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## Sexual Orientation and Gender Identity

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## Sexual Orientation and Gender Identity

MARK E. WOJCIK\*

This article surveys selected legal developments around the world related to sexual orientation and gender identity during 2019.<sup>1</sup>

### I. Hate Crimes and Violence

LGBT persons continued to face hate crimes and violence around the world in 2019. In El Salvador, a transgender woman who had been deported from the United States was found dead with multiple injuries.<sup>2</sup> Three Salvadoran police officers were charged for her murder.<sup>3</sup> A trans advocacy group in Brazil reported that one trans person was killed in Brazil every forty-eight hours annually.<sup>4</sup> And the International Lesbian, Bisexual, Trans, and Intersex Association for Latin America and the Caribbean reported that an average of four LGBT people are killed each day in Latin America.<sup>5</sup> Brazil, Mexico, and the United States had the highest numbers of murders of transgender persons.<sup>6</sup>

At least two LGBT persons were also killed in Chechnya in 2019.<sup>7</sup>

### II. Sodomy Laws

States that criminalize sexual acts between consenting adults violate international human rights law because sodomy laws, “by their mere existence, violate the rights to privacy and non-discrimination.”<sup>8</sup> 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

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1. Because of space limitations, this article cannot include all the legal developments in sexual orientation and gender identity around the world during 2019. The omission of a development should not suggest that it was not important. For developments during 2018, see Mark E. Wojcik et al., *Sexual Orientation and Gender Identity*, 53 ABA/SIL YIR 263 (2019).

2. Michael K. Lavers, *Top 10 International News Stories of 2019*, WASH. BLADE (Jan. 3, 2020), <https://www.washingtonblade.com/2020/01/01/top-10-international-news-stories-of-2019/>.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Rep. of the U.N. High Comm’n for Human Rights, *Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, U.N. Doc. A/HRC/29/23 at 12, ¶ 43 (May 4, 2015) [hereinafter A/HRC/29/23].

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*Toonen v. Australia*, at least sixty-nine states still have laws that criminalize and harass people on the basis of their sexual orientation and gender expression.<sup>9</sup> 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.<sup>10</sup>

Prosecutions for violation of a country's sodomy laws are not theoretical.<sup>11</sup> For example, a same-sex couple in Zambia was sentenced to fifteen years imprisonment.<sup>12</sup> And two Vietnamese men were convicted of committing "immoral activities" in a hotel in Malaysia.<sup>13</sup>

In response to global protests, the Kingdom of Brunei reportedly put a moratorium on executions under that country's new penal code, but it did not repeal or suspend its sodomy law.<sup>14</sup> Also in 2019, lawmakers in Gabon approved a new penal code that criminalizes "les relations sexuelles entre personnes du même sexe" (sexual relations between people of the same sex).<sup>15</sup>

In 2019, the nations of Angola and Botswana decriminalized homosexuality.<sup>16</sup> The National Assembly of Angola approved a new penal code in January 2019 that decriminalized consensual, same-sex sexual activity.<sup>17</sup> And in June 2019, the High Court of Botswana ruled in *Motshidiemang v. Attorney General* that Botswana's sodomy law was unconstitutional.<sup>18</sup> The Botswana government reportedly has appealed that 132-page ruling.<sup>19</sup>

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9. *Id.* at 12–13, ¶¶ 43–44; see Benjamin Weinthal, *US urges 69 nations, including Iran, to decriminalize homosexuality*, JERUSALEM POST (Dec. 21, 2019), <https://www.jpost.com/Middle-East/US-urges-69-nations-including-Iran-Yemen-decriminalize-homosexuality-611618>.

10. A/HRC/29/23, *supra* note 8, at 13, ¶ 46.

11. See, e.g., Bukola Adebayo, *Nigeria Is Trying 47 Men Arrested in a Hotel Under its Anti-Gay Laws*, CNN (Dec. 12, 2019), <https://www.cnn.com/2019/12/12/africa/nigeria-men-trial-anti-gay-law-intl/index.html>.

12. *Zambia: 15-Year Prison Sentences 'Shocked the World'*, RIGHTS AFRICA (Nov. 29, 2019), <https://rightsafrika.com/2019/11/29/zambia-15-year-prison-sentences-shocked-the-world/>.

13. Balvin Kaur, *Gay Vietnamese tourists fined for committing 'immoral act' in Penang hotel*, NEW STRAITS TIMES (Nov. 25, 2019), <https://www.nst.com.my/news/crime-courts/2019/11/541938/gay-vietnamese-tourists-fined-committing-immoral-act-penang-hotel>.

14. Lavers, *supra* note 2.

15. Gabon Code Pénal, Loi No. 042/2018, art. 402; Lavers, *supra* note 2; Rachel Savage, *Gabon Bans Gay Sex as Global Pace of Reform Falters*, OPENLY (Dec. 13, 2019), <https://www.openlynews.com/i/?id=62aa889f-1ba6-4694-ae10-f06febc7aa80>.

16. Lavers, *supra* note 2.

17. Frans Viljoen, *Abolition of Angola's Anti-gay Laws May Pave the Way for Regional Reform*, THE CONVERSATION (Feb. 14, 2019), <https://theconversation.com/abolition-of-angolas-anti-gay-laws-may-pave-the-way-for-regional-reform-111432>.

