-to-legalize-civil-unions-for-gays.html>.

124. EURO. CONV. HUM. RTS. art. 8. Article 8 on the “Right to Respect for Private and Family Life” provides that (1) “Everyone has the right to respect for his private and family life, his home and his correspondence,” and (2) “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

125. Michael Lavers, *Italy High Court Rejects Same-Sex Marriage*, WASH. BLADE (Feb. 12, 2015), <http://www.washingtonblade.com/2015/02/12/italy-high-court-rejects-sex-marriage/>.

126. *Italy one of the worst countries in Western Europe for gay rights: report*, THE LOCAL (May 17, 2017), <https://www.thelocal.it/20170517/italy-one-of-the-worst-countries-in-western-europe-for-gay-rights-report>.

127. *Decreto del Presidente del Consiglio dei Ministri recante disposizioni transitorie per la tenuta dei registri nell'archivio dello stato civile, da emanare ai sensi dell'articolo 1, comma 34, della legge n. 76 del 2016*, Nr. 22/A2016-001775 (2016), D.P.C.M. 23/07/2016, N. 144, G.U. 28/07/2016.

128. Michele Capocchi, *On civil unions and de facto couples*, FLORENTINE (May 26, 2016), <http://www.theflorentine.net/lifestyle/2016/05/civil-unions-de-facto-couples/>.

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provides that Italy will recognize “inviolable rights of man, for the individual, and for social groups where personality is expressed”¹²⁹ Article Three affirms that “[a]ll citizens have equal social dignity and are equal before the law, without distinction as to sex, race, language, religion, political opinions, or personal or social condition.”¹³⁰ By citing only Articles Two and Three when creating the “specific social formation” of civil unions, the legislature rejected any argument that civil unions should be equated to traditional matrimony. The legislation did not cite article Twenty-Nine of the Italian Constitution, in which Italy “recognizes the rights of the family as a natural association founded on matrimony.”¹³¹ By not citing Article Twenty-Nine in the Civil Union Law, civil unions in Italy have a lower legal status than marriage. Partners in a civil union are unable to adopt children, even the stepchildren of one of the partners.¹³² Additionally, partners in a civil union expressly have no duty of fidelity, whereas infidelity is otherwise grounds for divorce in Italy.¹³³

Although the Italian Civil Union Law entered into effect in 2016, as of 2018 there have been relatively few same-sex couples taking advantage of its provisions.¹³⁴ First, there is anecdotal evidence that even long-term same-sex couples are not taking advantage of the civil union law because it provides no tangible benefits of importance that they cannot otherwise arrange by private property transactions (wills, joint tenancy, and trusts).¹³⁵ Second, same-sex couples reject the lesser dignity of a civil union as compared to marriage. When traveling outside of Italy, partners in a civil union may be denied certain rights that they would otherwise have if married.¹³⁶ For example, if one partner in a civil union is injured and hospitalized while abroad, the other partner may be denied visitation rights in that hospital.¹³⁷ And third, many Italian couples prefer getting married in other (usually European) jurisdictions where they can have full marriage

129. ITALY CONST. art. 2.

130. ITALY CONST. art. 3. Article 3 also provides that: “It is the duty of the Republic to remove those obstacles of an economic and social nature that, by in fact limiting the freedom and equality of citizens, impede the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country.”

131. ITALY CONST. art. 29.

132. *Why Not Everyone Is Happy With Italy's Civil Unions Bill*, THE LOCAL IT (May 12, 2016), <https://www.thelocal.it/20160512/why-not-everyone-is-happy-with-italys-civil-unions-bill>.

133. *Id.*

134. See *Total number of same-sex civil partnerships in capitals of Italian region as of January 2017*, STATISTA, <https://www.statista.com/statistics/742552/total-number-of-same-sex-civil-unions-in-italy/>.

135. *Differences Between Civil Unions and Marriage*, GAY FRIENDLY ITALY (Mar. 9, 2019), <https://www.gayfriendlyitaly.com/differences-between-civil-unions-and-marriage>.

136. *Id.*

137. See e.g., Garrett Riou, *Hospital Visitation and Medical Decision Making for Same-Sex Couples*, CENTER FOR AMERICAN PROGRESS (Apr. 15, 2014), <https://www.americanprogress.org/issues/lgbt/news/2014/04/15/88015/hospital-visitation-and-medical-decision-making-for-same-sex-couples/>.

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rights.¹³⁸ Although Italy may recognize the foreign same-sex marriage as a civil union under Italian law, couples prefer the full rights of marriage when traveling to other countries that will recognize their marriage as a marriage.¹³⁹

II. Sodomy Laws

States that criminalize sexual acts between consenting adults violate international human rights law because “these laws, by their mere existence, violate the rights to privacy and non-discrimination.”¹⁴⁰ Although the U.N. Human Rights Committee and other human rights mechanisms have urged states to repeal sodomy laws since the 1994 landmark decision in *Toonen v. Australia*, many states still have laws that criminalize and harass people on the basis of their sexual orientation and gender expression.¹⁴¹ *Countries that may punish consensual acts of homosexuality with the death penalty include Brunei, the Islamic Republic of Iran, Mauritania, Saudi Arabia, Sudan, Yemen, and parts of Nigeria and Somalia.*¹⁴²

In 2013, the *India Supreme Court reversed a lower court ruling that had found India’s sodomy law to be unconstitutional.*¹⁴³ In 2018, the Indian Supreme Court overruled that 2013 decision and declared the sodomy law in Section 377 of the Indian Penal Code to be unconstitutional under the Indian Constitution.¹⁴⁴ In *Johar v. Union of India*,¹⁴⁵ the Supreme Court of India decriminalized all consensual sex among adults in private, including consensual sex between persons of the same gender.¹⁴⁶ Some parts of Indian Penal Code Section 377 relating to sex with minors, non-consensual sexual acts (such as rape), and bestiality remain in force.¹⁴⁷ The declaration that Section 377 was unconstitutional as to consenting adults had been expected after the Indian Supreme Court’s ruling in *Puttaswamy v. Union of India*,¹⁴⁸ in which a nine-judge bench recognized a fundamental right of privacy in favor of all persons.

138. See e.g., *The Freedom to Marry Internationally*, FREEDOM TO MARRY (Mar. 26, 2019), <http://www.freedomtomarry.org/pages/the-freedom-to-marry-internationally>.

139. As a legal entity peculiar to Italian law, an Italian civil union may (or may not) enjoy any legal recognition in other countries.

140. Rep. of the Office of the United Nations High Commissioner for Human Rights on the operations of the Voluntary Fund for Financial and Technical Assistance in the Implementation of the Universal Periodic Review, Human Rights Council, 29th session, ¶ 43, U.N. Doc. A/HRC/29/23 at 12 (Apr. 2, 2015).

141. *Id.* at 12–13, ¶¶ 43–44.

142. *Id.* at 13, ¶ 46.

143. Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 (India).

144. Michael Safi, *Campaigners celebrate as India decriminalises homosexuality*, THE GUARDIAN (Sept. 6, 2018), <https://www.theguardian.com/world/2018/sep/06/indian-supreme-court-decriminalises-homosexuality>.

145. Johar v. Union of India, W. P. (CrL.) No. 76 of 2016 (Supreme Court of India).

146. *Id.* at 164–65, ¶¶ 253(xv), (xvi) (Opinion of Chief Justice Dipak Misra).

147. See *id.* at 165, ¶ 253(xvii).

148. Puttaswamy v. Union of India, (2017) 10 SCC 1 (India).