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# El Derecho A Amar (The Right to Love): Same-Sex Relationships in Spain and El Salvador

Anna C. Forgie\*

¶1 Much of the Spanish-speaking world is making strides toward providing equal rights to same-sex couples. Spain<sup>1</sup> and Argentina<sup>2</sup> have legalized gay marriage, Uruguay permits civil unions,<sup>3</sup> and at the municipal level, Mexico City has approved gay marriage.<sup>4</sup> Until very recently, however, El Salvador has been an exception to this trend. Even despite the recent historic election of the left-wing party to the presidency, and subsequent changes aimed at creating greater social unity, the country remains steadfast in denying the basic right to marry. This article contrasts Spain—the first Spanish-speaking country to authorize gay marriage—and El Salvador—a country where that authorization is still a dream—and explores why El Salvador has lagged behind in the movement toward more permissive attitudes on gay marriage.

¶2 This paper will examine each country's position in the international community based on its treaty ratifications and membership in regional organizations, and each country's position on same-sex marriage. It finds that while Spain has taken strong steps toward fulfilling its international treaty obligations, El Salvador is still squarely in violation of its obligations. The paper concludes with a discussion of why the status differs in the two countries.

¶3 Part I establishes that the basic fundamental human right to be free from discrimination outlined in the United Nations ("UN") Charter and the Universal Declaration of Human Rights ("UDHR") includes the right to legally sanction a same-sex relationship as a marriage. Part II focuses on the treaty bodies of the UN, including the International Covenant for Economic, Social, and Cultural Rights ("ICESCR") and the International Covenant for Civil and Political Rights ("ICCPR") with respect to the right to same-sex marriage. Part III examines the regional bodies relevant to each country and asks whether these bodies impose any requirements for legalizing gay marriage on the specific member countries. Parts IV and V look at the specific legal systems and recent legal, political, and social developments in both countries. Finally, Part VI proposes that the European Union's more progressive guiding documents, as well as the generally more liberal social atmosphere in Europe, serve to explain the two countries' different attitudes toward same-sex relationships.

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<sup>1</sup> See *infra* pt. IV.

<sup>2</sup> Law No. 26.618, July 22, 2010, [CXVIII] B.O. 31.949 (Arg.).

<sup>3</sup> Unión Concubinaria No. 18.246, Pub. D.O. 2008 No. 27402 (Uru.).

<sup>4</sup> Código Civil Para el Distrito Federal [Civil Code for the Federal District] *as amended*, Lib. Primero De Las Personas, tit. 5, cap. II, art. 146 (Mex.).

## I. THE UN CHARTER AND THE UDHR

¶4 The UN was founded in part out of a shared desire to “reaffirm faith in fundamental human rights.”<sup>5</sup> Three years after its creation, the UN issued the UDHR, a non-binding international bill of human rights that entitles all people to certain rights.<sup>6</sup> Two articles of the UDHR are of particular relevance here. Article 7 states that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law.”<sup>7</sup> Article 2 provides that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex ... or other status.” Though not listed among the enumerated statuses, “sexual orientation” should be considered part of the “other status” catch-all and thus not a basis for alternative treatment.<sup>8</sup> Based on the language of the UDHR, the right to be free from discrimination based on sexual orientation is a basic human right that may not be violated. States often impose restrictions based on status: for example, a state may impose age requirements on military service or driving privileges. These kinds of restrictions, however, must arise from legitimate state interests.<sup>9</sup> Governments seeking to discriminate based on sexual orientation would thus need to argue both that maintaining traditional marriage was a legitimate state interest and that gay marriage would harm traditional marriage.<sup>10</sup>

## II. INTERNATIONAL

¶5 The ICESCR should be read to prohibit discrimination based on sexual orientation. The document was written in 1966;<sup>11</sup> El Salvador signed it on September 21, 1967 and ratified it on November 30, 1979, while Spain signed it on September 28, 1976 and ratified it on April 27, 1977.<sup>12</sup> The ICESCR contains language nearly identical to that in the UDHR, namely that the signatory parties “undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, ... or other status.”<sup>13</sup> Unlike the Universal Declaration, however, the ICESCR is *binding* on the signatory parties. Article 4 specifically notes that the State

<sup>5</sup> U.N. Charter pmbl.

<sup>6</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

<sup>7</sup> *Id.* art. 7.

<sup>8</sup> This article assumes that “sexual orientation” is or should be included in “other status” in order to focus on why, given that assumption, the treatment of the LGBT community remains so different in El Salvador and Spain.

<sup>9</sup> Aaron X. Fellmeth, *Essay in Honor of W. Michael Reisman: Human Rights: Nondiscrimination as a Universal Human Right*, 34 YALE J. INT’L L. 588, 594 (2009) (arguing for flexibility in the scope of universal human rights).

<sup>10</sup> In the United States, for example, the Supreme Court has referred to the preservation of traditional marriage as a legitimate state interest. *See* Lawrence v. Texas, 539 U.S. 558, 585 (2003); *see also infra*, pt. III.

<sup>11</sup> International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316, 993 U.N.T.S. 3 (Dec. 16, 1966) [hereinafter *ICESCR*].

<sup>12</sup> *See* Multilateral Treaties Deposited with the Secretary-General, ICESCR Status of Ratification, Declarations and Reservations, 993 U.N.T.S. 3 (Jan. 3, 1976), *available at* [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en).

<sup>13</sup> *Id.* pt. II, art. 2, ¶ 2.

“may subject such rights only to such limitations as are determined by law ... solely for the purpose of promoting the general welfare in a democratic society.”<sup>14</sup>

¶16 Forty years after the creation of the ICESCR, the UN General Assembly unanimously adopted the Optional Protocol to the ICESCR on December 10, 2008.<sup>15</sup> Spain signed the Optional Protocol on September 24, 2009, and El Salvador signed it on September 25, 2009, becoming one of only two Central American countries to sign.<sup>16</sup> The Optional Protocol combines the various international statements on human rights into a compact reminder that all humans deserve certain basic civil rights:

¶17 *Recalling* that the Universal Declaration of Human Rights and the International Covenants on Human Rights recognize that the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy civil, cultural, economic, political and social rights.<sup>17</sup>

Given this language, El Salvador, as a signatory country, recognizes that everyone must enjoy certain civil rights in order to guarantee an atmosphere of freedom from fear. In failing to sanction same-sex marriage,<sup>18</sup> El Salvador has created an environment in which some members of society are unable to enjoy a basic civil right.

¶18 Likewise, the ICCPR should be read to support the right of non-discrimination based on sexual orientation. The ICCPR was established in 1966<sup>19</sup> along with the Human Rights Committee, the treaty-body that monitors countries’ implementation of the ICCPR. A concurrent Optional Protocol enabled the Human Rights Committee to hear communications from people claiming violations of the ICCPR.<sup>20</sup>

¶19 Discrimination based on sexual orientation is a violation of the plain language of several sections of the ICCPR. Using the ICESCR’s language, the document promises the relevant rights (those substantive rights guaranteed therein) to all people without distinction: “Each State party ... undertakes to respect and to ensure to all individuals ... the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex ... *or other status*.”<sup>21</sup> After listing several categorical groups of people, the language explicitly refers to any other distinction that might be made between people based on a certain status. This is clear evidence that there can be no separation of people into two groups, one group guaranteed certain rights and one

<sup>14</sup> *Id.* pt. II, art. 4.

<sup>15</sup> Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 832, U.N. GAOR, 63d Sess., U.N. Doc. A/RES/63/117 (Dec. 10, 2008) [hereinafter *Optional Protocol ICESCR*].

<sup>16</sup> Guatemala is the other Central American signatory country.

<sup>17</sup> Optional Protocol ICESCR, *supra* note 15, pmb1.

<sup>18</sup> *See infra* pt. V.

<sup>19</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, 999 U.N.T.S. 171 (Dec. 16, 1966) [hereinafter *ICCPR*].

<sup>20</sup> El Salvador signed the optional protocol on September 21, 1967 and ratified it on June 6, 1995 with a minor reservation. Spain is not a signatory party, but acceded to the protocol on January 25, 1985.

<sup>21</sup> ICCPR, *supra* note 19, pt. II, art. 2, ¶ 1 (emphasis added).

group not guaranteed the relevant rights. Article 26 includes a clear statement that no person may be singled out for discriminatory treatment:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. ... [T]he law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, ... birth or other status.<sup>22</sup>

The rights recognized apply to all people: sexual orientation should not preclude anyone from enjoying those basic recognized rights.

¶10 The ICCPR recognizes the right to be free from cruel or inhuman treatment<sup>23</sup> and from “unlawful interference with ... privacy.”<sup>24</sup> Article 23 states, “[t]he right of men and women of marriageable age to marry and to found a family shall be recognized.”<sup>25</sup> Given this plain language, it should be the case that anyone, as long as he or she is of a certain age, has a right to marry. As long as both parties consent to the marriage, the right to marry should exist regardless of whom one chooses to marry.

¶11 The UN Human Rights Committee took a step toward actual inclusion of sexual orientation as a protected category within the ICCPR’s delineated rights in a seminal case in 1994. In *Toonen v. Australia*, the Committee found that the use of “sex” in the above-referenced Articles 2 and 26 of the ICCPR was meant to include sexual orientation.<sup>26</sup> In finding discrimination on the basis of sexual orientation to be a violation of the ICCPR, the Committee specifically held that sodomy laws in Australia violated the ICCPR and therefore violated Australia’s obligations as a state party to the covenant.