18. *Motshidiemang v. Attorney General*, High Ct. of Bots., No. MAHGB-000591-16 (June 11, 2019).

19. Lavers, *supra* note 2; see generally *Motshidiemang*, No. MAHGB-000591-16.

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In May 2019, the High Court of Kenya at Nairobi upheld that country's sodomy law in the case of *EG v. Attorney General*.<sup>20</sup> In the previous year of 2018, the Supreme Court of India declared India's sodomy law (Section 377 of the Indian Penal Code) to be unconstitutional under the Indian Constitution.<sup>21</sup> In *Johar v. Union of India*,<sup>22</sup> the Supreme Court of India decriminalized all consensual sex among adults in private, including consensual sex between persons of the same gender.<sup>23</sup> Other parts of Section 377 remain in force, including its provisions relating to sex with minors, bestiality, and non-consensual sexual acts (such as rape).<sup>24</sup>

In 2019, India's sovereign neighbor, the Kingdom of Bhutan, made substantial progress toward repealing its own sodomy law. The National Assembly (the lower house of the Bhutanese parliament) voted in June 2019 to decriminalize same-sex relationships.<sup>25</sup> The Bhutan Penal Code (2004) had defined the offence of "unnatural sex" when the defendant "engages in sodomy or any other sexual conduct that is against the order of nature."<sup>26</sup> The offense was a misdemeanor under Bhutanese law<sup>27</sup> and no one was known to have ever been prosecuted under the law,<sup>28</sup> but its presence on the statute books violated the rights of privacy and non-discrimination. Oddly enough, despite having a criminal sodomy statute, the category of "sexual orientation" is a protected category of non-discrimination under Bhutan's Consumer Protection Law.<sup>29</sup> Additionally, the Constitution of Bhutan provides that "[a]ll persons are equal before the law and are entitled to equal and effective protection of the law and shall not be discriminated against on the grounds of race, sex, language, religion, politics, or other status."<sup>30</sup> The category of "other status" can be read to include both sexual orientation and gender identity. The legislation to repeal Bhutan's sodomy law will next go to the National Council (the upper chamber of the Bhutanese parliament).<sup>31</sup>

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20. See Karan Gupta, *Kenya and LGBT Rights – EG v the Hon. Attorney-General*, IACL-AIDC BLOG (July 24, 2019), <https://blog-iacl-aidc.org/indian-young-scholars/2019/7/24/kenya-and-lgbt-rights-eg-v-the-hon-attorney-general>.

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

22. *Johar v. Union of India*, (2016) W. P. (Crl.) No. 76 of 2016 (Supreme Court of India).

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

24. *See id.* at 165, ¶ 253(xvii).

25. *Bhutan: Historic Opportunity to Decriminalize Same-Sex Relationships*, AMNESTY INT'L (Jan. 9, 2020), <https://www.amnesty.org/en/latest/news/2020/01/bhutan-historic-opportunity-to-decriminalize-same-sex-relationships/>; *see also* Sonam Chuki, *Being LGBT: Their Status and Rights in Bhutan*, 20 AUSTL. J. ASIAN L., art. 10: 1-8 (2019).

26. Bhutan Penal Code § 213 (2004).

27. *Id.* § 214.

28. *See, e.g., Bhutan: Historic Opportunity to Decriminalize Same-Sex Relationships supra* note 25.

29. BHUTAN CONSUMER PROTECTION RULES AND REGULATIONS § 8(c) (2015).

30. BHUTAN CONST. 2008, art. 7(15), *available at* [https://www.constituteproject.org/constitution/Bhutan\\_2008.pdf?lang=en](https://www.constituteproject.org/constitution/Bhutan_2008.pdf?lang=en).

31. *Bhutan: Historic Opportunity to Decriminalize Same-Sex Relationships supra* note 25.

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In December 2019, the Court of Appeal of Belize affirmed a decision from 2016 that the sodomy statute in section 53 of the Belize Criminal Code was void because it violated the constitutional rights to dignity, equality before the law, privacy, freedom of expression, and non-discrimination on the grounds of sex.<sup>32</sup>

### III. Equality and Non-Discrimination

#### A. VISIBILITY

Visibility of LGBT persons is a precursor to achieving equality and non-discrimination based on sexual orientation and gender identity. The United States saw its first openly-gay Presidential candidate Pete Buttigieg, the former Mayor of South Bend, Indiana, and a veteran of the war in Afghanistan.<sup>33</sup> And the highest openly-gay person in the Trump administration was the U.S. Ambassador to Germany.<sup>34</sup>

The cities of Chicago, Illinois and Bogota, Colombia each had openly lesbian mayors.<sup>35</sup>

In the United Kingdom, at least forty-six out of 650 members of the new British parliament are openly LGBT.<sup>36</sup>

On September 24, 2019, Xavier Better, the Prime Minister of Luxembourg, became the first openly gay head of government to address LGBT issues at the U.N. General Assembly.<sup>37</sup>

#### B. NON-DISCRIMINATION BASED ON SEXUAL ORIENTATION

With the adoption of a new Constitution in Cuba during 2019, ten countries now expressly protect sexual orientation under their national

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32. Emma Eastwood, *Belize Court Upholds Finding That LGBT People Are Protected by Non-Discrimination Laws, Major Victory for Human Rights*, HUMAN DIGNITY TRUST (Dec. 30, 2019), <https://www.humandignitytrust.org/news/belize-court-upholds-finding-that-lgbt-people-are-protected-by-non-discrimination-laws-major-victory-for-human-rights/>.

