

## Moving Forward in the Face of Backlash

### *Equal Rights Regardless of Sexual Orientation and Gender Identity*

The extent of legalized discrimination and violence around the world against lesbian, gay, bisexual, and transgender individuals and other sexual and gender minorities (LGBT+)¹ remains staggering. As of 2019, 68 countries had criminalized consensual sexual activity between adults of the same sex, nearly all of which provide for some length of imprisonment.² In 32 countries, the maximum prison sentence for same-sex relationships ranges from 10 years to life, while the laws of 8 countries allow for the death penalty.³

The treatment of LGBT+ individuals is also one of the few areas in which a significant number of countries are increasing rather than dismantling discrimination in the law. Indeed, while many countries' criminalization laws are historical holdovers, others were enacted much more recently, such as Nigeria's "Same-Sex Marriage Prohibition Act," adopted in 2013, and the Maldives's 2014 Criminal Code.⁴

Discrimination affects the lives of LGBT+ individuals and their families around the world. Across Europe, 13% of LGBT respondents to a 2012 survey reported that they had experienced discrimination when applying for jobs in the previous year, including 30% of transgender respondents; of those who were working, 19% had personally experienced discrimination, while 67% reported witnessing negative

treatment toward a colleague perceived to be LGBT.<sup>5</sup> Similarly, in a survey of the LGBTI population in China, 56% reported experiencing discrimination within their families, as did 40% in education and 21% in the workplace.<sup>6</sup> According to the World Values Survey, which asks respondents across 58 countries for their views on important social issues, 54% of adults in the average country surveyed would not want a gay person as their neighbor.<sup>7</sup> This discrimination—whether by the state, private employers, or others in one’s community—can have devastating effects on home and personal life, educational and career opportunities, and leadership in public and private spheres.

Legal protections from discrimination on the basis of sexual orientation and gender identity (SOGI) lag far behind protections against other common grounds of discrimination, like race and religion. Yet in countries where legal protections are passed and enforced, the impact can be dramatic, even in the face of the backlash that can follow progress.

#### THE PACE AND POSSIBILITY OF CHANGE

In this chapter, we examine what can be done to ensure the removal of discriminatory laws and the enactment of equal rights for those in the LGBT+ community. For effective change to happen, which needs to change first: norms or laws?

We believe the answer is that both need to change, but either can change first.

In every area of profound bias, markedly reducing discrimination requires changes both in legal rights and in people’s beliefs. Without legal protections from discrimination, marginalized populations’ access to education, work, and civic and community life can be impaired. Even when the views of the majority of the population do change, without legal protections, people have few tools to use against institutions that choose to discriminate. But likewise, laws alone are rarely enough. While constitutional equal rights can help protect against discriminatory laws and reduce systematic institutional discrimination, constitutional equal rights are unlikely to effectively change the behavior of a country’s population as a whole unless they contribute to changing people’s beliefs.

While it may be self-evident that both equal legal rights and the public’s beliefs about equality need to change, it has been less clear which has to change first. Some have argued that laws never change before social values change, while others have argued that legal change is a powerful force in itself for changing communities’ beliefs. The evidence is clear and compelling. There are strong examples of countries that enacted laws and expanded constitutional protections—both through new constitutions and through court interpretations—well in advance of popular support for equal rights, but subsequently saw marked shifts in public opinion in favor of equality. There are also examples of countries where social movements led to widespread change in public beliefs and legal rights followed.

*Ireland: Broad Public Support Leads to Stronger Rights*

Ireland provides an example of a country where norms changed first. In 2015, Ireland became the first country in the world to legalize same-sex marriage through a popular vote, when 62% voted in favor of a constitutional amendment via referendum.<sup>8</sup> This broad popular support for marriage equality reflected a remarkable norm shift in a country where 83% of citizens identify as Catholic and where Catholic doctrine had been interpreted as opposing same-sex marriage.<sup>9</sup> Many Catholics who voted in favor of the amendment, including clergy members, described support for marriage equality as a “natural outgrowth of their faith” rather than something that conflicted with it, signaling how even long-standing religious norms and traditions are often less rigid than presumed.<sup>10</sup>

*South Africa: A Transformative Constitution Precedes Shifts in Public Opinion*

The opposite was true in South Africa, which adopted a new constitution guaranteeing equal rights well before the public widely accepted the equality of LGBT+ individuals. The 1996 constitution grew out of widespread movements for equality, dignity, and freedom in post-apartheid South Africa. Following many decades of among the worst subjugation on the basis of race, the post-apartheid constitutional congress displayed a profound commitment to ensuring all people were treated equally.