¶12 Spain signed the ICCPR on September 28, 1976 and ratified it on April 27, 1977 without any relevant objections. In addition, representatives of the Spanish government expressly recognized the “competence of the Human Rights Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant.”<sup>27</sup> Spain thus acknowledges that state parties may be brought before the Committee for failing to fulfill their obligations under the Covenant.

¶13 El Salvador signed the ICCPR on September 21, 1967 and ratified it on November 30, 1979 without reservations or obligations.<sup>28</sup> The country’s only derogations to the Covenant were made in the mid-1980s on issues relating to an alleged need to suspend constitutional rights during the Salvadoran civil war. Thus, El Salvador agrees to the ICCPR as written.

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<sup>22</sup> *Id.* pt. III, art. 26.

<sup>23</sup> *Id.* arts. 6, 7.

<sup>24</sup> *Id.* art. 17.

<sup>25</sup> *Id.* art. 23, ¶ 2.

<sup>26</sup> *Toonen v. Austl.*, U.N. Hum. Rts. Comm., Commc’n No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994) (finding that “the reference to ‘sex’ in art[s.] 2 [and] 26 is to be taken as including sexual orientation”).

<sup>27</sup> See United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, ICCPR Declarations and Reservations, *available at* <http://www.ccprcentre.org/doc/ICCPR/Status%20ICCPR.pdf> (last visited Feb. 15, 2010).

<sup>28</sup> *Id.*

¶14 Some argue that the right to marry is by definition limited to unions between a man and a woman.<sup>29</sup> Although the plain language of the ICCPR clearly indicates a positive right to marriage for all people, the Human Rights Committee has stated that the ICCPR does not impose a positive requirement on states to permit gay marriage. In a 2002 decision, *Joslin v. New Zealand*, the Committee found that because Article 23 is the only gender-specific provision in the ICCPR, it only permits men and women to marry each other.<sup>30</sup> The Committee noted that failure to provide for same-sex marriage did not constitute discrimination.<sup>31</sup>

¶15 However, Article 23 does not say explicitly that men may only marry women or vice versa. Indeed, it has been argued that the *Joslin* decision failed to take into account “sexual orientation rights embedded in the ICCPR,”<sup>32</sup> and that the decision, nearly a decade old, is no longer relevant given “current human rights principles.”<sup>33</sup> The *Joslin* decision violates the ICCPR’s plain language: the statute does not say it is merely protecting the right of a man to marry a woman or a woman to marry a man. Its broader protection of the right of men and women to marry should be read as a basic statement that all humans have the right to form a union recognized by law. Indeed, the ICCPR charges state parties with ensuring general marriage rights: “State parties to the present Covenant shall take appropriate steps to ensure equality of rights ... as to marriage.”<sup>34</sup>

¶16 As mentioned, unlike the purely aspirational Universal Declaration, both the ICCPR and ICESCR are binding on signatory parties. Countries are therefore obligated under the covenants to work toward achieving the relevant guarantees.<sup>35</sup> However, despite their binding force, the covenants do not provide penalties for countries that fail to guarantee those rights.<sup>36</sup> Nevertheless, just as Australia violated the ICCPR<sup>37</sup> in failing to ensure the ICCPR-protected rights in Australia, it seems that any country failing to ensure the relevant rights is in violation of the covenants.

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<sup>29</sup> See generally Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons*, pt. I, ¶ 2, available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20030731\\_homosexual-unions\\_en.html#fn4](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html#fn4) (last visited Feb. 10, 2010) (stating that “marriage exists solely between a man and a woman”); Matthew Spalding, *A Defining Moment: Marriage, the Courts, and the Constitution*, THE HERITAGE FOUNDATION, Exec. Summ. No. 1759, May 17, 2004, available at [http://www.heritage.org/research/legalissues/upload/bg\\_1759.pdf](http://www.heritage.org/research/legalissues/upload/bg_1759.pdf) (last visited Feb. 10, 2010) (calling for the preservation of marriage as the “legal union between one man and one woman”).

<sup>30</sup> *Joslin v. New Zealand*, U.N. Hum. Rts. Comm., Commc’n No. 902/1999, U.N. Doc. A/57/40, ¶ 8.2 (2002).

<sup>31</sup> *Id.* ¶ 8.3.

<sup>32</sup> *Marriage Equality – A Basic Human Right: Submission to the Inquiry Into the Marriage Equality Amendment Bill 2009*, HUMAN RIGHTS LAW RESOURCE CENTRE, §3.2, ¶17 (Aug. 2009), available at <http://www.hrlrc.org.au/files/HRLRC-Submission-on-Marriage-Equality.pdf>.

<sup>33</sup> *Id.* ¶ 20.

<sup>34</sup> ICCPR, *supra* note 19, pt. III, art. 23, ¶ 4.

<sup>35</sup> HENRY J. STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 152 (Oxford Univ. Press 3d ed. 2008) (1996) (“The Covenant ... binds the states parties in accordance with its terms and with international law, subject to such formal matters as reservations and ... exceptional circumstances.”).

<sup>36</sup> *Id.*

<sup>37</sup> See Toonen, Commc’n No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992.

### III. EUROPEAN AND INTER-AMERICAN INTERNATIONAL TREATIES

#### A. *European Arena*

¶17 Several bodies and documents within the European region are relevant for the discussion of freedom from discrimination based on sexual orientation as a fundamental human right. Within the Council of Europe, the European Court of Human Rights and the European Commission on Human Rights<sup>38</sup> hear cases under the European Convention for the Protection of Human Rights and Fundamental Freedoms. In addition, both the Commissioner for Human Rights and the Parliamentary Assembly refer to the topic. Within the European Union, the founding documents as well as various resolutions of the European Parliament have addressed the issue.

#### 1. Council of Europe

¶18 The European Court of Human Rights (“European Court”) interprets cases under the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”). Although the European Convention makes no specific reference to sexual orientation, its language mirrors that of the ICESCR and ICCPR regarding the right to freedom from discrimination.<sup>39</sup> In addition, Protocol No. 12 to the Convention<sup>40</sup> took further steps to ensure equal protection of rights for all persons using the language of the international covenants: “The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race ... or other status.”<sup>41</sup>

¶19 As the Council of Europe’s judicial bodies, the European Court and the European Commission have issued several opinions related to sexual orientation, focusing on Articles 8 and 12 (the right to privacy and the right to marry, respectively) of the European Convention.<sup>42</sup> Article 8 states: “[e]veryone has the right to respect for his private and family life, his home and his correspondence,”<sup>43</sup> while Article 12 notes that “[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”<sup>44</sup>

¶20 In *Dudgeon v. UK*, the plaintiff alleged that his rights under Article 8 of the European Convention were being violated by the law in Ireland, which made it a crime

<sup>38</sup> The now-defunct European Commission on Human Rights heard cases under the European Convention until 1999.

<sup>39</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, Nov. 4, 1950, 213 U.N.T.S. 221, available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf> [hereinafter *ECHR*] (“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”).

<sup>40</sup> Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, pmb., Nov. 4, 2000, 2465 U.N.T.S. 203, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/177.htm> (Spain signed the protocol on Oct. 4, 2005 and ratified it on Feb. 13, 2008; El Salvador has not signed the protocol).

<sup>41</sup> *Id.* art. 1.

<sup>42</sup> See *infra* notes 45, 49, 50, 51.

<sup>43</sup> ECHR, *supra* note 39, art. 8, ¶ 1.

<sup>44</sup> *Id.* art. 12.

for a man to commit an “act of gross indecency” with another man.<sup>45</sup> The state argued that the law was necessary for the protection of society such that officials were warranted in questioning the plaintiff about “homosexual activities” after conducting a search of his house.<sup>46</sup> Although the European Commission did not provide for a remedy under the European Convention, finding that a remedy should instead be found within the country (thus allowing states to establish their own state interests), it nonetheless found an Article 8 violation.<sup>47</sup> In addition, the court found that sexual orientation should be a protected class under the “other status” provision of Article 14.<sup>48</sup>

¶21 In 2002, the European Court of Human Rights held in *I. v. United Kingdom* that the United Kingdom’s failure to change the legal identities of two transgendered women violated their rights under both Article 8 and Article 12 of the European Convention.<sup>49</sup> And in *Modinos v. Cyprus*, in finding the criminalization of sexual acts between two men to be an Article 8 violation, the European Court relied on the reasoning in *Dudgeon* to find that the right to privacy in Article 8 must be extended to relations between adults of the same-sex in the privacy of their own home.<sup>50</sup> In these cases, the European Court found that the state may justify differences in treatment based on sexual orientation only when there is a particularly serious state interest at issue.

¶22 In June 2010, the Court held in *Schalk and Kopf v. Austria*<sup>51</sup> that the European Convention does not require states to ensure homosexual couples’ right to marry under Article 12. The court highlighted that the decision to sanction same-sex marriage is one best left to individual states because of their differing social and cultural customs. However, the Court’s emphasis on the current lack of “European” consensus on the issue arguably suggests that as additional countries in the region begin to recognize same-sex marriage, the Court will consider revisiting whether or not such a consensus exists, and thus whether Article 12 ought to also encompass a right to marry among same-sex couples.

