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Sexual Orientation and Gender Identity

MARK E. WOJCIK*

This article surveys international developments affecting legal issues in sexual orientation and gender identity during 2015.¹ Among other developments, same-sex marriage became legal in the United States (by a landmark U.S. Supreme Court decision) and in Ireland (by an overwhelming voter referendum), bringing the number of nations recognizing same-sex marriage to eighteen (or twenty-one, depending on how England, Wales, and Scotland are counted).

I. Equality and Non-Discrimination

A. NATIONAL CONSTITUTIONS

As of the end of 2015, sexual orientation was expressly protected under the national constitutions of Bolivia,² Ecuador,³ Fiji,⁴ Kosovo,⁵ Malta,⁶ Mexico,⁷ Portugal,⁸ South Africa,⁹ and Sweden.¹⁰ Sexual orientation is also protected under the Human Rights Act of New Zealand,¹¹ the Northern Ireland Act of 1988, as amended,¹² and the Scotland Act

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1. For earlier international developments in legal issues affecting sexual orientation and gender identity, see David W. Austin, *Sexual Orientation and Gender Identity*, 48 ABA/SIL YIR 489 (2014), and David W. Austin, *Sexual Orientation and Gender Identity*, 47 ABA/SIL YIR 469 (2013).

2. PLURINATIONAL STATE OF BOL. CONST. art. 14(II).

3. ECUADOR CONST. arts. 11(2), 83(14).

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

5. REPUBLIC OF KOS. CONST. art. 24(2). Although not all nations recognize Kosovo as an independent country following its declaration of independence in 2007, as of 2015 it has received diplomatic recognition by 112 countries. See *International Recognition of Kosovo*, WIKIPEDIA, https://en.wikipedia.org/wiki/International_recognition_of_Kosovo (last visited Mar. 7, 2016).

6. MALTA CONST. arts. 32 and 45(5)(b).

7. Constitución Política de los Estados Unidos Mexicanos [Political Constitution of the United Mexican States], CP, art. 1, Diario Oficial de la Federación [DOF], 05-02-1917 (Mex.).

8. PORT. CONST., art. 13(2).

9. S. AFR. CONST., 1996, art. 9(3).

10. REGERINGSFORMEN [RF] [CONSTITUTION], 1:2, 2:12 (Swed.); see also TRYCKFRIHETSFÖRORDNINGEN [TF] [CONSTITUTION], 7:4 (Swed.) (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.”).

11. Human Rights Act 1993, pt 2, ss 21(1)(m), 27(2), 45, 59 (N.Z.).

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of 1988, as amended.¹³ “Gender identity” is protected as an additional category under the constitutions of Bolivia,¹⁴ Ecuador,¹⁵ and Malta.¹⁶ The Constitution of Fiji protects sexual orientation, gender identity, and gender expression.¹⁷

The Supreme Court of India, in *National Legal Services Authority v. Union of India*,¹⁸ upheld the right of transgender persons “to decide their self-identified gender” and ordered the national and state governments to “grant legal recognition of their gender identity such as male, female or as [a] third gender.”¹⁹ Bangladesh and Nepal also recognize a legal “third gender” category.²⁰

B. SAME-SEX MARRIAGE

The number of countries recognizing same-sex marriage continues to increase. As of the end of 2015, same-sex marriage is legal in eighteen countries: Argentina; Belgium; Brazil; Canada; Denmark (including its former province, Greenland, which is now an autonomous Danish dependent territory); France; Iceland; Ireland; Luxembourg; the Netherlands; New Zealand; Norway; Portugal; South Africa; Spain; Sweden; the United States; and Uruguay.²¹ Same-sex marriage also became legal in England, Wales, and Scotland in 2014, bringing to twenty-one the number of nations that recognize same-sex marriage at the end of 2015.²²

In 2015, same-sex marriage became legal in three countries: Luxembourg, all of the United States, and Ireland. Same-sex marriage became legal in Luxembourg on January

12. Northern Ireland Act 1998 c. 47 § 75(1)(a) (N. Ir.) (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.”).

13. Scotland Act 1998, § L2, sch. 5 (Scot.) (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”).

14. PLURINATIONAL STATE OF BOL. CONST., art. 14(II).

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

16. See, U.N. Human Rights Council, Ann. Rep. of U.N. High Comm’r for Human Rights, *Discrimination and Violence against Individuals Based on Their Sexual Orientation and Gender Identity*, at 19, A/HRC/29/23 at 19 (2015) [hereinafter U.N.H.R.C. Ann. Rep. 2015].

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

18. Nat’l Legal Servs. v. Union of India, Writ Pet. (Civ.) No. 400 (2012) & No. 604 (2013), available at <http://supremecourtindia.nic.in/outtoday/wc40012.pdf> (India).

19. *Id.* at 109. See also Mark E. Wojcik, *Male. Female. Other. India Requires Legal Recognition of a Third Gender*, 43:4 INT’L L. NEWS 1 (2014); Dhananjay Mahapatra, *Supreme Court Recognizes Transgenders as ‘Third Gender,’* TIMES OF INDIA (Apr. 15, 2014, 11:08 AM), <http://timesofindia.indiatimes.com/india/Supreme-Court-recognizes-transgenders-as-third-gender/articleshow/33767900.cms>.