A wide range of marginalized groups, including LGBT+ advocacy groups, had a voice in the drafting of the 1996 constitution.<sup>11</sup> After a few key activists worked to get an explicit protection of equal rights on the basis of sexual orientation included in the 1993 interim constitution, an umbrella organization of 78 LGBT+ organizations, the National Coalition for Gay and Lesbian Equality (NCGLE), formed to participate in the work of the Constitutional Assembly as a united force and ensure the language was preserved in the final draft.<sup>12</sup> As a result of their organizing, the assembly received 7,032 submissions in favor of retaining the explicit protection, and just 564 opposing it.<sup>13</sup> The NCGLE focused their advocacy on the core principles of equality and nondiscrimination, rather than specific rights like marriage, and drew parallels between racial discrimination and discrimination on the basis of sexual orientation.<sup>14</sup> Their efforts paid off when the new constitution was enacted in 1996, which represented a major victory for both the LGBT+ community in South Africa and LGBT+ movements globally.

Nearly two decades after the post-apartheid constitution prohibited discrimination on the basis of sexual orientation, surveys reveal that only one-third of South Africans believe that society should “accept homosexuality.”<sup>15</sup> However, there has been progress over time. Between 2012 (the first year the question was asked) and 2015, the share of South Africans saying they “strongly agreed” with same-sex marriage increased from 1.5% to 9.9%, while the share saying they “strongly disagreed”

decreased from 48.5% to 23.4%.<sup>16</sup> Moreover, in a survey of 39 countries by the Pew Research Center, acceptance of same-sex relationships in South Africa, the only African nation to explicitly guarantee equal rights on the basis of sexual orientation in its constitution, was 24 to 31 percentage points higher than throughout the five other African countries surveyed.<sup>17</sup>

### *Working in Coalitions to Advance Equal Rights*

In South Africa, one key strategy for advancing the constitutional provision on sexual orientation was working in partnership with other groups seeking to advance equal rights, and identifying both common goals and shared experiences. In addition to inviting LGBT+ groups to directly participate in the constitution's drafting, the South African process recognized the interconnectedness of struggles for equal rights across groups and across history, as emphasized by the country's Constitutional Court itself: "In the judges' conceptualization, the struggle for equality for LGBT persons flowed from the struggle against racism."<sup>18</sup>

Building alliances with other marginalized groups has also been important in countries that enacted equal rights by popular vote. For example, in Ecuador during the early 2000s, LGBT+ rights groups partnered with the country's burgeoning feminist and indigenous movements to advocate for more comprehensive protections of equal rights in the new constitution, including an explicit prohibition of discrimination on the basis of both sexual orientation and gender identity.<sup>19</sup> The 2008 constitution—which, in addition to establishing equal rights across SOGI, strengthened rights to education and pensions for informal sector workers—was approved by popular vote, with 64% voting in favor.<sup>20</sup>

### *The Broader Role of Constitutional Rights and Rulings in Shifting Views on Equality*

LGBT+ individuals are not the only group for whom constitutional change and the recognition of equal legal rights have preceded shifts in popular views of equality. For example, just 20% of Americans approved of interracial marriage the year after its prohibition was found unconstitutional in *Loving v. Virginia*, and this figure did not pass 50% for nearly four decades.<sup>21</sup> In India, the 1950 independence constitution abolished "untouchability" and prohibited caste discrimination at a time when the caste system was still deeply entrenched, as a way to accelerate the shift toward abandoning caste distinctions.<sup>22</sup> And in Tunisia, the 2014 constitution guaranteed women's and men's equal opportunities in all domains, even as women's labor force participation rates remained low and 86% of respondents to a 2012 poll felt that men should have priority access to employment when jobs were scarce.<sup>23</sup> Nevertheless, the inclusion of this language signaled a state commitment to shifting norms to enable all people to have equal chances regardless of gender.

## HOW CONSTITUTIONAL EQUAL RIGHTS MAKE A DIFFERENCE

As discussed in previous chapters, constitutional equal rights guarantees can have important effects on both public and private life. First, constitutions can be used to ensure that all legislation in a country is consistent with equal rights. Second, they can ensure that the application and implementation of a country's laws is done in a way that upholds equal rights and opportunities. Third, they can ensure individuals are treated equally by the private institutions that shape many aspects of our lives. And fourth, they can ensure the equal application of laws that shape interpersonal relations.

Constitutional equal rights for LGBT+ individuals have played important roles in each area. A case from South Africa illustrates how guaranteeing equal rights in constitutions can ensure that LGBT+ citizens receive equal treatment from the government, as well as equal recognition of private relationships that are shaped by government rules.