¶23 Beyond these recent court decisions, within the Council of Europe, the European Commissioner for Human Rights has recently indicated that failure to extend basic human rights to LGBT (lesbian, gay, bisexual, transgender) people is a violation of the UDHR and has called on the European community to improve efforts in this area.<sup>52</sup> In response to ongoing incidents of hate crimes and denial of basic rights to LGBT activists, the Commissioner found that “[t]he problems at stake go to the very roots of what human rights are: the protection of the most vulnerable in society, the integrity of the human body and the right to be free from inhumane treatment.”<sup>53</sup>

¶24 As the Council’s legislative body, the Parliamentary Assembly has also taken steps to highlight the issue, calling on member states to grant same-sex couples registered

<sup>45</sup> *Dudgeon v. United Kingdom*, App. No. 7525/76, 4 Eur. H.R. Rep. 149, 149 (1981).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*; see also ECHR, *supra* note 39, art. 14.

<sup>49</sup> *I. v. United Kingdom*, 36 Eur. Ct. H.R. Rep. 53 (2002).

<sup>50</sup> *Modinos v. Cyprus*, 16 Eur. Ct. H.R. (ser. A) at 485 (1993).

<sup>51</sup> *Schalk and Kopf v. Austria*, App. No. 30141/04, Eur. Ct. H.R. (2010).

<sup>52</sup> Thomas Hammarberg, Eur. Comm’r for Hum. Rts., Statement to the Int’l Lesbian and Gay Ass’n Europe Conf. (Oct. 31, 2008), available at <https://wcd.coe.int/ViewDoc.jsp?id=1365221&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>.

<sup>53</sup> *Id.*

partnership rights, a potential step toward legalizing same-sex marriage across the region. The Assembly's general recommendation on discrimination against the LGBT community laments the fact that "despite some efforts ... directed towards eliminating discrimination against homosexuals, they continue to suffer from discrimination."<sup>54</sup> The recommendation goes on to note that while "of course traditional family life has its own place and value," rampant acts of discrimination against people based on sexual orientation are "survivals of several centuries of prejudice" and should be eradicated as vestiges of a different era.<sup>55</sup> Although the recommendation does not address same-sex partnerships or marriage, it does note that all people "should enjoy the right to sexual self-determination."<sup>56</sup> Significantly, there is no claim that protection of traditional family life would constitute a legitimate state interest. The failure to include that claim weakens a state's effort to lean on that as an alleged legitimate state interest. Indeed, even if such claims were to be included, it would not follow that permitting same-sex marriage would weaken protection of traditional family life.

¶25 In 2000, the Assembly issued a recommendation regarding gays and lesbians in relation to asylum status and immigration, finding that homosexual couples ought to be allowed to prove partnership by means other than a marriage certificate and that "immigration rules applying to couples should not differentiate between homosexual and heterosexual partnerships."<sup>57</sup> Finally, on April 29, 2010, the Parliamentary Assembly adopted a resolution on "Discrimination on the Basis of Sexual Orientation and Gender Identity."<sup>58</sup> The resolution is hopeful in both its strong stance against discrimination on the basis of sexual orientation and its clear call for legal recognition of same-sex relationships: "Council of Europe member states should ensure legal recognition of same-sex partnerships."<sup>59</sup> Further, the resolution notes judicial decisions prohibiting discrimination based on sexual orientation in the absence of a compelling state interest, and expresses deep concern for violations of the freedom of expression and the general denial of rights engaged in by member states.<sup>60</sup> Most importantly, the document "stresses that it is the paramount duty of all public authorities ... to protect the rights enshrined in human rights instruments in a practical and effective manner."<sup>61</sup>

## 2. European Union

¶26 In comparison with other international bodies, the European Union ("EU") has taken the most explicit steps toward including sexual orientation as a protected category covered by anti-discrimination provisions in the Treaty of Amsterdam and the Charter of Fundamental Rights of the European Union. The Treaty of Amsterdam

<sup>54</sup> Recommendation on Discrimination Against Homosexuals, EUR. PARL. DOC. No. 924/1981, ¶ 2 (Oct. 1, 1981), available at <http://www.hrea.org/erc/Library/hrdocs/coe/PACE-Rec924.pdf>.

<sup>55</sup> *Id.* ¶ 3.

<sup>56</sup> *Id.* ¶ 5.

<sup>57</sup> EUR. PARL. DOC. Recommendation No. 1470/2000, ¶ 6 (June 30, 2000), available at <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta00/EREC1470.htm>.

<sup>58</sup> EUR. PARL ASS'N. Res. 1728, Discrimination on the Basis of Sexual Orientation and Gender Identity, Apr. 29, 2010.

<sup>59</sup> Report of the Comm. on Legal Aff. and Hum. Rts., EUR. PARL. DOC. No. 12087 (Dec. 8, 2009), available at <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc09/EDOC12087.htm>.

<sup>60</sup> *Id.* ¶¶ 3, 5-6.

<sup>61</sup> EUR. PARL. ASS'N., *supra* note 58.

amended the EU's founding treaties (including the founding treaty of the European Community) and includes an explicit prohibition on discrimination based on sexual orientation.<sup>62</sup> The Treaty enabled the EU to actively fight discrimination, giving the European Council (the body made up of leaders of EU member states) power to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."<sup>63</sup> Under the ICCPR and other documents, to find member states in violation of the international covenants, it was necessary to construe "sexual orientation" as an "other status" within the relevant provisions.<sup>64</sup> Here, however, those efforts are unnecessary: to remain compatible with the guiding documents of the EU, member states must prevent discrimination on the basis of sexual orientation. Spain's legalization of same-sex marriage<sup>65</sup> was thus an essential step for the country in its obligations as a member of the EU. The Treaty's explicit mention of sexual orientation as a protected class therefore puts the EU at the forefront of the effort to stop discrimination based on sexual orientation.

¶27 Originally intended as a visionary document, the Charter of Fundamental Rights of the European Union became part of European law upon ratification of the Lisbon Treaty in December 2009.<sup>66</sup> Article 21 of the Charter includes the specific mention of sexual orientation used in the Treaty of Amsterdam to prohibit discrimination on any ground: "Any discrimination based on ... sex, race, color, ethnic or social origin, genetic features, ... birth, disability, age or *sexual orientation* shall be prohibited."<sup>67</sup> That this language has been codified into binding law only serves to reaffirm the European community's commitment to the protection of individuals' rights regardless of sexual orientation.

¶28 In addition, the European Parliament has issued several resolutions on sexual orientation in the human rights context. Though non-binding, the Parliament's resolutions can put pressure on member states and states aspiring to join the EU. Indeed, a 1998 resolution stated that the EU would not "give its consent to the accession of any country that, through its legislation or policies violates the human rights of lesbians and gay men."<sup>68</sup> In 2007, the Parliament, asserting its influence, adopted a resolution noting that "statements and actions by political leaders have a major impact on public opinion."<sup>69</sup> It went on to affirm that "EU institutions and Member States have a duty to ensure that the human rights of people living in Europe are respected and promoted,"<sup>70</sup>

<sup>62</sup> Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, art. 2, ¶ 6, Oct. 2, 1997, 1997 O.J. (C 340) (inserting art. 6a and amending art. 13 of the Treaty Establishing the European Community), *available at* <http://www.europarl.europa.eu/topics/treaty/pdf/amst-en.pdf> [hereinafter *Treaty of Amsterdam*].

<sup>63</sup> *Id.*

<sup>64</sup> *See* ICCPR, *supra* note 19, pt. II, art. 2.

<sup>65</sup> *See infra* pt. IV.

<sup>66</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, art. 1, ¶ 8, Dec. 13, 2007, 2007 O.J. (C 306) 10 (amending art. 6), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0010:0041:EN:PDF>.

<sup>67</sup> Charter of Fundamental Rights of the European Union, art. 21, 2000 O.J. (C 364) 1 (Dec. 7, 2000) (emphasis added).

<sup>68</sup> Resolution on Equal Rights for Gays and Lesbians in the Eur. Cmty., EUR. PARL. DOC. No. 0852/98, ¶ J., 1998 O.J. (C 313) 186 (Oct. 12, 1998).

<sup>69</sup> Resolution on Homophobia in Eur., EUR. PARL. DOC. No. 0171/2007, ¶ B., 2007 O.J. (C 74E) 776-779 (Apr. 26, 2007) [hereinafter *Resolution on Homophobia*].

<sup>70</sup> *Id.* pt. 2.

and included freedom from discrimination on the basis of sexual orientation as one of those human rights. In 2008, the Parliament issued a proposal for a Council Directive to establish a certain level of protection within the EU for people who have been discriminated against because of sexual orientation, seeking to extend the prohibition on such discrimination to all aspects of life.<sup>71</sup>

¶29 In response, the European Economic and Social Committee (“EESC”), a consultative body that gives representatives of Europe's socio-occupational interest groups a means to transmit their views to the EU's legislative bodies, concluded that in spite of the amended provisions of the founding documents,<sup>72</sup> the need for even further EU legislation prohibiting discrimination based on sexual orientation remains.<sup>73</sup> Thus, despite the recent developments in the region, the EESC believes the EU must take additional steps to confirm its commitment to preventing discrimination based on sexual orientation.

¶30 The EU has also taken an active role in keeping the issue at the forefront of the international conscience. In December 2008, an EU delegation of representatives from several countries introduced a declaration to the UN General Assembly in an effort to convince the Assembly to take a stronger stand against the current criminalization of homosexuality in some countries.<sup>74</sup> The non-binding declaration, sponsored by fifty-three countries including Spain,<sup>75</sup> stated:

We reaffirm the principle of non-discrimination which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity; We condemn the human rights violations based on sexual orientation or gender identity wherever they occur, in particular the use of the death penalty ... and deprivation of economic, social and cultural rights, including the right to health; We urge States to ensure that human rights violations based on sexual orientation or gender identity are investigated and perpetrators held accountable and brought to justice.<sup>76</sup>

¶31 In response, the Holy See (the representative government of the Catholic Church) spoke out against the criminalization of homosexual conduct, but opposed the declaration, criticizing it as a step toward allowing gay marriage:

<sup>71</sup> *Commission Proposal for a Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation*, at 2, COM (2008) 426 final (July 2, 2008).