20. U.N.H.R.C. Ann. Rep. 2015, *supra* note 16, at 19.

21. Rex Wockner, *Where is Same-Sex Marriage Legal?*, WOCKNER, <http://wockner.blogspot.com/2015/06/where-is-same-sex-marriage-legal.html> (last updated Mar. 3, 2016).

22. *Id.* Unless England, Wales, and Scotland are not counted as nations but only as part of the United Kingdom of Great Britain and Northern Ireland, which would bring the number to eighteen.

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1, 2015, when legislation enacted in 2014 entered into effect.²³ The openly gay prime minister of Luxembourg married his same-sex partner in May 2015.²⁴

Same-sex marriage became legal for the entire United States on June 26, 2015, when the U.S. Supreme Court ruled in *Obergefell v. Hodges* that “the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment [to the U.S. Constitution,] couples of the same-sex may not be deprived of that right and that liberty.”²⁵ The Supreme Court held in *Obergefell* that “same-sex couples may exercise the fundamental right to marry,”²⁶ and that “there is no lawful basis for a State [of the United States] to refuse to recognize a lawful same-sex marriage performed in another State [or foreign country] on the ground of its same-sex character.”²⁷ Prior to the decision in *Obergefell*, same-sex marriage was recognized in thirty-eight states and the District of Columbia.

Same-sex marriage became legal in Ireland on November 16, 2015, after Ireland became the first nation in the world to legalize same-sex marriage by a popular vote in May 2015.²⁸

Finland will recognize same-sex marriage as of March 1, 2017.²⁹

Slovenia had passed a law to recognize same-sex marriage, but voters there repealed the same-sex marriage law before it could enter into effect.³⁰

Mexico recognized same-sex marriages in only some of its states at the end of 2015, but the Mexican Supreme Court requires all Mexican states to recognize lawful same-sex marriages performed in other states, and individual Mexican states increasingly recognize same-sex marriage.³¹

23. Mémorial A no. 125 du 4 juillet 2014 réforme du mariage [Law A- No. 125 of July 4, 2015 Reforming Marriage] JOURNAL OFFICIEL DU GRAND-DUCHÉ DE LUXEMBOURG [J.O.] [OFFICIAL GAZETTE OF LUXEMBOURG], July 17, 2014 (Lux.), available at <http://www.legilux.public.lu/leg/a/archives/2014/0125/a125.pdf>; https://en.wikipedia.org/wiki/Same-sex_marriage_in_Luxembourg.

24. Damien Gayle, *Luxembourg's Prime Minister First EU Leader to Marry Same-Sex Partner*, THE GUARDIAN (May 15, 2015, 8:41 AM), <http://www.theguardian.com/world/2015/may/15/luxembourg-prime-minister-eu-xavier-bettel-gauthier-destenay-gay-marriage>.

25. *Obergefell v. Hodges*, 136 S. Ct. 2584, 2604 (2015).

26. *Id.* at 2604-05.

27. *Id.* at 2608.

28. Wockner, *supra* note 21. Irish voters approved the measure by a landslide margin of 62.07 percent to 37.93 percent. *Id.* The amendment to the Irish Constitution provides: “Marriage may be contracted in accordance with law by two persons without distinction as to their sex.” CONSTITUTION OF IRELAND 1937 (BUNREACTH NA HEIREANN) art. 41(4) (2015), available at http://www.taoiseach.gov.ie/eng/Historical_Information/The_Constitution/Bunreacht_na_h%C3%89ireann_October_2015_Edition.pdf. The national vote in favor of marriage was a significant event, making Ireland the first country to adopt same-sex marriage by popular vote. The Vatican was not happy. See Gaia Pianigiani, *Vatican Aide Denounces Ireland's Vote on Marriage*, N.Y. TIMES, May 28, 2015, at A6. In 2005, Switzerland had a national vote to approve same-sex registered partnerships, which fall short of marriage. See *Registered Partnership in Switzerland*, WIKIPEDIA, https://en.wikipedia.org/wiki/Registered_partnership_in_Switzerland (last visited Mar. 7, 2016).

29. Wockner, *supra* note 21.

30. Barbara Surk & Sewell Chan, *Slovenians Overwhelmingly Vote to Repeal Law Allowing Same-Sex Marriage*, N.Y. TIMES, Dec. 22, 2015, at A4.

31. See Randal C. Archibold & Paulina Villegas, *Ruling by Ruling, Mexico Has Legalized Same-Sex Marriage*, N.Y. TIMES, June 14, 2015, at A1. The First Chamber of Mexico's Supreme Court issued a ruling on June 3, 2015 that requires judges to grant injunctions ordering same-sex marriage to individual same-sex couples or to couples who file together. See Wockner, *supra* note 21.

