NEW FRONTIERS IN LGBTI RIGHTS

This panel was convened at 9:00 a.m., Thursday, March 31, 2016, by its moderator Andrew Park of the University of California, Los Angeles School of Law, who introduced the panelists: Melanie Bejzyk of the University of Oxford; Fanny Gómez-Lugo of the Inter-American Commission on Human Rights; and Mark E. Wojcik of The John Marshall Law School.*

SEXUAL ORIENTATION AND GENDER IDENTITY UNDER INTERNATIONAL LAW

By Mark E. Wojcik†

INTERNATIONAL DEVELOPMENTS FOR LGBTI PERSONS

Protection for Sexual Orientation, Gender Identity, and Gender Expression Under National Constitutions

“Sexual orientation” is expressly protected under nine national constitutions: Bolivia; Ecuador; Fiji; Kosovo; Malta; Mexico; Portugal; South Africa; and Sweden. Sexual orientation is also protected under the Human Rights Act of New Zealand, the Northern Ireland Act of 1988, as amended, and the Scotland Act of 1988, as amended. “Gender identity” is protected as an additional category under the constitutions of Bolivia, Ecuador, and Malta. The Constitution of Fiji protects not only sexual orientation and gender identity, but also “gender expression.” And although it was by statute rather than under a national constitution, Australia and Malta became the first countries to protect intersex persons.

Same-Sex Marriage

As of 2016, same-sex marriage is legal in twenty countries: Argentina; Belgium; Brazil; Canada; Colombia; Denmark (and its former province, Greenland, which is now an autonomous Danish dependent territory); France (and its Caribbean Department, Martinique); Iceland; Ireland; Luxembourg; Mexico (by court decisions and writs of amparo that require recognition of same-sex marriages from other Mexican states, even in Mexican states that do not yet authorize same-sex marriage by legislation); the Netherlands (and its Caribbean municipality, Saba); New Zealand; Norway; Portugal; South Africa; Spain; Sweden; the United States; and Uruguay. Same-sex marriage also became legal in England, Wales, and Scotland in 2014, bringing to twenty-three the number of nations that recognize same-sex marriage (if England, Wales, and Scotland are counted as countries; if they are not, then the number of countries remains at twenty because the United Kingdom cannot be counted until Northern Ireland allows same-sex marriage). Finland will recognize same-sex marriage as of March 1, 2017.

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.” The Supreme Court held that “same-sex couples may exercise the fundamental right to marry,” and that “there is no lawful basis

* Mr. Park and Ms. Gómez-Lugo did not contribute remarks for the Proceedings.
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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.’”

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. (Switzerland had earlier voted as a nation to recognize same-sex civil unions, but these fall short of marriage.)

Not all nations recognize same-sex marriage. Slovenia passed a law to recognize same-sex marriage, but voters repealed it before it could enter into effect. And despite advances elsewhere, some countries have constitutions that 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, Bulgaria, Burundi, Hungary, Latvia, Lithuania, Moldova, Montenegro, Mozambique, Nicaragua, Panama, Poland, Rwanda, Serbia, the Seychelles, Slovakia, Somalia, South Sudan, Tajikistan, Uganda, Ukraine, and Vietnam. The constitutions of Peru and Venezuela also provide for common law marriage only between a man and a woman.

But despite setbacks and obstacles, the march of same-sex marriage continues around the world. And many jurisdictions that do not yet recognize same-sex marriage nonetheless provide for civil unions or similar relationships such as registered partnerships, domestic partnerships, reciprocal beneficiary relationships, civil solidarity pacts, and similar relationships. Chile and Greece, for example, each adopted civil union and civil partnership laws in 2015.

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

Countries that do not protect same-sex couples may see political and legal challenges that would require those countries to recognize same-sex relationships. In July 2015, the European Court of Human Rights (ECHR) ruled in favor of three same-sex couples who had been denied the right to marry in Italy or to enter into any type of civil union or domestic partnership. The ECHR found in Olieri v. Italy 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.” Italy’s failure to protect same-sex couples violated Article 8 of the European Convention on Human Rights. Italy was divided as to how it will comply with the court’s ruling that it provide legal protection to same-sex couples, but in 2016 (after the ASIL Annual Meeting) it adopted a civil union law that falls short of full marriage equality.

Sodomy Laws

Statutes that continue to criminalize sexual acts between consenting adults violate rights to privacy and nondiscrimination under international human rights law. The Global Commission on HIV and the Law also determined that sodomy laws facilitate the spread of HIV/AIDS. 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 only one in fifteen men. Although the UN Human Rights Committee and other human rights mechanisms have urged states to repeal sodomy laws since the Committee’s 1994 landmark opinion 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.

Although same-sex sexual relationships between consenting adults have been legal throughout the United States since 2003, two men in Louisiana were arrested in 2015 for violating the state sodomy law that was still on the books. Until unconstitutional sodomy laws are removed from the statute books, police may continue to harass consenting adults for private sexual conduct.