<sup>72</sup> See Treaty of Amsterdam, *supra* note 62.

<sup>73</sup> EUR. ECON. & SOC. COMM., *Opinion on the ‘Proposal for a Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation,’* 2009 O.J. (C 182/19), 45th plen. sess. (Jan. 14, 2009), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:182:0019:0023:EN:PDF>.

<sup>74</sup> Anna Momigliano, *In Europe, Same-Sex Showdown Moves to UN*, CHRISTIAN SCIENCE MONITOR (Dec. 10, 2008), <http://www.csmonitor.com/World/2008/1210/p07s01-wogn.html>.

<sup>75</sup> *Id.*

<sup>76</sup> U.N. Declaration on Sexual Orientation and Gender Identity, U.N. GAOR, 63d Sess., 71st plen. mtg., ¶¶ 3, 6, 12, U.N. Doc. A/63/635/Annex (Dec. 22, 2008).

The Holy See continues to advocate that every sign of unjust discrimination towards homosexual persons should be avoided ... Despite the *Declaration's* rightful condemnation of and protection from all forms of violence against homosexual persons, the document ... goes beyond this goal and instead gives rise to uncertainty in the law and challenges existing human rights norms.<sup>77</sup>

¶32 In addition, an official opposition statement to the original declaration, proffered by Saudi Arabia and signed by fifty-seven countries,<sup>78</sup> stated that the original declaration “attempt[s] to introduce to the United Nations some notions that have no legal foundation in any human rights instrument.”<sup>79</sup> This claim baldly ignores the sources of the right to same-sex marriage outlined above. It appears to be a cover for discriminatory sentiment and fear of the unknown, feelings that become more apparent when the statement suggests a litany of harms that could erupt from a prohibition on sexual-orientation-based discrimination: “The notion of orientation spans a wide range of personal choices that expand way beyond the individual’s sexual interest in copulatory behavior with normal, consenting adult human beings, thereby ushering in the social normalization ... of many deplorable acts, including paedophilia.”<sup>80</sup> While an analysis of correlations between economic development and commitment to democratic values is outside the scope of this paper, it is worth noting that many of the signatory countries to this rebuttal statement are among the poorest and most under-developed countries of the world.<sup>81</sup>

### B. Inter-American Arena

¶33 Although there is currently little jurisprudence relating to discrimination based on sexual orientation in the Inter-American region, recent activity in the region, including policy changes in several Latin American countries, suggests the issue is becoming more important.

¶34 The Charter of the Organization of American States (“OAS”), an Inter-American regional agency within the United Nations,<sup>82</sup> includes among its explicit purposes the aim to “promote, by cooperative action, [the Member States’] economic,

<sup>77</sup> Press Release, Statement of the Holy See Delegation at the 63d Sess. of the Gen. Ass. of the United Nations on the Declaration on Human Rights, Sexual Orientation and Gender Identity (Dec. 18, 2008), available at [http://www.vatican.va/roman\\_curia/secretariat\\_state/2008/documents/rc\\_seg-st\\_20081218\\_statement-sexual-orientation\\_en.html](http://www.vatican.va/roman_curia/secretariat_state/2008/documents/rc_seg-st_20081218_statement-sexual-orientation_en.html).

<sup>78</sup> El Salvador neither took a stance on the declaration nor on the opposition statement.

<sup>79</sup> U.N. GAOR, 63d Sess., 71st plen. mtg., ¶ 4, U.N. Doc. A/63/663/Annex (Dec. 26, 2008).

<sup>80</sup> *Id.* ¶ 5.

<sup>81</sup> See Resolution on Homophobia, *supra* note 69.

<sup>82</sup> Organization of American States (O.A.S.) Charter, 2 U.S.T. 2394, O.A.S.T.S. Nos. 1-C, 61, Apr. 30, 1948; amended by the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, 721 U.N.T.S. 324; amended by the Protocol of Cartagena de Indias, Dec. 5, 1985, O.A.S.T.S. 66; amended by the Protocol of Washington, Dec. 14, 1992, 33 I.L.M. 1005; amended by the Protocol of Managua, June 10, 1993, 33 I.L.M. 1009, available at [http://www.oas.org/dil/treaties\\_A-41\\_Charter\\_of\\_the\\_Organization\\_of\\_American\\_States.htm](http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm).

social, and cultural development.”<sup>83</sup> El Salvador ratified the Charter with its most recent amendments on July 22, 1993.<sup>84</sup>

¶35 OAS resolutions regarding human rights cite both the 1948 American Declaration of the Rights and Duties of Man<sup>85</sup> (“American Declaration”), a statement of commitment to human rights that pre-dates the UDHR, and the 1969 American Convention on Human Rights<sup>86</sup> (“American Convention”). The American Declaration includes the statement that “the essential rights of man are not derived from the fact that he is a national of a certain state, but as based upon attributes of his human personality.”<sup>87</sup> It also includes provisions for a right to equality before the law,<sup>88</sup> a right to protection against attack upon personal privacy,<sup>89</sup> a right to enjoy basic civil rights,<sup>90</sup> and a right to “associate with others to promote, exercise and protect legitimate interests of a ... social ... or other nature.”<sup>91</sup>

¶36 Recent developments in the OAS suggest an increased awareness of the issue of discrimination based on sexual orientation. In 2008, the OAS adopted a declaration in response to ongoing sexual orientation-based violence in the region and called on the OAS General Assembly to open dialogue on the issue.<sup>92</sup> Pursuant to the declaration, the General Assembly’s June 2009 conference entitled “Nonviolence” furthered the discussion, resulting in another resolution by the same title officially condemning human rights violations committed based on sexual orientation, and putting affirmative pressure on member states to “ensure that acts of violence and human rights violations committed against individuals because of their sexual orientation and gender identity are investigated and their perpetrators are brought to justice.”<sup>93</sup> Because El Salvador is a party to the OAS, this resolution places renewed pressure on Salvadoran authorities to pay increased attention to the issue and to investigate sexual orientation-based crimes.

¶37 The American Convention gave authority to the Inter-American Court of Human Rights (“ICtHR”) and the Inter-American Commission on Human Rights (“ICHR”) to protect the rights enumerated therein.<sup>94</sup> In language similar to that used in the ICCPR, the Convention imposes on all its American member states, including El Salvador, the “obligation to respect rights ... and freedoms recognized herein and to

<sup>83</sup> *Id.* art. 2, ¶ f.

<sup>84</sup> Diario Oficial (D.O.) Decree 595, T. 320, July 22, 1993 (El Sal.).

<sup>85</sup> American Declaration of the Rights and Duties of Man, *adopted by the Ninth Int’l Conf. of Am. States*, U.N. Doc. E/CN.4/122 (June 10, 1948) [hereinafter *Am. Declaration*].

<sup>86</sup> American Convention on Human Rights “Pact of San José, Costa Rica,” O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (Nov. 22, 1969), *available at* <http://treaties.un.org/doc/Publication/UNTS/Volume%201144/volume-1144-I-17955-English.pdf> [hereinafter *ACHR*].

<sup>87</sup> *See* Am. Declaration, *supra* note 85.

<sup>88</sup> *Id.* art. II.

<sup>89</sup> *Id.* art. V.

<sup>90</sup> *Id.* art. XVII.

<sup>91</sup> *Id.* art. XXII.

<sup>92</sup> O.A.S. Gen. Ass., Hum. Rts., Sexual Orientation, and Gender Identity, G.A. Res. AG/RES. 2435 (XXXVIII-O/08) 38th Sess., 4th plen. mtg., pmb. (June 3, 2008) (stating the reaffirmation of “the principles of universality, indivisibility, and interdependence of human rights” and requesting an on-going dialogue on the issue).

<sup>93</sup> O.A.S. Gen. Ass., Hum. Rts., Sexual Orientation, and Gender Identity, G.A. Res. AG/Res. 2504 (XXXIX-O/09) 39th Sess., 4th plen. mtg., ¶ 2 (June 4, 2009).

<sup>94</sup> *See* ACHR, *supra* note 86.

ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, ... birth, or any other social condition.”<sup>95</sup> The Convention includes a right to freedom from “arbitrary or abusive interference with ... private life,”<sup>96</sup> the right to associate freely,<sup>97</sup> and the right of “men and women of marriageable age to marry.”<sup>98</sup> Despite these statements of human rights protections, there is little merits-based jurisprudence in either regional judicial body on the question of discrimination based on sexual orientation.<sup>99</sup> (The ICtHR has noted that gay children face increased barriers to the right to receive an education and are more likely to experience violations of their civil rights.)<sup>100</sup>

¶38 Recent developments, however, suggest the topic will begin to receive increased attention. When the ICHR determines that a state has acted in violation of the ICHR’s reports and recommendations, it can refer the state to the ICtHR. The members of the ICHR are international human rights experts who are elected independently and do not represent specific states. Their independent status, and the location of the ICHR in Washington, D.C., gives it an “outsider” flavor. Unlike the European Court, which appears willing to lag behind individual countries’ actions on the issue of same-sex rights, the ICHR’s independent, region-wide perspective suggests the ICtHR will be willing to take a broad, regional attitude rather than waiting for individual states to catch up to the most progressive sentiments.