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Despite the advances 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,³² Bulgaria,³³ Burundi,³⁴ Hungary,³⁵ Latvia,³⁶ Lithuania,³⁷ Moldova,³⁸ Montenegro,³⁹ Mozambique,⁴⁰ Nicaragua,⁴¹ Panama,⁴² Poland,⁴³ Rwanda,⁴⁴ Serbia,⁴⁵ the Seychelles,⁴⁶ Slovakia,⁴⁷ Somalia,⁴⁸ South Sudan,⁴⁹

32. BELAR. 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”).

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

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

35. MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, 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”).

36. LAT. 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.”).

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

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

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

40. MOZAM. 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.

41. INSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [CN.], tit. IV, Ch. III, art. 72, LA GACETA, DIARIA OFICIAL [L.G.] 9 January 1987 (“Marriage and stable de facto unions are protected by the State; they rest on the voluntary agreement between a man and a woman.”).

42. PAN. 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.”).

43. POL. 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.”).

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

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

46. SEY. 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.”).

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

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

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

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Tajikistan,⁵⁰ Uganda,⁵¹ Ukraine,⁵² and Vietnam.⁵³ The constitutions of Peru⁵⁴ and Venezuela⁵⁵ also provide for common law marriage only between a man and a woman.

Yet, the march of same-sex marriage continues around the world. For example, a lawsuit was filed in the People's Republic of China in 2015 to recognize same-sex marriage.⁵⁶

C. CIVIL UNIONS, DOMESTIC PARTNERSHIPS, AND OTHER FORMS OF LEGAL
RECOGNITION OF SAME-SEX RELATIONSHIPS FALLING SHORT OF
MARRIAGE

Other jurisdictions that do not yet recognize same-sex marriage may nonetheless provide for civil unions or similar relationships such as registered partnerships, domestic partnerships, reciprocal beneficiary relationships, civil solidarity pacts, and similar relationships. Chile⁵⁷ and Greece,⁵⁸ for example, each adopted civil union and civil partnership laws in 2015.

Some of these legal civil union creations falling short of marriage may be open to both same-sex and opposite-sex couples,⁵⁹ although some jurisdictions (such as the United Kingdom) limit civil unions to same-sex couples.

Unless civil union or similar statutes are repealed, jurisdictions that recently recognized same-sex marriage may now effectively offer same-sex couples the choice of entering into a civil union or lawful marriage. These jurisdictions may also offer same-sex couples in a civil union the option of converting that civil union to a marriage.⁶⁰ As of April 2015, 34 states offered same-sex couples either marriage or civil unions.⁶¹

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

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

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

53. VIET. 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.”).

54. 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.”).

55. VENEZ. 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.”).

56. See Edward Wong & Venessa Piao, *The Case for Same-Sex Marriage in China: A Couple's Lawsuit is a First for the Nation*, N.Y. TIMES, Jan. 28, 2016, at A4.

57. Chile Civil Union Law Comes into Force, BBC (Oct. 22, 2015), <http://www.bbc.com/news/world-latin-america-34602629>.

58. Renee Maltezou & Georgia Kalovyra, *Greece Allows Civil Partnership for Same-Sex Couples*, REUTERS (Dec. 22, 2015, 8:26 PM), <http://www.reuters.com/article/us-greece-rights-vote-idUSKBN0U52HK20151223>.

59. 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.”).

60. See, e.g., 750 ILL. COMP. STAT. 75/65.

61. U.N.H.R.C. Ann. Rep. 2015, *supra* note 16, at 18.

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The lack of legal recognition for same-sex couples can result in mistreatment by state actors, private actors (including healthcare providers), and insurance companies.⁶² Countries that do not protect same-sex couples may see political and legal challenges to provide legal recognition of relationships. Some of these challenges, at least in Europe, may be based on a July 2015 decision of the European Court of Human Rights (ECHR).⁶³ In July 2015, the ECHR ruled in favor of three same-sex couples in *Oliari and Others v. Italy*.⁶⁴ The couples had been denied the right to marry in Italy or to enter into any type of civil union or domestic partnership.⁶⁵ The ECHR found that without same-sex marriage or any form of legal recognition for same-sex couples, 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.”⁶⁶ The ECHR held that Italy’s failure to protect same-sex couples violated Article 8 of the European Convention on Human Rights.⁶⁷ Italy is divided as to how it will comply with the court’s ruling.⁶⁸

D. 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.”⁶⁹ The Global Commission on HIV and the Law also determined that sodomy laws facilitate the spread of HIV/AIDS.⁷⁰ In Caribbean countries with sodomy laws, almost one in four men who have sex with men is HIV-positive; in Caribbean countries without sodomy laws, the rate is one in fifteen men.⁷¹ Although the U.N. Human Rights Committee and other human rights mechanisms have urged states to repeal sodomy laws since the Committee’s 1994 landmark decision in *Toonen v. Australia*, at least seventy-six states still have laws that criminalize and harass people on the basis of their sexual orientation and gender expression.⁷²

62. *Id.*

63. Case of *Oliari and Others v. Italy*, Applications Nos. 18766/11 & 36030/11, HUDOC (July 21, 2015), <http://hudoc.echr.coe.int/eng?i=001-156265>.

64. *Id.*

65. *Id.*, at paras. 45 and 99.

66. *Id.*, at para. 185. See also *Italia obbligata alle unioni gay*, IL GIORNALE DI VICENZA, July 22, 2015, at 1; *Strasburgo condanna l'Italia: "Riconosca le coppie gay"*, IL GIORNALE DI VICENZA, July 22, 2015, at 3.