33. See, e.g., Chris Johnson, *The Top National News Stories of 2019*, WASH. BLADE (Dec. 31, 2019), <https://www.washingtonblade.com/2019/12/31/the-top-national-news-stories-of-2019/>; Chris Johnson, *Buttigieg Says Nation 'Absolutely' Ready for Gay President*, WASH. BLADE (Dec. 13, 2019), <https://www.washingtonblade.com/2019/12/13/buttigieg-says-nation-absolutely-ready-for-gay-president/>.

34. Ariel Jao, *Openly Gay U.S. Ambassador to Germany Makes Republican History*, NBC (Apr. 27, 2018), <https://www.nbcnews.com/feature/nbc-out/openly-gay-u-s-ambassador-germany-makes-republican-history-n869641>.

35. *La alcaldesa electa de Bogotá Claudia López se casará con una senadora colombiana [Bogota Mayor-Elect Claudia López to Marry Colombian Senator]*, EL DIARIO (Dec. 13, 2019), [https://www.eldiario.es/politica/alcaldesa-Bogota-Claudia-Lopez-colombiana\\_0\\_973602677.html](https://www.eldiario.es/politica/alcaldesa-Bogota-Claudia-Lopez-colombiana_0_973602677.html).; John Blake, *The "Terrible" Hypocrisy That Got Chicago's First Black Lesbian Mayor Elected* (Apr. 7, 2019), <https://www.cnn.com/2019/04/07/us/chicago-gay-woman-mayor-black-church/index.html>.

36. Carmen Aguilar García et al., *General Election: 2019 Heralds the Most Diverse Parliament for Gender and Ethnicity*, SKY NEWS (Dec. 16, 2019), <https://news.sky.com/story/general-election-2019-heralds-the-most-diverse-parliament-for-gender-and-ethnicity-11885529>.

37. Lavers, *supra* note 2.

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constitutions: Bolivia,<sup>38</sup> Cuba,<sup>39</sup> Ecuador,<sup>40</sup> Fiji,<sup>41</sup> Kosovo,<sup>42</sup> Malta,<sup>43</sup> Mexico,<sup>44</sup> Portugal,<sup>45</sup> South Africa,<sup>46</sup> and Sweden.<sup>47</sup> “Sexual orientation” is also protected under the Human Rights Act of New Zealand,<sup>48</sup> the Northern Ireland Act 1998, as amended,<sup>49</sup> and the Scotland Act 1998, as amended.<sup>50</sup> “Gender identity” is also expressly protected as an additional category under the constitutions of Bolivia,<sup>51</sup> Cuba,<sup>52</sup> Ecuador,<sup>53</sup> and Malta.<sup>54</sup> The Constitution of Fiji was the first to protect explicitly three categories: sexual orientation, gender identity, and gender expression.<sup>55</sup>

In the United States, the U.S. Supreme Court heard oral arguments in October 2019 in three cases considering whether federal statutory protections “based on sex” extend to protect against discrimination based on

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38. PLURINATIONAL STATE OF BOLIVIA CONST. Feb. 7, 2009, art. 14(II), *available at* [https://www.constituteproject.org/constitution/Bolivia\\_2009.pdf](https://www.constituteproject.org/constitution/Bolivia_2009.pdf).

39. CUBA CONST. Feb. 24, 2019, art. 42, *available at* [https://www.constituteproject.org/constitution/Cuba\\_2019.pdf?lang=en](https://www.constituteproject.org/constitution/Cuba_2019.pdf?lang=en); See Lázaro Javier Chirino, *Cuba analizará nuevo Código de Familia en 2021 [Cuba Will Analyze New Family Code in 2021]*, CIBERCUBA (Dec. 21, 2019), <https://www.cibercuba.com/noticias/2019-12-21-u199482-e199482-s27061-cuba-analizara-marzo-2021-nuevo-codigo-familia>. (noting that although Cuba adopted a new constitution protecting both sexual orientation and gender identity, the country has deferred revisions to its family law that would have recognized same-sex marriage.); See Lavers, *supra* note 2 (Cuba also arrested individuals who took part in an unsanctioned LGBT march in Havana on May 11, 2020).

40. ECUADOR CONST. Jan. 31, 2011, arts. 11(2), 83(14), *available at* <https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

41. FIJI CONST. Sept. 6, 2013, art. 26(3)(a), *available at* [https://www.constituteproject.org/constitution/Fiji\\_2013.pdf?lang=en](https://www.constituteproject.org/constitution/Fiji_2013.pdf?lang=en) (protecting both gender identity and expression).

42. REPUBLIC OF KOSOVO CONST. Jan. 27, 2016, art. 24(2), *available at* [https://www.constituteproject.org/constitution/Kosovo\\_2016.pdf?lang=en](https://www.constituteproject.org/constitution/Kosovo_2016.pdf?lang=en).