¶39 In September 2010, the ICHR brought the first case of discrimination based on sexual-orientation to the ICtHR.<sup>101</sup> After a Chilean Supreme Court decision held that Karen Atala could lose custody of her children because she is lesbian, the ICHR ruled in April 2010 that Chile’s decision violated various provisions of the American Convention including Article 24’s right to equality and non-discrimination, and Article 17’s right to a family.<sup>102</sup> The ICHR then brought the suit to the ICtHR after finding that Chile failed to comply with ICHR’s recommendations regarding the steps required to rectify the situation. Although not a case about same-sex marriage rights, the ICHR’s actions clearly indicate a belief that discrimination based on sexual orientation violates the American Convention, opening the door for future cases specifically related to same-sex marriage.

<sup>95</sup> *Id.* art. 1, ¶ 1.

<sup>96</sup> *Id.* art. 11, ¶ 2.

<sup>97</sup> *Id.* art. 16, ¶ 1.

<sup>98</sup> *Id.* art. 17, ¶ 2; *see also* ICCPR, *supra* note 19, pt. II (arguing that this provision extends the right to marry to all people regardless of sexual orientation).

<sup>99</sup> *See, e.g.*, *Álvarez v. Colombia*, Case 11.656, Inter-Am. Comm’n H.R., Report No. 71/99, OEA/Ser.L/V/II.106, doc. 3 rev. 211 (May 4, 1999), *available at* [http://www.cidh.org/annualrep/99eng/admissible/colombia11656.htm#\\_ftn1](http://www.cidh.org/annualrep/99eng/admissible/colombia11656.htm#_ftn1) (finding admissible petitioner’s claim of discrimination under Articles 5, 11, 24 of the Am. Convention but failing to rule on the merits of the claim).

<sup>100</sup> *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17 at 41 (Aug. 28, 2002), *available at* [http://www.corteidh.or.cr/docs/opiniones/seriea\\_17\\_esp.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_17_esp.pdf).

<sup>101</sup> *See* Emily Rose Johns, *IACtHR to Hear First Case on Discrimination Based on Sexual Orientation*, THE HUMAN RIGHTS BRIEF, Nov. 7, 2010, *available at* <http://hrbrief.org/2010/11/iacthr-to-hear-first-case-on-discrimination-based-on-sexual-orientation/>.

<sup>102</sup> *Application of the Inter-American Commission on Human Rights Before the Inter-American Court of Human Rights Against the State of Chile* (Sept. 17, 2010), *available at* <http://www.cidh.oas.org/demandas/12.502ENG.pdf>.

¶40 For now, general arguments similar to those made regarding parties' obligations under the international covenants can also be made within the Inter-American arena based on the American Convention's plain language. The phrase "any other social condition," (a detrimental choice of words that perpetuates the claim that homosexuality is a "condition" that can be chosen), still ought to encompass sexual orientation. As such, member states must ensure "the free and full exercise" of the "rights and freedoms" enumerated within the Convention.

#### IV. SPAIN

¶41 The Spanish legal system is based in civil law and interprets rights declared under the Spanish Constitution in conformity with the Universal Declaration of Human Rights and the international treaties to which Spain is a party.<sup>103</sup> This establishes Spain's commitment to universal fundamental human rights and makes it even more evident that the Spanish government is committed to its obligations under those instruments. The Constitutional Court is an independent part of the government with its own rules and rights, and is the sole interpreter of the Constitution.<sup>104</sup> The Constitution explicitly prohibits discrimination based on "any ... condition or circumstance."<sup>105</sup> Spanish law provides for a writ of "amparo," a complaint made by an individual directly to the Constitutional Court premised on the belief that their individual rights have been violated by a public authority (upon exhaustion of other remedies).<sup>106</sup>

¶42 The Constitution expressly lays out the state's obligation to ensure that citizens' rights and liberties are protected: the liberties and rights guaranteed by the Constitution do not merely protect citizens from state interference, but also affirmatively impose a duty on public authorities to promote conditions in which these liberties can thrive and be equally enjoyed by all citizens.<sup>107</sup> Thus, the Spanish state acknowledges its positive duty not only to provide its citizens with Spanish rights and duties, but also to ensure that those rights are compatible with international human rights norms. This globalized view of human rights may play a large role in Spain's progressive outlook in the context of sexual orientation-based discrimination.

¶43 In 2005, despite opposition from the Catholic Church, Spain legalized gay marriage.<sup>108</sup> The amended Civil Code now provides that the right of marriage will be the same for straight and same-sex couples: "Marriage will have the same requirements and effect when both contracting parties are of the same sex or of the opposite sex."<sup>109</sup> Meanwhile, the Constitution's marriage provision states that "man and woman have the right to contract matrimony with full legal equality."<sup>110</sup> The Constitution limits who may

<sup>103</sup> C.E., B.O.E. n. 311, Dec. 29, 1978, tit. I, ch. 0, art. 10, ¶ 2 (Spain).

<sup>104</sup> *Id.* tit. IX, arts. 159, 161.

<sup>105</sup> *Id.* tit. I, ch. II, § 0, art. 14.

<sup>106</sup> Ley Orgánica del Tribunal Constitucional L.O.T.C. No. 2/1979, art. 2, ¶ 1(b.) Oct. 3, 1979; *see also* C.E. tit. I, ch. IV, art. 53, ¶ 2.

<sup>107</sup> C.E. tit. I, ch. IV, art 53, ¶¶ 1, 3.

<sup>108</sup> Jennifer Green, *Spain Legalizes Same-Sex Marriage*, THE WASHINGTON POST, July 1, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/30/AR2005063000245.html>.

<sup>109</sup> C.C. lib. 1, tit. IV, cap. II, art. 44, ¶ 2. (B.O.E. 2005, 157) (Spain) ("El matrimonio tendrá los mismos requisitos y efectos cuando ambos contrayentes sean del mismo o de diferente sexo.") (trans. by author).

<sup>110</sup> C.E. tit. I, ch. II, § 2, art. 32, ¶ 1.

bring a constitutional appeal,<sup>111</sup> and constitutional determinations issued by the Constitutional Court may not be appealed.<sup>112</sup> Although the Constitutional Court has not ruled on whether the new law is constitutional or not, the Court refused to adjudicate a case brought by the head judge of a lower court challenging the law as being inconsistent with the Constitution's marriage provision.<sup>113</sup> Thus, the new law remains valid.

¶44 Since the new law went into effect, many gay couples have sought wedding licenses. A small Spanish village, Campillo de Ranas, has seen a flood of gay marriages: of the 140 couples to marry there since 2005, forty percent have been same-sex couples. “[Campillo de Ranas], with around [sixty] full-time residents, ... has in the last few years been transformed into the unofficial gay wedding capital of Spain.”<sup>114</sup> In legalizing same-sex marriage, Spain has to a large degree fulfilled its obligations under international treaties to end formal sexual orientation-based discrimination.

## V. EL SALVADOR

¶45 Despite recent policy changes in El Salvador, the country currently denies legal recognition of same-sex marriage. Though the Asamblea Legislativa (Legislative Assembly) recently rejected amendments to the Constitution that would have outlawed same-sex marriage, gay marriage is generally frowned upon and gay activists and leaders remain subject to violence and threats.<sup>115</sup> Gay marriage is not explicitly prohibited, but El Salvador appears to be a long way from matching Spain's affirmative legalization of same-sex relationships.

¶46 The Salvadoran Constitution highlights the value of the familial unit and establishes the state's role in protecting it. Article 32 states:

The family is the fundamental basis of society and shall have the protection of the State, which shall dictate the necessary legislation and create the appropriate organizations and services for its integration, well-being and social, cultural, and economic development. The legal foundation of the family is marriage and rests on the juridical equality of the spouses. The State shall foment marriage; but the lack of this shall not affect the enjoyment of the rights established in favor of the family.<sup>116</sup>

Further, Article 33 states: “The law shall ... establish the rights and reciprocal duties [of spouses] ... and shall regulate the family relations resulting from the stable union of a man and a woman.”<sup>117</sup> Finally, Article 34 states: “Every child has the right to live in familial and environmental conditions that permit his integral development, for which he

<sup>111</sup> *Id.* tit. IX, art. 162, ¶ 1a; *see also id.* art. 163.

<sup>112</sup> *Id.* tit. IX, art. 164, ¶ 1.

<sup>113</sup> STS, Jan. 16, 2008 (B.J.C., No. 7796-2007) (Spain), *available at* <http://www.tribunalconstitucional.es/en/jurisprudencia/Pages/Auto.aspx?cod=9075> (last visited Feb. 20, 2010).

<sup>114</sup> Andrew Ferren, *Spanish Village of Rainbow Weddings*, N.Y. TIMES, Sept. 6, 2009, *available at* <http://travel.nytimes.com/2009/09/06/travel/06journeys.html>.

<sup>115</sup> Edgardo Ayala, *Anti-Gay Reform Fails in Congress*, IPS NEWS, Sept. 25, 2009, *available at* <http://www.ipsnews.net/news.asp?idnews=48604>.

<sup>116</sup> CONST. POL. REPUB. EL SAL. tit. I, cap. II, art. 32 (1983).