67. 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.”

European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Sept. 3, 1953, 213 U.N.T.S. 221.

68. See, e.g., Jim Yardley, *Italy Divided Over Allowing Civil Unions: An Outlier in the West Moves on Gay Rights*, N.Y. TIMES, Jan. 25, 2016, at A1.

69. U.N.H.R.C. Ann. Rep. 2015, *supra* note 16, at 12.

70. *Id.* at 14.

71. *Id.*

72. *Id.* at 12-13.

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Same-sex sexual relationships between consenting adults have been legal throughout the United States since the Supreme Court's 2003 ruling in *Lawrence v. Texas*.⁷³ Nonetheless, two men in the state of Louisiana were arrested in 2015 for violating the state sodomy law that was still on the books despite the Supreme Court's ruling in *Lawrence*.⁷⁴ Until these unconstitutional sodomy laws are removed from the statute books, police may continue to harass and threaten to arrest consenting adults for their private sexual conduct. And in another development of 2015, a California judge threw out as patently unconstitutional a proposed state ballot initiative that would have imposed the death penalty for sodomy in California.⁷⁵

Three countries have recently abolished their sodomy laws. São Tomé and Príncipe abolished its sodomy law in 2012, and the Republic of Palau abolished its sodomy laws in 2014.⁷⁶ Palau, for its part, had accepted the recommendation made in 2011 by the U.N. Human Rights Council to repeal laws that criminalized consensual sexual activity between adults of the same sex.⁷⁷ And Mozambique abolished its sodomy law effective in 2015 as part of an overall reform of its colonial criminal code.⁷⁸

The United Kingdom and several Australian states adopted measures to expunge criminal records of convictions for sodomy and other offenses related to consensual homosexuality.⁷⁹

Some other countries have kept, reinstated, or enacted new sodomy laws. The India Supreme Court reinstated that country's sodomy law in 2013, reversing lower court rulings that found the law unconstitutional.⁸⁰ In 2014, The Gambia enacted a criminal code to provide life sentences for homosexual activity.⁸¹ In that same year, Brunei enacted a new criminal code that provided for death by stoning for acts of sodomy.⁸² Other countries that can punish consensual acts of homosexuality with the death penalty include

73. *Lawrence v. Texas*, 539 U.S. 558 (2003). The European Court of Human Rights had reached this conclusion much earlier. See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H. R. (1981). See also *Leung TC William Roy v. Secretary for Justice*, [2005] 3 H.K.L.R.D. 657, para. 150 (C.F.I.) (decision from Hong Kong invoking *Lawrence* to strike down sodomy law); *McCoskar v. State*, [2006] EJHC 500 (court decision from Fiji citing *Lawrence* to strike down Fiji's anti-sodomy law).

74. See Ian Millhauser, *Police Arrest Two Men Under Anti-Sodomy Law Declared Unconstitutional In 2003*, THINKPROGRESS (Feb. 20, 2015, 9:26 AM), <http://thinkprogress.org/justice/2015/02/20/3624719/louisiana-police-arrest-two-men-anti-sodomy-law-declared-unconstitutional-2003/>.

75. See Lisa Leff, *California Judge Agrees to Dismiss Proposed 'Shoot the Gays' Ballot Initiative*, LGBTQ NATION (June 23, 2015), <http://www.lgbtqnation.com/2015/06/california-judge-agrees-to-dismiss-proposed-shoot-the-gays-ballot-measure/>.

76. See Colin Stewart, *Two tiny nations drop anti-gay laws: Palau and Sao Tome*, ERASING 76 CRIMES (Oct. 16, 2014), <http://76crimes.com/2014/10/16/two-tiny-nations-drop-anti-gay-laws-palau-and-sao-tome/>.

77. *Id.*

78. Lei No. 35/2014, Boletim da República, I Serie, No. 105 (Dec. 31, 2014) (entered into effect on June 29, 2015), available at <http://www.loc.gov/law/foreign-news/article/mozambique-new-penal-code-removes-colonial-era-dispositions-against-homosexuality>.

79. U.N.H.R.C. Ann. Rep. 2015, *supra* note 16, at 19.

80. Suresh Kumar Koushal v. Naz Foundation, (2013) Civil Appeal No. 10972, available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070> (India).

81. Gambia Criminal Code (Amendment) Act No. 11 of 2014, sec. 4 (Oct. 9, 2014).

82. See, e.g., James Nichols, *Brunei Law To Allow Death By Stoning For Gay Sex*, HUFFINGTON POST (Apr. 30, 2014, 4:49 PM), http://www.huffingtonpost.com/2014/04/15/brunei-gay-sex-law_n_5154960.html (last updated Feb. 2, 2016); Associated Press, *Brunei Embraces Strict Islamic Laws, Calls for Death by Stoning for Sodomy*, LGBTQ NATION (May 1, 2014), <http://www.lgbtqnation.com/2014/05/brunei-embraces-strict-islamic-laws-calls-for-death-by-stoning-for-sodomy/>.