43. MALTA CONST. 2016, arts. 32, 45(3), & 45(5)(b), *available at* [https://www.constituteproject.org/constitution/Malta\\_2016.pdf?lang=en](https://www.constituteproject.org/constitution/Malta_2016.pdf?lang=en).

44. Constitución Política de los Estados Unidos Mexicanos, CP, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014, art. 1 (Mex.).

45. CONSTITUIÇÃO DA REPUBLICA PORTUGUESA [CONSTITUTION] art. 13(2) (Port.).

46. S. AFR. CONST. 2012, art. 9(3).

47. REFERINGSFORMEN [RF] [CONSTITUTION] 1:2, 2:12 (Swed.); See also Freedom of the Press Act, ch. 7, art. 4. Tryckfrihetsförordning [TF] [Constitution] 1949:105 (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, color, national or ethnic origin, religious faith or sexual orientation.).

48. Human Rights Act 1993, pt 2, subpt 3, art 21(1)(m); pt 2, subpt 5, art 27(2); pt 2, subpt 9, art 45; & pt 2, subpt 11, art 59 (N.Z.).

49. Northern Ireland Act 1998 c. 47, § 75(1)(a).

50. Scotland Act 1998 c. 46, sch. 5, pt. 2, § L2.

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

52. CUBA CONST. art. 42 (2019).

53. ECUADOR CONST., arts. 11(2) & 83(14).

54. A/HRC/29/23, *supra* note 8, at 19, ¶ 72.

55. FIJI CONST., art. 26(3)(a).

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sexual orientation and gender identity.<sup>56</sup> Decisions in those cases are expected by June 2020.<sup>57</sup>

Also in the United States, a jury awarded nearly \$20 million to a gay police sergeant who had claimed that the St. Louis County Police Department had failed to promote him based on sex stereotyping and retaliated against him for filing a discrimination lawsuit.<sup>58</sup>

Only twenty-one states, the District of Columbia, Guam, and Puerto Rico have statutes that protect against employment discrimination based on sexual orientation and gender identity.<sup>59</sup> A proposed federal statute, the Equality Act, passed the U.S. House of Representatives but was blocked in the U.S. Senate.<sup>60</sup> If passed, the Equality Act would amend the Civil Rights Act of 1964 to prohibit anti-LGBT discrimination in housing, employment, public accommodation, federal programs, federal jury service, education, and credit.<sup>61</sup>

### C. NON-DISCRIMINATION BASED ON GENDER IDENTITY

Several countries afford various levels of legal recognition to a non-binary third gender (neither male nor female). These countries include Australia,<sup>62</sup> Austria,<sup>63</sup> Bangladesh,<sup>64</sup> Canada,<sup>65</sup> Chile,<sup>66</sup> Denmark,<sup>67</sup> India,<sup>68</sup> Nepal,<sup>69</sup> the

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56. *Bostock v. Clayton Cty., Ga.*, 139 S. Ct. 1599 (2019); *Altitude Express, Inc. v. Zarda*, 140 S. Ct. 34 (2019) (considering whether “based on sex” includes sexual orientation); *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, 139 S. Ct. 1599 (2019) (considering whether “based on sex” includes gender identity); See Michelle Phillips & Christopher Repole, *U.S. Supreme Court to Hear Arguments on LGBTQ+ Workplace Protections under Title VII*, JACKSONLEWIS (Oct. 7, 2019), <https://www.jacksonlewis.com/publication/us-supreme-court-hear-arguments-lgbtq-workplace-protections-under-title-vii>.

57. Phillips & Repole, *supra* note 56.

58. Heather Murphy, *‘Tone Down Your Gayness’: Police Sergeant Is Awarded \$20 Million in Discrimination Case*, N.Y. TIMES (Oct. 29, 2019), <https://www.nytimes.com/2019/10/29/us/gay-police-officer-st-louis.html>; see also Elizabeth A. Eisele, *Sergeant Who Won Gay Discrimination Lawsuit to Lead Police Department’s Diversity Unit*, KMOV (Dec. 12, 2019), [https://www.kmov.com/news/sergeant-who-won-gay-discrimination-lawsuit-to-lead-police-department/article\\_082caf20-1d48-11ea-97b9-afeadd995fb0.html](https://www.kmov.com/news/sergeant-who-won-gay-discrimination-lawsuit-to-lead-police-department/article_082caf20-1d48-11ea-97b9-afeadd995fb0.html) (“Keith Wildhaber, who won a \$19 million discrimination lawsuit saying he was passed over for promotion because he is gay, will be the first commander of the St. Louis County Police Department’s Diversity and Inclusion Unit.”).

59. Kerith Conron & Shoshana Goldberg, *LGBT People in the U.S. Not Protected by State Nondiscrimination Statutes*, UCLA WILLIAMS INST. (Mar. 2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Equality-Act-March-2019.pdf>.

60. See Johnson, *supra* note 33.

61. *Id.*

62. 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*, GUARDIAN (Sept. 15, 2011), <https://www.theguardian.com/world/2011/sep/15/australian-passports-third-gender-option; A/HRC/29/23>.