<sup>117</sup> *Id.* art. 33.

shall have the protection of the State.”<sup>118</sup> (Like Spain, El Salvador has a civil law system and allows individuals to bring constitutional complaints through the “amparo.”<sup>119</sup>)

¶47 In April 2009, the Assembly considered amendments that would alter these three articles to institute a constitutional ban on gay marriage. Specifically, the proposed reforms would have amended Article 32 to provide that only “men and women who were born so” are competent to enter into marriage.<sup>120</sup> The amendments would have further added that “[m]arriages between persons of the same sex celebrated or recognised under the laws of other countries, and other unions that do not fulfill the conditions established under Salvadoran law, will be null and void in El Salvador.”<sup>121</sup> The initial vote to adopt the amendments passed and the legislative process then moved toward the ratification stage.<sup>122</sup>

¶48 However, in March 2009, Salvadoran voters elected Mauricio Funes as the new President of El Salvador.<sup>123</sup> Funes is a member of the left-wing Farabundo Martí Liberación Nacional party (“FMLN”).<sup>124</sup> For the two decades before his election, the right-wing Alianza Republicana Nacionalista party (“ARENA”) controlled the government.<sup>125</sup> Thus, Funes’ election signaled a major shift in national power. Once in power, the FMLN argued that the newly approved amendments to the Constitution were a violation of civil rights and, in September 2009, members of the FMLN voted against ratification of the previously approved amendments.<sup>126</sup> (The FMLN held thirty-five of eighty-five seats in the Assembly;<sup>127</sup> because the Salvadoran Constitution requires a two-thirds majority for ratification of amendments, the amendments failed when the entire FMLN delegation withdrew its support.)<sup>128</sup>

¶49 The amendments garnered substantial support from the Catholic Church as well as the Fundación Salvadoreña para el Desarrollo Económico y Social (“FUSADES”) (the Salvadoran Foundation for Economic and Social Development). As an institution dedicated to the development of El Salvador, FUSADES regularly publishes its opinions and recommendations on current issues “considered pertinent to El Salvador’s development and progress” in various newspapers.<sup>129</sup> In a statement released as the

<sup>118</sup> *Id.* art. 34.

<sup>119</sup> *Id.* tit. VI, cap. III, art. 182.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> See Ayala, *supra* note 115.

<sup>123</sup> Claudia Huete, *Mauricio Funes Se Proclama Presidente de El Salvador [Mauricio Funes Proclaimed President of El Salvador]*, LA PRENSA GRÁFICA, Mar. 15, 2009, available at <http://www.laprensagrafica.com/el-salvador/politica/23214-mauricio-funes-se-proclama-presidente-de-el-salvador.html>.

<sup>124</sup> See Historia del FMLN [History of the FMLN], <http://www.fmln.org.sv/historia.php> (last visited Feb. 20, 2010) (The FMLN became a legitimate political party in 1992 but served throughout the 1980s as the umbrella organization of the guerrilla movement during El Salvador’s civil war).

<sup>125</sup> See Eric Lemus, *Funes Toma Las Riendas en El Salvador [Funes Takes the Reins in El Salvador]*, BBC, June 1, 2009, available at [http://www.bbc.co.uk/mundo/america\\_latina/2009/06/090601\\_0925\\_funes\\_poder\\_ln.shtml](http://www.bbc.co.uk/mundo/america_latina/2009/06/090601_0925_funes_poder_ln.shtml) (noting that ARENA had been in power for two decades before Funes’ election).

<sup>126</sup> See Ayala, *supra* note 115.

<sup>127</sup> Asamblea Legislativa [Legislative Assembly] List of Represented Parliamentary Groups, <http://www.asamblea.gob.sv/GruposParlamentarios.aspx> (last visited Feb. 20, 2010).

<sup>128</sup> See Ayala, *supra* note 115.

<sup>129</sup> See FUSADES, <http://fusades.org/index.php?cat=1077&lang=en&title=Institutional%20Releases> (noting its “Institutional Pronouncement” policy of publishing its official positions in newspapers) (last

Asamblea considered the ratification of the constitutional amendments, FUSADES announced its opposition to gay marriage and urged the Asamblea to ratify the reforms such that gay marriage would be prohibited.<sup>130</sup> The organization argued that such a prohibition would serve to strengthen El Salvador's young democracy.<sup>131</sup> In the same statement, FUSADES referred to the Catholic Church's simultaneous advocacy of the prohibition, noting that the Church's opposition was not directed at same-sex unions but rather at the proposition of referring to those unions as "marriages."

¶50 Indeed, the Catholic Church took a vocal stance in favor of the amendments that would enact the prohibition. The Archbishop of San Salvador, who framed the issue as one of protection of the family rather than a prohibition on a right, visited the Asamblea to personally urge members to support the amendments, arguing that it would set a desirable precedent for the country as "an essential protection of marriage and the family."<sup>132</sup> Calling gay marriage "immoral," the Archbishop brought a collection of over 200,000 signatures from citizens supporting the amendments to prohibit gay marriage.<sup>133</sup>

¶51 At the time these amendments were being debated, the Ministry of Public Health issued an Executive Accord stating an intention to end discrimination based on sexual orientation. Framing the issue as a matter of public health, the Accord stated:

Considering that the health of [El Salvador's] citizens constitutes a public aim and that the state and citizens are obligated to watch over their conservation and recovery ... that all people independent of their sexual orientation have the right to prompt attention, to freedom from discrimination, to confidentiality, equity without prejudice to the rights established in the constitution ... it is [therefore] necessary that the different institutions participate in the fight against homophobia, establishing effective channels of condemnation that guarantee respect for the Human Rights of this Population.<sup>134</sup>

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visited Oct. 31, 2010).

<sup>130</sup> Raúl Méndez, *FUSADES Se Pronuncia Contra Matrimonios Gay*, LA PÁGINA, Apr. 21, 2009, <http://www.lapagina.com.sv/nacionales/7446/2009/04/21/FUSADES-se-pronuncia-contra-matrimonios-gay> (last visited Nov. 7, 2010).

<sup>131</sup> *Id.* (stating that "El Salvador vive una coyuntura politica oportuna para aprobar algunas reformas constitucionales, entre ellas la que prohíba las bodas gay.") ("El Salvador has an opportune political moment to approve several constitutional reforms, including that which prohibits gay marriage.") (trans. by author).

<sup>132</sup> Rossy Tejada, *Iglesia Pide a Diputados Prohibir Matrimonios Gay [The Church Asks Representatives to Prohibit Gay Marriage]*, LA PRENSA GRÁFICA, Apr. 20, 2009, available at <http://www.laprensagrafica.com/el-salvador/social/28830--iglesia-pide-a-diputados-prohibir-matrimonios-gay.html>.

<sup>133</sup> Karen Molina and Rafael Mendoza, *Iglesia Apremia Rechazo a Bodas Gay [The Church Urges Rejection of Gay Marriage]*, EL DIARIO DE HOY, Apr. 19, 2009, available at [http://www.elsalvador.com/mwedh/nota/nota\\_completa.asp?idCat=6351&idArt=3555603](http://www.elsalvador.com/mwedh/nota/nota_completa.asp?idCat=6351&idArt=3555603).

<sup>134</sup> Diario Oficial (D.O.) Decree 202, T. 383, arts. I, IV, VII, at 40-41, Apr. 14, 2009 (El Sal.) ("Considerando que ... la salud de los habitantes constituye un bien público y que el estado y las personas están obligados a velar por su conservación y restablecimiento ... que todas las personas independientemente de su orientación sexual, tienen derecho a la atención oportuna, a la no discriminación, a la confidencialidad, equidad sin perjuicio a los derechos establecidos en la constitución ... es necesario que las diferentes instituciones participen en el combate contra la homofobia, estableciendo canales de denuncia eficaces que garanticen el respeto de los Derechos Humanos de esta Población.") (trans. by author).

The Accord charges not only all agencies of public health, but all public institutions, with the task of facilitating, promoting, and supporting actions intended toward the eradication of any type of discrimination based on sexual orientation.<sup>135</sup> Official government expression of this view, even though not specifically related to same-sex relationships, represents a strong step toward eventual abolishment of sexual orientation-based discrimination.

¶52 Although this indicates a government position consistent with human rights standards (namely, the protection of the rights of people based on sexual orientation), the Salvadoran Code of the Family<sup>136</sup> still defines and establishes marriage as the union of a man and a woman.<sup>137</sup> Under a separate section entitled “Rules and Impediments to Contracting into Marriage,” the Code specifically lists situations in which marriage is prohibited.<sup>138</sup> Nowhere in the list of prohibitions is there any reference to same-sex couples who wish to be married. A strange situation results: while the constitutional amendments defining marriage as between a man and a woman have been rejected, the Code of the Family still defines marriage that way. This apparent contradiction merits further attention from the state.

¶53 Statements made in Salvadoran newspapers reflect the prevailing social attitudes on same-sex relationships. Mirroring the position of the Catholic Church, the author of a recent newspaper editorial piece voiced no objection to the creation of legalized same-sex relationships, but was vehemently opposed to the idea of referring to these unions as marriages: “To refer to these unions as marriages ... that is an attack on reality, it is a lie and legal violence, it is to go against nature and is a tremendous social injustice against the true marriages.”<sup>139</sup> The editorial’s author also argued the need for a constitutional definition of marriage as between a man and a woman:

Thus, to speak of homophobia regarding this reform is an attempt to confuse the public, inventing something that does not exist. And to speak of discrimination is to not understand this word. Justice demands discriminations, because justice does not consist of giving everyone the same, but in giving each his own. And before the law we are equal in some things; in others, no.<sup>140</sup>

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<sup>135</sup> *Id.* art. 1.