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the Islamic Republic of Iran, Mauritania, Saudi Arabia, Sudan, Yemen, and parts of Nigeria and Somalia.⁸³

E. ANTI-GAY-PROPAGANDA LAWS

Some countries have recently proposed or enacted “anti-gay-propaganda laws” that purport to protect minors from public discussion or information on “non-traditional sexual relations.”⁸⁴ These countries include Kyrgyzstan, Nigeria, the Republic of Moldova, the Russian Federation, Uganda, and Ukraine.⁸⁵ As the U.N. High Commissioner for Human Rights observed, these anti-gay-propaganda laws “are often vaguely worded and arbitrarily restrict the rights to freedom of expression and assembly.”⁸⁶ These laws “also contribute to ongoing persecution of members of the LGBT community, including young persons who identify or are perceived as LGBT.”⁸⁷ Individuals in those countries that have enacted these laws face arrest as well as acts of violence and discrimination.⁸⁸

F. CONVERSION THERAPY

Efforts to change an individual’s sexual orientation “are now widely regarded by mainstream mental health practitioners as unscientific, ineffective, and mentally and emotionally harmful.”⁸⁹ There is increasing recognition that involuntary conversion therapy may also be a form of torture. In 2014, three members of the U.N. Committee Against Torture questioned the United States as to whether the practice of conversion therapy violates the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁹⁰ And in 2015, the report of the U.N. High Commissioner for Human Rights stated that conversion therapy had “been found to be unethical, unscientific and ineffective and, in some instances, tantamount to torture.”⁹¹

83. U.N.H.R.C. Ann. Rep. 2015, *supra* note 16, at 13.

84. *Id.*

85. *Id.* at 14.

86. *Id.* at 13.

87. *Id.*

88. *Id.* at 14.

89. Arcangelo S. Cella, *A Voice in the Room: The Function of State Legislative Bans on Sexual Orientation Change Efforts for Minors*, 40 AM. J. L. & MED. 113, 114 (2014).

90. See Press Release, Nat’l Ctr. Lesbian Rts., U.N. Committee Raises Concern About LGBT Conversion Therapy in U.S. (Nov. 12, 2014), *available at* <http://www.nclrights.org/press-room/press-release/u-n-committee-raises-concern-about-lgbt-conversion-therapy-in-u-s/>. Although committee members questioned the United States about this issue, the issue was not included in the committee’s concluding observations on the reports submitted by the United States. See Comm. against Torture, Concluding Observations on the Third to Fifth Periodic Reports of the U.S., U.N. Doc. CAT/C/USA/CO/3-5 (2014), *available at* <http://www.state.gov/documents/organization/234772.pdf>. It was also not raised by the United States in its 2015 follow-up response to the Committee Against Torture. See *One-Year Follow-up Response of the United States of America to Recommendations of the Committee Against Torture*, U.S. DEPT. OF STATE (NOV. 27, 2015), *available at* <http://www.state.gov/j/drl/rls/250342.htm>.

91. U.N.H.R.C. Ann. Rep. 2015, *supra* note 16, at 14.

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Some jurisdictions have begun to enact laws to ban conversion therapy against minors. In the United States, conversion therapy bans have been enacted in Illinois,⁹² New Jersey,⁹³ Oregon,⁹⁴ and Washington, D.C.⁹⁵ In 2015, the U.S. Supreme Court declined to hear a case in which counselors argued the conversion therapy ban enacted in New Jersey had denied them their right of free speech under the First Amendment.⁹⁶ Other jurisdictions are expected to enact conversion therapy bans.

In the United Kingdom conversion therapy is not yet illegal, but in January 2015, fourteen health organizations signed a statement that conversion therapy was “potentially harmful and unethical.”⁹⁷

G. GENDER IDENTITY AND EXPRESSION

In the United States, the Equal Employment Opportunity Commission and federal courts now characterize discrimination against transgender persons as sex-based discrimination in violation of Title VII of the Civil Rights Act.⁹⁸

As previously noted, Bangladesh, India, and Nepal give legal recognition to a “third gender”. And new passport policies in Australia and New Zealand allow individuals to choose male, female, or indeterminate gender markers.⁹⁹

Colombia abandoned the requirement for transgender persons to have gender reassignment surgery before the government will recognize their transition.¹⁰⁰

Despite advances in some countries, transgender persons usually cannot obtain legal recognition of their preferred gender, including changes in the name and gender on state-issued identity documents.¹⁰¹ They consequently face difficulties and discrimination in housing, employment, financial credit, international travel, and other matters.¹⁰²

92. Ill. Public Act 99-411 (2015), available at <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=099-0411>; Monique Garcia, *New Year, New Laws in Illinois*, CHICAGO TRIB., Jan. 1, 2016, § 1, at 8; Kim Bellware, *Illinois Bans Gay Conversion Therapy For LGBT Youths*, HUFFINGTON POST (Aug. 20, 2015, 9:42 PM), http://www.huffingtonpost.com/entry/illinois-bans-gay-conversion-therapy_us_55d668b4e4b020c386de2cc4.

93. N.J. STAT. ANN. § 45:1-55 (West 2013), available at http://www.njleg.state.nj.us/2012/Bills/A3500/3371_11.htm.

94. Katy, Steinmetz, *Oregon Becomes Third State to Ban Conversion Therapy on Minors*, TIME (May 19, 2015), <http://time.com/3889687/oregon-conversion-therapy-ban>.