63. 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/foreignnews/article/austria-court-allows-intersex-individuals-to-register-third-gender-other-than-male-or>

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Netherlands,<sup>70</sup> New Zealand,<sup>71</sup> Portugal,<sup>72</sup> and Uruguay.<sup>73</sup> These jurisdictions may issue gender-neutral birth certificates, passports, and other official documents.<sup>74</sup>

In the United States, the states of California, Illinois, and Oregon have made advances in recognizing intersexuality and in making it easier to change one's gender marker on birth certificates and other documents.<sup>75</sup>

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female/; Verfassungsgerichtshof [VfGH] [Constitutional Court], June 15, 2018, Erkenntnis und Beschlüsse des Verfassungsgerichtshofes [VfSlg] No. 77/2018-9 (Austria); *see also* 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](https://www.ilga-europe.org/sites/default/files/non-binary_gender_registration_models_in_europe_0.pdf).

64. A/HRC/29/23, *supra* note 8, at 19, ¶ 73.

65. *See, e.g.*, Mythli Sampathkumar, *Canada to add third gender option to next census*, INDEPENDENT (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*, GUARDIAN (Aug. 31, 2017), <https://www.theguardian.com/world/2017/aug/31/canada-introduces-gender-neutral-x-option-on-passports>.

66. *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/>.

67. *See, e.g.*, Fikri, *Denmark's New Law Makes Legal Gender Recognition a Lot Easier*, AUTOSTRADDE (Sept. 4, 2014), <https://www.autostraddle.com/denmarks-new-law-makes-legal-gender-recognition-a-lot-easier-253562>.

68. *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 43:4 INTERNATIONAL LAW NEWS 1 (Fall 2014), available at [https://www.americanbar.org/groups/international\\_law/publications/international\\_law\\_news/2014/fall/male\\_female\\_other\\_india\\_requires\\_legal\\_recognition\\_a\\_third\\_gender/](https://www.americanbar.org/groups/international_law/publications/international_law_news/2014/fall/male_female_other_india_requires_legal_recognition_a_third_gender/).

69. *See, e.g.*, Michael Bochenek & 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 8.

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

71. *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>.

72. 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.")

73. 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>.

74. *See, e.g.*, *Non-Binary*, EQUAL RECOGNITION, <http://equalrecognition.scot/non-binary> (last visited June 1, 2020).

75. *See* 410 ILL. COMP. STAT. 535/1(15) (2019) (defining "intersex condition"); 410 ILL. COMP. STAT. 535/17(1)(d) (2019) (easing procedure to correct a birth certificate); *See also* Mary

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On the federal level, a federal district court in Colorado had ordered the U.S. State Department in 2018 to issue a passport to Dana Alix Zzyym, a U.S. Navy veteran who identifies as non-binary: neither male nor female.<sup>76</sup> Dana is otherwise qualified to obtain a passport but was requesting the letter “X” to indicate gender rather than “M” (male) or “F” (female).<sup>77</sup> Although some other countries and the International Civil Aviation Organization (ICAO) provide for travel documents that use “X” to indicate gender,<sup>78</sup> the U.S. State Department refused to issue such a passport.<sup>79</sup> The State Department argued that requiring binary gender markers: (1) ensured the accuracy and verifiability of the passport holder’s identity; (2) determined a person’s eligibility to receive a passport; (3) ensured easy verification of the passport holder’s identity in domestic contexts; (4) was necessary because there is no medical consensus on how to define a third sex; and (5) would be expensive and time-consuming for the State Department system to alter.<sup>80</sup> The federal district court found these arguments to be arbitrary and capricious<sup>81</sup> and it enjoined the State Department “from relying upon its binary-only gender marker policy to withhold the requested passport from Dana.”<sup>82</sup> The trial court denied a stay while the federal government filed an appeal with the Tenth Circuit.<sup>83</sup> Oral arguments before the Tenth Circuit were scheduled for January 22, 2020.<sup>84</sup>

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.”<sup>85</sup>

#### IV. Marriage Equality

##### A. RECOGNIZING SAME-SEX MARRIAGE

Marriage equality continues to expand around the world. As we began 2019, same-sex marriage was legal in Argentina, Australia, Belgium, Brazil,

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Emily O’Hara, *Oregon Becomes First State to Add Third Gender to Driver’s Licenses*, NBC NEWS (June 15, 2017), <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 TODAY (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/>.

76. *Zzyym v. Pompeo*, 341 F.Supp.3d 1248, 1261 (D. Colo. Sept. 19, 2018).

77. *Id.* at 1251.

78. *Id.*

79. *Id.* at 1251, 1254 (before 1976, U.S. passports did not indicate gender).

80. *Id.* at 1256–57, 1258.

81. *Id.* at 1256.

82. *Zzyym*, 341 F.Supp.3d at 1260.

83. *See Zzyym v. Pompeo*, No. 15-cv-02362-RBJ, 2019 WL 764577, at \*4 (D. Colo. Feb. 21, 2019) (denying motion to stay judgment pending appeal).

84. *See Zzyym v. Pompeo*, 958 F.3d 1014, 1019 (10th Cir. 2020).