<sup>136</sup> Diario Oficial (D.O.) Code of the Family, Decree 677, T. 321, Dec. 13, 1993 (El Sal.).

<sup>137</sup> *Id.* tit. I, ch. I, art. 11.

<sup>138</sup> *Id.* tit I., ch. II.

<sup>139</sup> Luís Fernández Cuervo, Editorial, *Matrimonio, Justicia y Lealtad Política* [Marriage, Justice and Political Loyalty] (El Sal.), EL DIARIO DE HOY, Aug. 30, 2009, available at [http://www.elsalvador.com/mwedh/nota/nota\\_opinion.asp?idCat=6342&idArt=3954516](http://www.elsalvador.com/mwedh/nota/nota_opinion.asp?idCat=6342&idArt=3954516) (“Pero llamar ‘matrimonio’ a esas uniones, ... eso sí que es un ataque a la realidad, eso es mentira y violencia legalizada, es ir contra la naturaleza y una tremenda injusticia social contra los verdaderos matrimonios.”) (trans. by author).

<sup>140</sup> *Id.* (“Entonces, hablar de homofobia ante esta reforma es ganas de confundir a la opinión pública, inventando algo que no existe. Y hablar de discriminación es no entender esta palabra. La justicia exige discriminaciones, porque no consiste la justicia en dar a todos lo mismo, sino en dar a cada uno lo suyo. Y ante la ley sólo somos iguales en algunas cosas; en otras, no.”) (trans. by author).

One month later, in response to discussion of same-sex marriage in Ecuador, another Salvadoran columnist cited with approval the words of Monseñor Antonio Arregui, president of the Episcopal Conference of Ecuador:

One may not speak of marriage nor of the family regarding the unions formed by homosexuals. These unions or associations are contrary to nature and are sterile. There cannot be a 'gay marriage' nor a 'gay family.' The Christian morality considers homosexual practice to be a grave moral disorder incompatible with a life of faith because it is in contrast with natural law and the law of God.<sup>141</sup>

A seething intolerance simmers below the surface of these statements. They express an attitude akin to “we are not homophobic; we are merely opposed to the label of marriage being applied to same-sex relationships.” However, recent structural changes in the country’s government suggest the political powers that be are willing to move forward despite potential social opposition.

¶54

Shortly after taking office, President Funes issued a presidential decree creating the Department of Social Inclusion.<sup>142</sup> In its advisory capacity, the goal of the Department is to support the development and protection of the family and the elimination of discrimination, while encouraging social inclusion and opportunities for groups including youth, women, and people with disabilities to participate in civil society.<sup>143</sup> The Department’s Charter expressly states that the list of these groups is not exhaustive, and its website lists “sexual diversity” as one of the Department’s foci.<sup>144</sup> Indeed, the focus is on creating greater understanding among the general population with the aim of fostering an atmosphere of respect. To that end, the Director of the sexual diversity branch of the Department notes that the current emphasis of her branch is on ensuring civil, economic, cultural, and basic human rights, and not on pursuing a right to marriage or civil union.<sup>145</sup> This, however, presupposes that a right to marriage or civil union is not one of the basic human rights the Department aims to ensure. While including the right to marriage within the umbrella of basic human rights would be the most desirable step, the very creation of the Department itself is a major step forward in the country.

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In May 2010, the government issued a decree noting both El Salvador’s commitment to the various international conventions and the fact that in spite of those

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<sup>141</sup> Julia Regina de Cardenal, Editorial, *Legalización de Uniones Homosexuales en Ecuador [Legalization of Homosexual Unions in Ecuador]* (El Sal.), EL DIARIO DE HOY, Sept. 30, 2009, available at [http://www.elsalvador.com/mwedh/nota/nota\\_opinion.asp?idCat=6342&idArt=4068556](http://www.elsalvador.com/mwedh/nota/nota_opinion.asp?idCat=6342&idArt=4068556) (“No puede hablarse de matrimonio ni de familia en las uniones que puedan formar personas homosexuales. Esas uniones o asociaciones son contrarias a la naturaleza y, de suyo, estériles. No puede haber un 'matrimonio homosexual' ni una 'familia homosexual.' La moral cristiana considera la práctica homosexual como un grave desorden moral incompatible con la vida de fe, porque contrasta con la ley natural y los mandamientos de la Ley de Dios.”) (trans. by author).

<sup>142</sup> Decreto Presidencial No. 57, D.O. No. 193, T. 385, Oct. 16, 2009 (El Sal.).

<sup>143</sup> *Id.* tit. III, ch. IV, art. 53-A (El Sal.).

<sup>144</sup> Secretaría de Inclusión Social, <http://inclusion-social.presidencia.gob.sv/>, (last visited Mar. 26, 2010).

<sup>145</sup> E-mail from Lic. Barbara Romero, Directora de Diversidad Sexual, Secretaría de Inclusión Social, to Anna Forgie (Jan. 27, 2011, 9:24 CST) (on file with author).

commitments, sexuality-based discrimination persists in the country.<sup>146</sup> Most importantly, the decree acknowledges that it is the responsibility of the government to ensure the creation of conditions that not only protect all citizens but also eliminate any form of discrimination based on sexual orientation.<sup>147</sup> It then prohibits any discrimination within the institutions and organizations that make up the Public Administration (ministers, secretaries, etc.) and calls on all organs of the government to review their policies and programs to ensure compliance with the new decree and to take any necessary corrective measures to eliminate any forms of discrimination.<sup>148</sup> Although it does not deal specifically with gay marriage, this major step demonstrates that the government is now aware of the need to eliminate discrimination within its own branches in order to comply with its international obligations.

## VI. ANALYSIS<sup>149</sup>

¶56 The various international and regional bodies discussed above maintain differing perspectives on the rights to be afforded to same-sex relationships, and same-sex relationships have very different legal statuses in different parts of the world. This paper argues that the difference between the treatment of same-sex couples in Spain and El Salvador arises from two sources: first, as discussed, European binding documents are more progressive than Inter-American documents; and second, the social atmosphere in Spain is generally more liberal than in El Salvador, where the pervasive Christian viewpoint is intolerant of same-sex relationships.

¶57 While religion plays a prominent role in both Spanish-speaking countries, over 50% of the population in El Salvador identifies as Catholic and actively practices the religion, while much of the rest of the population belongs to conservative evangelical churches.<sup>150</sup> A June 2009 survey conducted by the Instituto Universitario de Opinion Publica (“IUDOP”) (University Institute of Public Opinion), part of the Universidad Centroamericana in San Salvador, found that the number of Salvadorans claiming membership in evangelical churches almost doubled in ten years from 20% of the population to nearly 40%.<sup>151</sup> The study also found a reduction in the number of people who claim not to belong to a religious faith, suggesting that the general influence of religious thought has increased in the country. More than half of those polled believe churches should involve themselves in social conflicts.<sup>152</sup> In comparison, in Spain, 73.8% of the population identifies as Catholic but only 36% is actively practicing.<sup>153</sup> Christian language permeates all aspects of Salvadoran society and discussion of what is

<sup>146</sup> Decreto Presidencial No 56, D.O. No. 86, T. 387, May 12, 2010 (El Sal.).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* arts. 2, 3.

<sup>149</sup> Some of the opinions regarding the situation in these countries come from the author’s experience living and working in San Salvador, El Salvador from June 2005 through August 2007, and from on-going conversations with colleagues living in the country.

<sup>150</sup> *El Salvador: Int’l Religious Freedom Rep. 2008*, DEP’T ST. RELEASE, available at <http://www.state.gov/g/drl/rls/irf/2008/108525.htm> (last visited Jan. 31, 2010).

<sup>151</sup> Press Release, IUDOP, La Religión Para Las y Los Salvadoreños, [Religion for Salvadorans], 2009, No. 4, available at [http://www.uca.edu.sv/publica/iudop/Web/2009/boletinrel\\_2009.pdf](http://www.uca.edu.sv/publica/iudop/Web/2009/boletinrel_2009.pdf).

<sup>152</sup> *Id.*

<sup>153</sup> *Spain: 36 Percent Claim to be Practicing Catholics*, CATHOLIC NEWS AGENCY, Aug. 21, 2007, available at <http://www.catholicnewsagency.com/new.php?n=10175>.

“contrary to God’s word” occurs in regular news commentary.<sup>154</sup> While the Archbishop of San Salvador was lobbying for a prohibition on gay marriage, the pastor of a large evangelical church in the country expressed his concern that gay marriages would set a bad example for children.<sup>155</sup>

¶158 Compared to the cosmopolitan, developed countries of the European continent, the countries of Central America generally maintain restrictive positions on social issues.<sup>156</sup> Spain has legalized both gay marriage and abortion while El Salvador imposes severe criminal penalties for abortion and maintains a strong aversion to granting marriage rights to the LGBT population.<sup>157</sup> Within Latin America, however, as noted above, both Uruguay<sup>158</sup> (on a national level) and Mexico City<sup>159</sup> (at the local level) have recently legalized same-sex relationships. The city of Buenos Aires has permitted same-sex civil unions since 2002,<sup>160</sup> and the first same-sex marriage in Latin America was permitted in Argentina in November 2009, after a judge ruled that the country’s ban on same-sex marriage was a violation of its Constitution.<sup>161</sup> Nevertheless, Latin American countries and the Inter-American region in general have traditionally taken a strong stance against same-sex relationships.<sup>162</sup>

¶159 The Catholic Church, a powerful institution throughout Latin America and Spain, makes its hostility to the legalization of same-sex relationships clear: “There are absolutely no grounds for considering homosexual unions to be in any way similar or even remotely analogous to God’s plan for marriage and family. Marriage is holy, while homosexual acts go against the natural moral law.”<sup>163</sup> Given the similarity in language between the Vatican’s official statements and the viewpoints expressed in the Salvadoran newspapers, it appears the Catholic Church exerts a certain amount of influence over the mindset of the Salvadoran population.