95. Conversion Therapy for Minors Prohibition Amendment Act of 2013, D.C. CODE ANN. § L20-0218 (West 2015), available at <http://lims.dccouncil.us/Legislation/B20-0501?FromSearchResults=true>; see also Aaron C. Davis, *D.C. Bans Gay Conversion Therapy of Minors*, WASH. POST (Dec. 14, 2014), https://www.washingtonpost.com/local/dc-politics/dc-bans-gay-conversion-therapy/2014/12/02/58e6ae4-7a67-11e4-84d4-7c896b90abdc_story.html.

96. See Susan K. Livio, *N.J. Gay-to-Straight Conversion Therapy Ban Survives U.S. Supreme Court Challenge*, NJ.COM, (May 5, 2015, 10:56 AM), http://www.nj.com/politics/index.ssf/2015/05/nj_gay-to-straight_conversion_therapy_ban_left_int.html.

97. See Benjamin Zand, *‘Culture War’ of Gay Conversion Therapy*, BBC (Apr. 23, 2015), <http://www.bbc.com/news/uk-32397465>; NHS England, medical and psychological professionals speak out against gay conversion therapy <http://www.psychotherapy.org.uk/news/memorandum-of-understanding>.

98. See Brian C. Konkler, *Transgender Inclusion Latest Legal Hot Button in Sports*, CHI. DAILY L. BULL., Dec. 15, 2015, at 5.

99. U.N.H.R.C. Ann. Rep. 2015, *supra* note 16, at 19.

100. LESBIAN/GAY LAW NOTES 336 (2015).

101. U.N.H.R.C. Ann. Rep. 2015, *supra* note 16, at 18.

102. *Id.*

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Discrimination against transgender persons often arises in connection with much more basic human needs, such as using a bathroom.¹⁰³

In a positive development for transgender Muslims, the first *madrassa* for transgender Muslims opened in Indonesia.¹⁰⁴ But this year in Malaysia, a Sharia court convicted nine transgender women under a law that prohibits “a male person posing as a woman.”¹⁰⁵

H. SAME-SEX SEXUAL HARASSMENT

Some jurisdictions recognize same-sex sexual harassment. In the United States, one case in 2015 brought an award of compensatory and punitive damages in the amount of \$2.4 million dollars.¹⁰⁶

I. RELIGIOUS FREEDOM

As same-sex marriage progressed, some claimed religious objections against any act that would facilitate a same-sex marriage. An elected court clerk in Kentucky, Kim Davis, was jailed after refusing to issue marriage licenses to same-sex couples despite federal court orders to do so.¹⁰⁷

In response to the growing acceptance of same-sex marriage and non-discrimination laws that prohibit acts of discrimination against lesbian, gay, bisexual, and transgender persons, some jurisdictions introduced legislation styled as “Religious Freedom Restoration Acts.” These legislative efforts were often deemed “flawed” attempts to reverse previous protections against discrimination based on sexual orientation or gender identity, or attempts to allow public servants and private citizens to discriminate based on sexual orientation or gender identity.¹⁰⁸

J. INTERSEX

Australia and Malta are the first countries to prohibit discrimination against intersex persons.¹⁰⁹ In 2013, Australia became the world’s first jurisdiction to prohibit discrimination based on “intersex status.” Subsection 4(1) of Australia’s Sexual Orientation, Gender Identity, and Intersex Status Act of 2013 defined “intersex status” as “having physical, hormonal or genetic features that are: (a) neither wholly female nor wholly male; or (b) a combination of female and male; or (c) neither female nor male.”¹¹⁰

103. Julie Bosman & Motoko Rich, *As Transgender Students Make Gains, Schools Hesitate at Bathrooms*, N.Y. TIMES, Nov. 4, 2015, at A14.

104. Jon Emont, *Transgender Muslims Find a Home for Prayer*, N.Y. TIMES, Dec. 23, 2015, at A8.

105. LESBIAN/GAY LAW NOTES 338 (2015).

106. Patricia Manson, *Same-Sex Suit on Harassment Brings \$2.4 Million*, CHI. DAILY L. BULL., Dec. 16, 2015, at 1.

107. See, e.g., *Kentucky Clerk Who Defied Orders Seeks Reversal of Rulings on Marriage*, N.Y. TIMES, Nov. 4, 2015, at A16.

108. See, e.g., Robert Katz, *Indiana’s Flawed Religious Freedom Law*, 49 IND. L. REV. 37 (2015).

109. U.N.H.R.C. Ann. Rep. 2015, *supra* note 16, at 19.

110. *Sexual Orientation, Gender Identity, and Intersex Status Act 2013* (Cth) s 4(1), available at <https://www.comlaw.gov.au/Details/C2013A00098> (Austl.).