Three countries 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. Palau, for its part, had accepted the recommendation made in 2011 by the UN Human Rights Council to repeal laws that criminalized consensual sexual activity between adults of the same sex. Mozambique abolished its sodomy law effective in 2015 as part of an overall reform of its colonial criminal code.

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

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 colonial-era sodomy law unconstitutional. In 2014, The Gambia enacted a criminal code to provide life sentences for homosexual activity. Brunei enacted a new criminal code that provided for death by stoning for acts of sodomy and other punishments for adultery. Other countries that punish consensual acts of homosexuality with the death penalty include the Islamic Republic of Iran, Mauritania, Saudi Arabia, Sudan, Yemen, and parts of Nigeria and Somalia.

Anti-Gay-Propaganda Laws

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

Conversion Therapy

Efforts to change an individual’s sexual orientation are now widely recognized as being “unscientific, ineffective, and mentally and emotionally harmful.” There is even recognition that involuntary conversion therapy may also be a form of torture. In 2014, three members of the UN Committee Against Torture questioned the United States as to whether the practice of conversion therapy in some states violates the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

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, New Jersey, Oregon, and Washington, D.C. In the United Kingdom, conversion therapy is not yet illegal, but in
January 2015, fourteen health organizations signed a statement affirming that conversion therapy was “potentially harmful and unethical.”

**Gender Identity and Expression**

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

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

The Islamic Republic of Iran is considered to be supportive of sex change operations, but it is not known how many of these sex change operations are performed on gay persons (who would otherwise face the death penalty) rather than transgender persons.

Australia and Malta became the first countries to prohibit discrimination against intersex persons. In 2013, Australia became the world’s first jurisdiction to prohibit discrimination based on “intersex status.” In 2015, Malta became the first state to prohibit sex-assignment surgery or treatment of intersex minors without their informed consent.

**Violence**

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). The UN 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.” Violence motivated by homophobia and transphobia is “in some instances characterized by levels of cruelty exceeding that of other hate crimes.”

The so-called Islamic State of Iraq and Syria (ISIS) has reportedly executed at least thirty-six men accused of having homosexual relations. The men, who are sometimes as young as fifteen years old, are pushed to their deaths from tall buildings. Murders of gay men, lesbians, and transgender persons were also reported around the world, including countries such as Brazil, Chile, Jamaica, the Islamic Republic of Iran, Uruguay, South Africa, and the United States.

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. Men assumed to be gay in the Syrian Arab Republic have reportedly been raped and tortured by government security agents and nonstate armed groups. Police in Zimbabwe reportedly arrested and beat forty-four members of an LGBT organization. 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.

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. And, in Guatemala, a transgender woman in detention was allegedly raped more than eighty times.

Many countries have recently enacted or strengthened anti-hate crime laws, including Albania, Chile, Finland, Georgia, Greece, Honduras, Malta, Montenegro, Portugal, and Serbia.
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.

OTHER INTERNATIONAL DEVELOPMENTS

In 2014, the African Commission on Human and People’s Rights adopted a resolution that condemned violence and other human rights violations based on actual or imputed sexual orientation and gender identity.

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.

In May 2015, the UN High Commissioner for Human Rights updated a 2011 report on violence and discrimination against individuals based on sexual orientation and gender identity. This report is discussed more fully in part two of this article.

DEVELOPMENTS ON LGBTI RIGHTS AT THE UNITED NATIONS

By Melanie Bejzyk*

DEVELOPMENTS AT THE UNITED NATIONS

There is no international treaty expressly protecting the rights of LGBTI people; however, there is a growing trend toward recognition of these rights within the existing framework of international human rights law. On numerous occasions, international human rights treaties have been interpreted to include LGBTI persons within their scope, and states have been called upon to fulfill their obligations to protect the human rights of LGBTI people.

UN Treaty Bodies and Special Procedures

Until the 1990s, the UN human rights system did little to recognize human rights violations suffered by individuals on the basis of sexual orientation or gender identity in any significant way. In the treaty bodies, a breakthrough came in relation to sexual orientation issues in the complaint of Toonen v. Australia, in which the Human Rights Committee (the treaty body that monitors state compliance with the International Covenant on Civil and Political Rights (ICCPR)) concluded in 1994 that Tasmanian criminal laws prohibiting private, adult, consensual, same-sex acts breached the author’s rights to privacy and nondiscrimination guaranteed by the ICCPR. The Committee found that even though the sodomy laws had not recently been enforced, the existence of these laws violated the author’s human rights. It determined that the laws were not necessary to protect public morals or health, and jeopardized the effectiveness of HIV/AIDS prevention programs by stigmatizing and driving targeted individuals underground. The Committee interpreted the reference to ‘‘sex’’ in the Covenant to include sexual orientation as a prohibited ground of discrimination.

The Human Rights Committee has had occasion to consider other individual complaints alleging discrimination and other rights violations on the basis of sexual orientation. In X v.

* Melanie Bejzyk, University of Oxford, is a Legal Officer on leave from the Department of Global Affairs Canada. These remarks were made in her personal capacity, and not on behalf of the Department.