85. *McEwan v. Att’y Gen. of Guyana*, [2018] CCJ 30, para 96 (AJ).

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Canada, Colombia, Denmark, Ecuador, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, the United States, and Uruguay.<sup>86</sup> In 2019, same-sex marriage also became a reality for Austria, Ecuador, and Taiwan.<sup>87</sup> And in January 2020, same-sex marriage became legal in Northern Ireland, finally joining England, Wales, Scotland, and all but five overseas British territories that still lack marriage equality.<sup>88</sup> In one of those remaining five territories—the Cayman Islands—the Cayman Islands Court of Appeal in November 2019 “ordered the government to immediately provide the necessary legislation, equal to marriage, for same-sex couples, after allowing an appeal” against an earlier case that had legalized same-sex marriage in the Cayman Islands.<sup>89</sup>

Costa Rica is slated to have same-sex marriage on May 26, 2020, the date when a 2018 ruling by the Constitutional Chamber of the Supreme Court of Justice of Costa Rica will take effect.<sup>90</sup> The Constitutional Court ruling in Costa Rica directly resulted from the Inter-American Court of Human Rights’ November 2017 marriage-equality ruling, which instructed Costa Rica and thirteen other nations without marriage equality to let same-sex couples marry.<sup>91</sup>

The Constitutional Chamber of the Supreme Court of Justice of El Salvador is expected to rule on same-sex marriage in that country before the end of March 2020.<sup>92</sup> And the Chilean Senate took a “first step” in January 2020 toward approving marriage equality for Chile, but the legislation is

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86. Rex Wockner, *Marriage Equality Around the World*, GLOBAL MARRIAGE EQUALITY (May 27, 2020), <https://wockner2.blogspot.com>.

87. *Id.*

88. *See, e.g.*, Peter Coulter, *Same-Sex Marriage Now Legal in Northern Ireland*, BBC NEWS (Jan. 13, 2020), <https://www.bbc.com/news/uk-northern-ireland-51086276>; Wockner, *supra* note 86 (noting the five British territories still lacking marriage equality are Anguilla, the British Virgin Islands, the Cayman Islands, Montserrat, and Turks and Caicos Islands); *see also Sark Becomes Last British Isle to Allow Same-Sex Marriage*, BBC NEWS (Dec. 18, 2019), <https://www.bbc.com/news/world-europe-guernsey-50786908>.

89. *See Gov’t Ordered to Legalise Gay Unions*, CAYMAN NEWS SERV. (Nov. 7, 2019), <https://caymannewsservice.com/2019/11/gov-ordered-legalise-gay-unions/>; *but see Activists Urge Action on LGBT Equality*, CAYMAN NEWS SER. (Dec. 30, 2019), <https://caymannewsservice.com/2019/12/activists-urge-action-on-lgbt-equality/>.

90. *See Ingrese a su cuenta para continuar disfrutando de nuestro contenido [Room IV Gives 18 Months for Homosexual Marriage to Enter into Force]*, LA NACION (Aug. 8, 2018), <https://www.nacion.com/el-pais/politica/sala-iv-da-18-meses-para-que-entre-en-vigencia-el/CZK6BUA5GRFSRJM7H6H25BLNY/story/> (The Constitutional Chamber of the Supreme Court of Justice of Costa Rica struck down the nation’s ban on marriage equality on Aug. 8, 2018, but delayed its ruling from taking effect until May 26, 2020 (18 months after it was published in the Judicial Bulletin).); *see also* Rex Wockner, *Worldwide Marriage Equality Watch List*, GLOBAL MARRIAGE EQUALITY (Jan. 20, 2020), <https://wockner2.blogspot.com/2018/09/worldwide-marriage-equality-watch-list.html> (Costa Rica).

91. Wockner, *supra* note 90.

92. Jaime López, *Sala de lo Constitucional resolvería demanda sobre matrimonio igualitario en los primeros tres meses de 2020 [Constitutional Chamber Would Resolve a Lawsuit on Equal Marriage in the First Three Months of 2020]*, ELSALVADOR.COM (Jan. 6, 2020), <https://www.elsalvador.com/>

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expected to face conservative opposition in the Chamber of Deputies.<sup>93</sup> Other countries that may next achieve marriage equality include the Czech Republic, Honduras, Japan, Panama, Peru, Switzerland, and Thailand.<sup>94</sup>

Mexico has same-sex marriage in eighteen of its thirty-one states and in the Federal District of Mexico City. But all Mexican states must recognize lawful same-sex marriages performed in other Mexican states.<sup>95</sup> 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.<sup>96</sup>

Same-sex marriage is recognized in all U.S. states and territories with the single exception of American Samoa.<sup>97</sup>

**B. OPPOSING SAME-SEX MARRIAGE**

Despite the advances in marriage equality around the world, some 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,<sup>98</sup> Bolivia,<sup>99</sup> Bulgaria,<sup>100</sup> Burundi,<sup>101</sup> Honduras,<sup>102</sup>

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noticias/nacional/sala-de-lo-constitucional-resolveria-demanda-sobre-matrimonio-igualitario-en-los-primeros-tres-meses-de-2020/674550/2020/.