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In 2015, Malta became the first state to prohibit sex-assignment surgery or treatment of intersex minors without their informed consent.¹¹¹

K. BLOOD DONATIONS

In the United States, the Food and Drug Administration ended a lifetime ban on blood donations by gay men.¹¹² Under the previous rule, any man who had sex with another man was barred for life from donating blood. The new rule removes that lifetime ban, but keeps it in place for any man who has had sex with another man in the past year. The new rule ignores modern advances in technology to test for HIV and also ignores situations such as monogamous same-sex couples that are HIV-negative and would pose no risk of transmitting HIV. The rule with its one-year prohibition perpetuates “the stereotype that all gay and bisexual men are inherently dangerous.”¹¹³

II. Violence

A. ACTS OF VIOLENCE

“[U.N.] human rights mechanisms continue to receive reports of homophobic and transphobic violence committed in all regions.”¹¹⁴ Acts of violence are both physical (including murders, beatings, kidnappings, and sexual assaults) and psychological (including threats, arbitrary deprivations of liberty, and forced psychiatric incarceration).¹¹⁵ The U.N. High Commissioner for Human Rights recognizes these attacks as “a form of gender-based violence, driven by a desire to punish individuals whose appearance or behaviour appears to challenge gender stereotypes.”¹¹⁶ Violence motivated by homophobia and transphobia is “in some instances characterized by levels of cruelty exceeding that of other hate crimes.”¹¹⁷

The terrorist organization, the Islamic State of Iraq and Syria (ISIS), has executed at least thirty-six men accused of having homosexual relations.¹¹⁸ The men, who are sometimes as young as fifteen years old, are pushed to their deaths from tall buildings.¹¹⁹

111. U.N.H.R.C. Ann. Rep. 2015, *supra* note 16, at 19. The text of Malta’s Gender Identity, Gender Expression, and Sex Characteristics Act as adopted on April 14, 2015 can be found at <http://justiceservices.gov.mt/Download/Document.aspx?app=lom&itemid=12312&l=1>.

112. Donald G. McNeil, Jr., *F.D.A. Ends Lifetime Ban on Blood Donations by Gay Men, but Caveat Draws Scorn*, N.Y. TIMES, Dec. 22, 2015, at A12.

113. *Id.* See also Matt Simonette, *Controversy Lingers After Blood-Donation Regulations Eased*, WINDY CITY TIMES, Dec. 30, 2015, at 13.

114. U.N.H.R.C. Ann. Rep., *supra* note 16, at 7.

115. *Id.*

116. *Id.*

117. *Id.* at 8.

118. See, e.g., Associated Press, *Inside Look at ISIS’ Brutal Persecution of Gays*, CBS NEWS (Dec. 2, 2015, 7:17 AM), <http://www.cbsnews.com/news/isis-persecution-gay-men-murder-lgbt-muslim-society>; *ISIS Extremists Throw Syrian ‘Gay Couple’ Off a Roof in Palmyra*, ARA NEWS (Dec. 3, 2015), <http://aranews.net/2015/12/isis-extremists-throw-syrian-gay-couple-off-a-roof-in-palmyra>; *ISIS Throws Four Gay Men to Their Death*, LGBTQ NATION (Oct. 5, 2015), <http://www.lgbtqnation.com/2015/10/isis-throws-four-gay-men-to-their-death>.

119. See, e.g., U.N.H.R.C. Ann. Rep. 2015, *supra* note 16, at 9; Tom Wyke & Ollie Gillman, *ISIS Throw 15-Year-Old Boy Off a Roof for Being Gay . . . But the Terror Chief who Raped Him is Let Off*, DAILY MAIL (Jan. 3,

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Murders of gay men, lesbians, and transgender persons were also reported around the world, including countries such as Brazil,¹²⁰ Chile,¹²¹ Jamaica,¹²² the Islamic Republic of Iran,¹²³ Uruguay,¹²⁴ South Africa,¹²⁵ and the United States.¹²⁶

Other acts of violence include kidnappings of gay men who are beaten and humiliated, sometimes with video being posted on social media, and rapes of lesbian women.¹²⁷ Men assumed to be gay in the Syrian Arab Republic have reportedly been raped and tortured by government security agents and non-State armed groups.¹²⁸ Police in Zimbabwe reportedly arrested and beat forty-four members of an LGBT organization.¹²⁹ Other arrests of LGBT persons were reported in countries such as Bangladesh and Egypt. Human rights defenders, in various countries, trying to protect LGBT persons also were subjected to violence and threats.¹³⁰

In the United States, sixteen gay or transgender individuals were allegedly subject to solitary confinement, torture, and ill-treatment including sexual assault while in immigration detention.¹³¹ And, in Guatemala, a transgender woman in detention was allegedly raped more than eighty times.¹³²

B. HATE CRIME LAWS

As stated in a 2015 report of the U.N. High Commissioner for Human Rights, many countries have recently enacted or strengthened anti-hate crime laws. These countries include Albania, Chile, Finland, Georgia, Greece, Honduras, Malta, Montenegro, Portugal, and Serbia.¹³³ Additionally, Brazil, Honduras, Mexico, and Spain established special hate crime prosecution units, and other measures to improve prosecutions of hate crimes were reported in countries including Belgium, Canada, Colombia, Denmark, France, Montenegro, the Philippines, South Africa, Spain, and the United Kingdom.¹³⁴

2016, 4:48 PM), <http://www.dailymail.co.uk/news/article-3382990/ISIS-throw-15-year-old-teenager-roof-gay-terror-chief-raped-let-off.html> (last updated Jan. 4, 2016, 2:47 AM).