### *South Africa: Protecting Equal Rights of Same-Sex Couples in Immigration Law*

Under the Aliens Control Act, spouses of South Africans were supported in applying for permanent residence in the late 1990s. Same-sex couples, however, were unable to legally marry and received no such benefit. In 1999, six couples, each comprising one South African national and one noncitizen, united to challenge the discriminatory barrier in court. Each pair had been in a committed relationship for at least a year, some for longer than four years. Some owned homes together, while others served as each other's beneficiaries in their wills. One couple had invited friends and family to a gathering to celebrate and formally acknowledge their partnership. However, the law did not allow these couples to marry. Unable to access the support provided to heterosexual spouses who sought to live together in South Africa, at least two of the South African nationals were planning to emigrate if their partners could not get permanent legal residence.

The 12 plaintiffs joined with the National Coalition for Gay and Lesbian Equality and the Commission for Gender Equality to challenge the constitutionality of Section 25(5) of the act, the provision that granted preferential treatment to legal spouses. Their challenge was based on Section 9 of the South African Constitution, which prohibits direct and indirect discrimination on the basis of both sexual orientation and marital status.

In court, the Ministry of Home Affairs argued that it had broad discretion to set immigration policy, and that the distinction made in the Aliens Control Act was based on "non-spousal" grounds, rather than sexual orientation or marital status.<sup>24</sup> Alternatively, they argued, even if it were a marital status distinction, "there was nothing that prevented gays and lesbians from contracting marriages with

persons of the opposite sex, thus becoming and acquiring spouses and accordingly being entitled to the spousal benefits under section 25(5).<sup>25</sup>

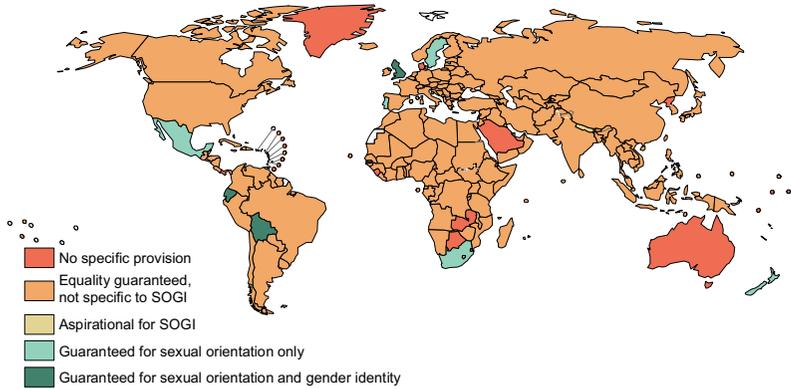
The Constitutional Court, however, dismissed this claim, finding: “The respondents’ submission that gays and lesbians are free to marry in the sense that nothing prohibits them from marrying persons of the opposite sex, is true only as a meaningless abstraction. This submission ignores the constitutional injunction that gays and lesbians cannot be discriminated against on the grounds of their own sexual orientation and the constitutional right to express that orientation in a relationship of their own choosing.” Instead, the Court found, the challenged provision amounted to “overlapping or intersecting discrimination on the grounds of sexual orientation and marital status.”<sup>26</sup> Because marriage was a prerequisite for the immigration preference, there was marital status discrimination—and because marriage was only available to heterosexual couples, there was sexual orientation discrimination. Further, the Court found that excluding same-sex couples from the immigration preferences accorded to legal spouses was a violation of their constitutional right to dignity, and noted that “the denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways.”<sup>27</sup>

To implement this finding, the Court ordered that the words “or partner, in a permanent same-sex life partnership” be “read in” after the word “spouse” in Section 25(5) of the Aliens Control Act.<sup>28</sup> A few years after the decision, the Immigration Act of 2002, which was enacted to supplant the Aliens Control Act, explicitly specified that the word “spouse” also applied to those in permanent same-sex relationships.<sup>29</sup>

The *Home Affairs* case proved to be an instrumental component of the growing body of case law around sexual orientation discrimination that has emerged in South Africa since the constitution first protected equal rights on the basis of sexual orientation in 1996. Six years later, in *Minister of Home Affairs v. Fourie*, the Constitutional Court addressed the issue of same-sex marriage directly. In a landmark and unanimous ruling, which cited the *Home Affairs* case, the Court found that same-sex couples have a constitutional right to marry, and ordered Parliament to pass legislation to that effect within a year.<sup>30</sup> As a result of the decision, on November 30, 2006, South Africa became the first country in Africa and just the fifth in the world to legalize same-sex marriage.<sup>31</sup>

#### THE STATE OF THE WORLD’S CONSTITUTIONS

Currently, South Africa is among just 6% of constitutions that explicitly protect equal rights on the basis of sexual orientation (Map 18). For example, Portugal’s constitution provides that “[n]o one may be privileged, favoured, prejudiced, deprived of any right or exempted from any duty on the basis of . . . sexual orientation.”<sup>32</sup> In one country, Nepal, “sexual orientation” is not listed as a protected