93. *Chilean Congress Takes Tentative Step Toward Marriage Equality*, BUENOS AIRES TIMES (Jan. 16, 2020), <https://www.batimes.com.ar/news/latin-america/chilean-congress-approves-first-step-toward-marriage-equality.phtml>.

94. See Wockner, *supra* note 90; *LGBT Rights Group Petitions Parliament on Gay Marriage Rights*, CHIANG RAI TIMES (Dec. 19, 2019), <https://www.chiangraitimes.com/thailand-national-news/news-asia-thailand/lgbt-rights-group-petitions-parliament-on-gay-marriage-rights/>; Aekarach Sattaburuth, *Activists Broaden Push for Same-Sex Marriage*, BANGKOK POST (Dec. 18, 2019), <https://www.bangkokpost.com/thailand/general/1819024/activists-renew-push-for-same-sex-marriage> (LGBT activists in Thailand “are broadening their push for an amendment to the Civil and Commercial Code in a bid to allow people to legally wed, regardless of gender.”).

95. See, e.g., 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>.

96. Rex Wockner, *Mexico’s Wild Ride to Marriage Equality*, GLOBAL MARRIAGE EQUALITY (Jan. 2, 2020), <https://wockner2.blogspot.com/2018/09/mexicos-wild-ride-to-marriage-equality.html>.

97. Ili Sagapolutele & Jennifer Sinco Kelleher, *American Samoa questions gay marriage validity in territory*, LGBTQ NATION (July 10, 2015), <https://www.lgbtqnation.com/2015/07/american-samoa-questions-gay-marriage-validity-in-territory/>; but see Daniel Villareal, *A Gay Criminal Case Could Help Bring Marriage Equality to American Samoa*, LGBTQ NATION (Nov. 27, 2019), <https://www.lgbtqnation.com/2019/11/gay-criminal-case-help-finally-bring-marriage-equality-american-samoa/>.

98. CONSTITUTION OF THE REPUBLIC OF BELARUS Oct.17, 2004, art. 32.

99. CONSTITUTION OF BOLIVIA 2009, art. 63(I).

100. BULGARIA CONSTITUTION July 12, 1991, art. 46(1).

101. CONSTITUTION OF BURUNDI 2018, art. 29, [https://www.constituteproject.org/constitution/Burundi\\_2018.pdf?lang=en](https://www.constituteproject.org/constitution/Burundi_2018.pdf?lang=en).

102. POLITICAL CONSTITUTION OF THE REPUBLIC OF HONDURAS 2013, arts. 112, 116, [https://www.constituteproject.org/constitution/Honduras\\_2013.pdf?lang=en](https://www.constituteproject.org/constitution/Honduras_2013.pdf?lang=en).

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Hungary,<sup>103</sup> Latvia,<sup>104</sup> Lithuania,<sup>105</sup> Moldova,<sup>106</sup> Montenegro,<sup>107</sup> Mozambique,<sup>108</sup> Nicaragua,<sup>109</sup> Panama,<sup>110</sup> Poland,<sup>111</sup> Rwanda,<sup>112</sup> Serbia,<sup>113</sup> the Seychelles,<sup>114</sup> Slovakia,<sup>115</sup> Somalia,<sup>116</sup> South Sudan,<sup>117</sup> Tajikistan,<sup>118</sup> Uganda,<sup>119</sup> Ukraine,<sup>120</sup> and Vietnam.<sup>121</sup> The constitutions of Peru<sup>122</sup> and Venezuela<sup>123</sup> also provide for common law marriage only between a man and a woman.

**C. CIVIL UNIONS AND OTHER FORMS OF LEGAL RECOGNITION  
THAT FALL 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.<sup>124</sup> Some of these legal creations may be open to both same-sex and opposite-

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103. MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY 2011, art. L(1), [https://www.constituteproject.org/constitution/Hungary\\_2011.pdf](https://www.constituteproject.org/constitution/Hungary_2011.pdf).

104. CONSTITUTION OF THE REPUBLIC OF LATVIA Oct. 4, 2018, art. 110.

105. CONSTITUTION OF THE REPUBLIC OF LITHUANIA Mar. 20, 2003, art. 38.

106. CONSTITUTION OF THE REPUBLIC OF MOLDOVA Mar. 29, 2016, art. 48(2).

107. CONSTITUTION OF MONTENEGRO 2007, art. 17, [https://www.constituteproject.org/constitution/Montenegro\\_2007.pdf](https://www.constituteproject.org/constitution/Montenegro_2007.pdf).

108. CONSTITUTION OF THE REPUBLIC OF MOZAMBIQUE 2007, art. 14(1), [https://www.constituteproject.org/constitution/Mozambique\\_2007?lang=en](https://www.constituteproject.org/constitution/Mozambique_2007?lang=en).

109. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [CONSTITUTION] 2005, art. 72, f [https://www.constituteproject.org/constitution/Nicaragua\\_2005.pdf](https://www.constituteproject.org/constitution/Nicaragua_2005.pdf).

110. CONSTITUTION OF PANAMA 2004, art. 58, [https://www.constituteproject.org/constitution/Panama\\_2004.pdf?lang=en](https://www.constituteproject.org/constitution/Panama_2004.pdf?lang=en).