120. U.N.H.R.C. Ann. Rep. 2015, *supra* note 16, at 9.

121. *Id.* at 8.

122. Scott Roberts, *Report: Gay Man Stoned to Death in Jamaica*, PINK NEWS (Mar. 10, 2015, 7:01 PM), <http://www.pinknews.co.uk/2015/03/10/report-gay-man-stoned-to-death-in-jamaica/>.

123. Dan Tracer, *14-Year-Old "Hanged from Tree" for Being Gay at Iranian Boys' Summer Camp*, QUEERTY (Jul. 17, 2015), <http://www.queerty.com/14-year-old-hanged-from-tree-for-being-gay-at-iranian-boys-summer-camp-20150717>.

124. U.N.H.R.C. Ann. Rep. 2015, *supra* note 16, at 8.

125. *Id.*

126. *See, e.g., The 21 Trans Women Killed in 2015*, THE ADVOCATE, (Jan. 12, 2016), <http://www.advocate.com/transgender/2015/07/27/these-are-trans-women-killed-so-far-us-2015>; Lila Shapiro, *Record Number of Reported LGBT Homicides So Far In 2015*, HUFFINGTON POST (Apr. 2, 2015), http://www.huffingtonpost.com/2015/04/02/lgbt-homicides_n_6993484.html; *Media Alert*, NAT'L COALITION OF ANTI-VIOLENCE PROGRAMS (Mar. 1, 2015), http://avp.org/storage/documents/webversion_ncavp_ma_national2015.pdf.

127. U.N.H.R.C. Ann. Rep. 2015, *supra* note 16, at 9.

128. *Id.*

129. *Id.* at 10.

130. *Id.* at 9-10.

131. *Id.* at 10.

132. *Id.* at 11.

133. U.N.H.R.C. Ann. Rep. 2015, *supra* note 16, at 11.

134. *Id.*

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III. Other International Developments

A. U.S. DIPLOMATIC REPRESENTATION

At one time, being gay would be grounds for dismissal from the U.S. Foreign Service. Now the United States has six openly gay ambassadors, and U.S. embassies around the world have hosted gay pride events, sometimes marking the first LGBT pride events to be held in those countries.¹³⁵

France has sent an openly gay ambassador to the United States.¹³⁶

B. UNITED NATIONS

In May 2015, the U.N. High Commissioner for Human Rights submitted a report requested by the U.N. Human Rights Council to update a 2011 report on violence and discrimination against individuals based on their sexual orientation and gender identity.¹³⁷ In addition to documenting homophobic and transphobic violence and discrimination, the report makes a number of specific recommendations for individual nations, for national human rights institutions, and for the Human Rights Council.¹³⁸ Among other points, the report emphasized that states “have well-established obligations to respect, protect and fulfill the human rights of all persons within their jurisdiction, including LGBT and intersex persons.”¹³⁹

The United Nations also continued its “Free and Equal” global education campaign to combat homophobia and transphobia.¹⁴⁰ The campaign has reached more than one billion people by 2015.¹⁴¹

C. AFRICAN COMMISSION ON HUMAN AND PEOPLE’S RIGHTS

The African Commission on Human and People’s Rights, in 2014, adopted a resolution that condemned violence and other human rights violations based on actual or imputed sexual orientation and gender identity.¹⁴² The resolution strongly urged African States

to end all acts of violence and abuse, whether committed by State or non-state actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their

135. See Colby Itkowitz, *The Six Openly Gay U.S. Ambassadors Were Together in One Room*, WASH. POST (Mar. 25, 2015), <https://www.washingtonpost.com/blogs/in-the-loop/wp/2015/03/25/the-six-openly-gay-u-s-ambassadors-were-together-in-one-room/>. But see Omar G. Encarnacion, *The Troubled Rise of Gay Rights Diplomacy*, CURRENT HISTORY, Jan. 2016, at 17; Matt Simonette, *Durbin Defends Gay Ambassador in Letter*, WINDY CITY TIMES, Dec. 23, 2015, at 8.

136. LESBIAN/GAY LAW NOTES 337 (2015).

137. U.N.H.R.C. Ann. Rep. 2015, *supra* note 16.

138. *Id.* at 20-22.

139. *Id.* at 5.

140. *Id.* at 4.

141. *Id.* See *The History of the Right to Love (If You’re Gay)*, FREE & EQUAL, www.unfe.org (last visited Mar. 8, 2016).

142. 275: *Resolution on Protection against Violence and other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity*, AFR. COMM’N ON HUM. & PEOPLES’ RTS. (Apr. 28-May 12, 2014), <http://www.achpr.org/sessions/55th/resolutions/275/>.

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imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims.¹⁴³

D. ORGANIZATION OF AMERICAN STATES

The Organization of American States continued to monitor the situation of LGBT persons in the Americas, having in 2014 adopted a resolution that condemned all forms of discrimination based on sexual orientation or gender identity.¹⁴⁴

143. *Id.*

144. *Organization of American States Adopts LGBT Human Rights Resolution*, HUM. RTS. CAMPAIGN (June 6, 2014), <http://www.hrc.org/blog/organization-of-american-states-adopts-lgbt-human-rights-resolution>.