<sup>154</sup> See, e.g., Fernandez, *supra* note 139; de Cardenal, *supra* note 141.

<sup>155</sup> See Molina, *supra* note 133.

<sup>156</sup> See, e.g., Jack Hitt, *Pro-Life Nation*, N.Y. TIMES, Apr. 9, 2006, available at <http://www.nytimes.com/2006/04/09/magazine/09abortion.html> (noting the serious repercussions for both doctor and woman involved in an abortion procedure); *Governments Urged to Condemn Nicaragua Abortion Ban*, AMNESTY INT’L, Feb. 4, 2010, available at <http://www.amnesty.org/en/news-and-updates/news/un-urged-condemn-nicaragua-abortion-ban-20100204> (noting that Nicaragua jails women who seek abortions).

<sup>157</sup> See *International Human Rights Law and Abortion in Latin America*, HUM. RTS. WATCH, at 3, available at <http://www.hrw.org/legacy/backgrounder/wrd/wrd0106/wrd0106.pdf> (last visited Feb. 15, 2010).

<sup>158</sup> See *Uruguay Approves Gay Civil Unions*, BBC, Dec. 19, 2007, available at <http://news.bbc.co.uk/2/hi/americas/7151669.stm> (noting that while civil unions would become legal in Uruguay, gay marriage would remain illegal).

<sup>159</sup> See *Aprueban Matrimonios Homosexuales en Ciudad de Mexico [Approval of Homosexual Marriage in Mexico City]*, EL UNIVERSAL, Dec. 21, 2009, available at [http://www.eluniversal.com/2009/12/21/int\\_ava\\_aprueban--matrimonio\\_21A3219571.shtml](http://www.eluniversal.com/2009/12/21/int_ava_aprueban--matrimonio_21A3219571.shtml).

<sup>160</sup> Law No. 1004, Dec. 12, 2002, 001617 B.O. Ciudad de Buenos Aires, Decree No. 63/2003, art. 1 (Arg.) (defining a civil union as a freely formed union between two people independent of their sexual orientation).

<sup>161</sup> *Argentine Couple Granted Marriage License*, N.Y. TIMES, Nov. 17, 2009, at A10, available at <http://www.nytimes.com/2009/11/17/world/americas/17argentina.html>.

<sup>162</sup> See, e.g., Álvarez, Report No. 71/99, OEA/Ser.L/V/II.106, doc. 3 rev. 211 (noting Colombia’s statement that there is a “deeply rooted intolerance in Latin American culture of homosexual practices”); see also Press Release, Inter-Am. C.H.R.: IACHR Issues Preliminary Observations on Visit to Jamaica, No. 59/08 (Dec. 5, 2008), available at <http://www.cidh.org/comunicados/english/2008/59.08eng.htm> (finding a “high level of homophobia that prevails”).

<sup>163</sup> See Congregation for the Doctrine of the Faith, *supra* note 29, ¶ 4.

¶160 Given the current state of the laws in the various countries, it would seem the Church has less of an influence in Spain than it does in El Salvador: as noted previously, membership in the Catholic Church may be in name only, as a relatively low percentage of the population actually practices. These figures suggest a social detachment from Church views.<sup>164</sup>

¶161 In El Salvador, by contrast, religion permeates daily life; indeed, authorities in the Catholic Church pressure lawmakers to prevent any legalization of same-sex benefits.<sup>165</sup> This pressure from the Catholic Church, coupled with the hard-line stance taken by the multiple evangelical churches, serves to entrench discriminatory views in the populace.<sup>166</sup> In a country where sentences are constantly peppered with the phrase “Gracias a Dios” (“Thanks to God”), maintaining a good relationship with that God (and the actions and beliefs that entails) is a pervasive part of the Salvadoran psyche.<sup>167</sup> The family unit is also a core part of Salvadoran society and some commentators claim that gay marriage is incompatible with the idea of a family.<sup>168</sup> Though beyond the discussion of this paper, there is a palpable irony in the claim that gay marriage will have some kind of detrimental effect on family in a country where so many parents leave children behind when they leave to seek a better life abroad.

¶162 Thus, it comes as little surprise that groups in El Salvador working to improve the civil rights of gays and lesbians are threatened with death while the police turn a blind eye.<sup>169</sup> William Hernandez, leader of the group Entre Amigos, a group dedicated to improving the lives of gay, lesbian, and transgendered people in El Salvador, was threatened at gunpoint outside his office.<sup>170</sup> In an interview with Radio Netherlands, Mr. Hernandez also noted that several homicides in the country have been targeted killings of gay community members.<sup>171</sup> Threats against gay rights groups are common and the police still refuse to provide protection.<sup>172</sup> Monseñor Arregui’s statement is admired in the newspaper.<sup>173</sup> The pervasive social mindset on same-sex couples may not

<sup>164</sup> See *El Cardenal Amigo Vallejo Se Despide de Sevilla* [Cardinal Amigo Vallejo Says Goodbye to Sevilla], EL PAÍS (Spain), Nov. 6, 2009, available at [http://www.elpais.com/articulo/andalucia/cardenal/Amigo/Vallejo/despide/Sevilla/elpepiespand/20091106elpand\\_14/Tes](http://www.elpais.com/articulo/andalucia/cardenal/Amigo/Vallejo/despide/Sevilla/elpepiespand/20091106elpand_14/Tes) (announcing the resignation of the Archbishop of Seville, who refused to urge his congregation to attend rallies intended to protest the legalization of gay marriage in Spain).

<sup>165</sup> See *El Salvador: Thousands Against Gay Marriage*, SPERO NEWS, Apr. 24, 2009, available at <http://www.speroforum.com/site/article.asp?idCategory=33&idsub=123&id=19044&t.=El+Salvador%3A+Thousands+against+gay+marriage>.

<sup>166</sup> See Fernandez, *supra* note 139.

<sup>167</sup> See ERIN FOLEY, CULTURES OF THE WORLD: EL SALVADOR 81 (Marshall Cavendish Int’l Private Ltd. 2d ed. 2005) (1995).

<sup>168</sup> See de Cardenal, *supra* note 141.

<sup>169</sup> Doug Ireland, *El Salvador: New Attacks Underscore Gays’ Dire Situation*, DIRELAND, Dec. 14, 2006, available at [http://direland.typepad.com/direland/2006/12/el\\_salvador\\_new.html](http://direland.typepad.com/direland/2006/12/el_salvador_new.html).

<sup>170</sup> *Id.*

<sup>171</sup> See Audio recording: Beatriz Diez Hernando, *Controversia en El Salvador por el Matrimonio Homosexual* [Controversy in El Salvador over Gay Marriage] (Aug. 31, 2009), available at <http://www.rnw.nl/espanol/article/controversia-en-el-salvador-por-el-matrimonio-homosexual>.

<sup>172</sup> Press Release, Int’l Gay & Lesbian Hum. Rts. Comm’n, El Salvador: Demand Salvadoran Authorities to Stop Aggressions Against Gay and Lesbian Hum. Rts. Defenders, Aug. 28, 2006, available at <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/globalactionalerts/295.html>; see also Press Release, Int’l Gay & Lesbian Hum. Rts. Comm’n, El Salvador: The Law Laughs; Salvadorian (sic) Police Refuse to Protect Threatened Activists, Jan. 20, 2000, available at <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/globalactionalerts/488.html>.

<sup>173</sup> See de Cardenal, *supra* note 141.

be easily changed. But the Salvadoran government, as party to the myriad international and regional bodies, especially the OAS, not only has the aforementioned duty to ensure non-discrimination, but also has a duty to bring to justice those who perpetrate acts of violence based on sexual orientation. Failure to do so constitutes a violation of the country's obligations under those bodies.<sup>174</sup> Worse yet, failure to act is a veiled affirmation of those violent acts and makes changing the social mindset all the more difficult. FUSADES, an organization supposedly dedicated in part to the social development of El Salvador, expressed the belief that prohibiting gay marriage would actually serve to fortify the country's democracy.

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The more progressive European organizations exert pressure on member states to fulfill human rights requirements.<sup>175</sup> Spain has responded by legalizing gay marriage. Although not yet expressly demanded by Inter-American organizations, international human rights standards to which El Salvador has expressed its commitment demand that the Salvadoran government meet those requirements. El Salvador's recent rejection of attempts to ban same-sex marriage may have been the first step toward greater inclusion and acceptance. The creation of a new government cabinet position dedicated to social inclusion is an even greater positive step. The efforts to create a more inclusive and tolerant society are a strong statement; enshrining certain basic rights in legal documents may be the next step. The waves of change passing through the country suggest a bright future for an end to discrimination based on sexual orientation.

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<sup>174</sup> See *supra* pts. II, III.

<sup>175</sup> See, e.g., Comm'r for Hum. Rts., Council of Europe, *Contribution of the Comm'r for Hum. Rts. to the Work of the Comm. of Experts on Discrimination on Grounds of Sexual Orientation and Gender Identity (DH-LGBT)*, Comm. DH (2009) 7, § A, ¶ 3, (Feb. 9, 2009), available at <https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstraneImage=1169269&SecMode=1&DocId=1370816&Usage=2>.