111. CONSTITUTION OF THE REPUBLIC OF POLAND Apr. 2, 1997, art. 18.

112. CONSTITUTION OF THE REPUBLIC OF RWANDA May 26, 2003, art. 26.

113. CONSTITUTION OF THE REPUBLIC OF SERBIA Sept. 30, 2006, art. 62.

114. CONSTITUTION OF THE REPUBLIC OF SEYCHELLES June 18, 1993, art. 32(2).

115. SLOVAK: ÚSTAVA SLOVENSKEJ REPUBLIKY [CONSTITUTION] 2014, art. 41(1), [https://www.constituteproject.org/constitution/Slovakia\\_2014.pdf](https://www.constituteproject.org/constitution/Slovakia_2014.pdf).

116. FEDERAL REPUBLIC OF SOMALIA [CONSTITUTION] June 12, 2012, art. 28(5).

117. TRANSITIONAL CONSTITUTION OF THE REPUBLIC OF SOUTH SUDAN 2011, art. 15, [https://www.constituteproject.org/constitution/South\\_Sudan\\_2011.pdf](https://www.constituteproject.org/constitution/South_Sudan_2011.pdf).

118. CONSTITUTION OF TAJIKISTAN June 22, 2003, art. 33, [https://www.constituteproject.org/constitution/Tajikistan\\_2003.pdf?lang=en](https://www.constituteproject.org/constitution/Tajikistan_2003.pdf?lang=en).

119. CONSTITUTION OF THE REPUBLIC OF UGANDA 1995, art. 31(1).

120. CONSTITUTION OF UKRAINE Dec. 8, 2004, art. 51.

121. CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM 2013, art. 36(1), [https://www.constituteproject.org/constitution/Socialist\\_Republic\\_of\\_Vietnam\\_2013.pdf?lang=en](https://www.constituteproject.org/constitution/Socialist_Republic_of_Vietnam_2013.pdf?lang=en).

122. POLITICAL CONSTITUTION OF PERU Dec. 29, 1993, art. 5.

123. CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA 2009, art. 77, [https://www.constituteproject.org/constitution/Venezuela\\_2009.pdf?lang=en](https://www.constituteproject.org/constitution/Venezuela_2009.pdf?lang=en).

124. See Michael Lipka & David Masci, *Where Europe Stands on Gay Marriage and Civil Unions*, PEW RES. CTR. (Oct. 28, 2019), <https://www.pewresearch.org/fact-tank/2019/10/28/where-europe-stands-on-gay-marriage-and-civil-unions/> (The Czech Republic, Croatia, Estonia,

sex couples,<sup>125</sup> although some jurisdictions may limit civil unions to same-sex couples as an alternative to marriage.<sup>126</sup>

The most recent nation to approve civil unions is Monaco, where, in December 2019, the National Council unanimously approved civil unions for same-sex romantic couples, opposite-sex romantic couples, and other cohabitants.<sup>127</sup>

## V. Other Family Law Developments

A court in Croatia ruled in December 2019 that a gay couple could be foster parents.<sup>128</sup> “The new policy in Croatia follows that of Greece in which same-sex couples in a civil partnership may become foster, but not adoptive, parents.”<sup>129</sup>

“Full joint adoption . . . by same-sex couples is legal in seventeen European countries: Andorra, Austria, Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom.”<sup>130</sup> “Another five countries (Estonia, Italy, Slovenia, San Marino, and Switzerland) permit stepchild adoption” where a registered partner may be able to adopt a partner’s biological and/or adopted child.<sup>131</sup>

In December 2019, the First Chamber of the Supreme Court of Justice of Mexico ruled against the Mexican state of Aguascalientes for prohibiting a lesbian couple from registering as the parents of their child.<sup>132</sup>

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Hungary, Greece, and Slovenia allow or recognize civil partnerships/unions for same-sex couples, but do not allow same sex couples to legally marry.)

125. *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.

126. *Where are Heterosexual Civil Partnerships Legal?*, BBC NEWS (June 27, 2018), <https://www.bbc.com/news/world-44633711>.

127. Loi 1481 du 17 décembre 2019 relative aux contrats civis de solidarité [Law 1481 of December 7, 2019 on civil solidarity contracts], *available at* <http://www.conseil-national.mc/2019/12/04/1481-loi-du-17-decembre-2019-relative-aux-contrats-civils-de-solidarite/>.

128. Forrest Stilin, *Croatia Court Decision: Gay Couple Allowed to be Foster Parents*, TOTAL CROAT. NEWS (Dec. 20, 2019), <https://www.total-croatia-news.com/politics/40398-croatia-court-gay-parents>.

129. *Id.*

130. *Id.*

131. *Id.*

132. *See* Supreme Corte de Justicia de la Nación (@SCJN), TWITTER (Dec. 19, 2019, 1:24 pm), <https://twitter.com/SCJN/status/1207743605470724096>. (“Todas las personas sin importar su orientación sexual tienen derecho a formar una familia y tener hijos propios, adoptados, gestados de manera asistida o procreados por uno de ellos. Uniones familiares formadas por dos mujeres tienen derecho al reconocimiento de sus hijos.”).