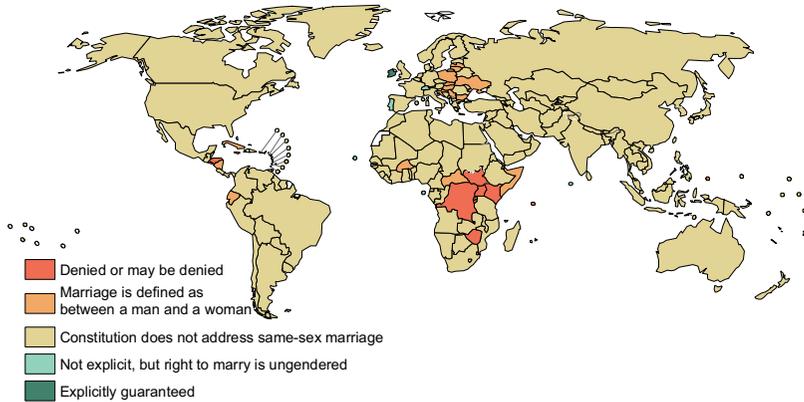


MAP 18. Does the constitution explicitly guarantee equality or nondiscrimination across sexual orientation and gender identity?

ground in the equal rights provision, but the constitution does provide that “nothing shall be deemed to prevent the making of special provisions by law for the protection of . . . sexual and gender minorities.”<sup>33</sup>

Among the 6% of constitutions that address sexual orientation, more than half also protect equal rights on the basis of gender identity (Bolivia, Ecuador, Fiji, Malta, Nepal, and the United Kingdom). For example, Bolivia’s constitution expansively provides: “The State prohibits and punishes all forms of discrimination based on sex, color, age, sexual orientation, gender identity, origin, culture, nationality, citizenship, language, religious belief, ideology, political affiliation or philosophy, civil status, economic or social condition, type of occupation, level of education, disability, pregnancy, and any other discrimination that attempts to or results in the annulment of or harm to the equal recognition, enjoyment or exercise of the rights of all people.”<sup>34</sup>

Importantly, although SOGI protections in constitutions remain uncommon, they are found in nearly all regions of the world. As discussed, through its 1996 constitution, South Africa became the first country in the world to explicitly protect equal rights on the basis of sexual orientation. Fiji followed in 1997, the first country in the Asia-Pacific,<sup>35</sup> and 13 years later became the first Pacific island to repeal its colonial-era criminalization law.<sup>36</sup> In 1998, Ecuador adopted the first constitution in Latin America to ban discrimination on the basis of sexual orientation; its 2008 constitution extended this protection to gender identity as well.<sup>37</sup> And through a 2004 amendment, Portugal became the first European country to constitutionally protect equal rights across sexual orientation, following an eight-year campaign launched by the International Lesbian, Gay, Bisexual, Trans and Intersex Association.<sup>38</sup>



MAP 19. What is the constitutional status of same-sex marriage?

### *Constitutional Backlash: Denial of Rights and Gendered Language*

Although the recent progress in establishing equal rights on the basis of SOGI across regions is encouraging, these steps forward have also met with backlash, both in countries that have begun enacting reforms to advance equality and in those not yet touched by improved laws. Nowhere in the law is this clearer than in the articulation of marriage rights.

In only one country, Ireland, does the constitution explicitly protect same-sex couples' right to marry (Map 19). Under Article 41(4), as amended by the 2015 referendum, "[m]arriage may be contracted in accordance with law by two persons without distinction as to their sex."<sup>39</sup> However, 6% of countries prohibit the right to marry for same-sex couples or allow legislation to do so. Zimbabwe's 2013 constitution, for example, states clearly that "[p]ersons of the same sex are prohibited from marrying each other."<sup>40</sup>

An additional 8% define marriage as exclusively between a man and a woman, such as that of Slovakia: "Marriage is a unique union between a woman and a man."<sup>41</sup> By contrast, 4% of countries phrase the right to marry in ungendered language. Albania's constitution, for instance, declares that "[e]veryone has the right to get married and have a family."<sup>42</sup> The majority of constitutions (81%) do not address same-sex marriage.

Notably, all of the constitutional bans on same-sex marriage were enacted since 2000, suggesting that they were direct responses to gains for LGBT+ rights (see Figure 8). In some countries, politicians' statements have left no doubt that their efforts to restrict rights were prompted by progress within their own countries or elsewhere. For example, Honduras explicitly restricted equal rights on the basis of sexual orientation in 2005, through the unanimous adoption of a constitutional amendment barring both same-sex marriage and adoption. The amendment

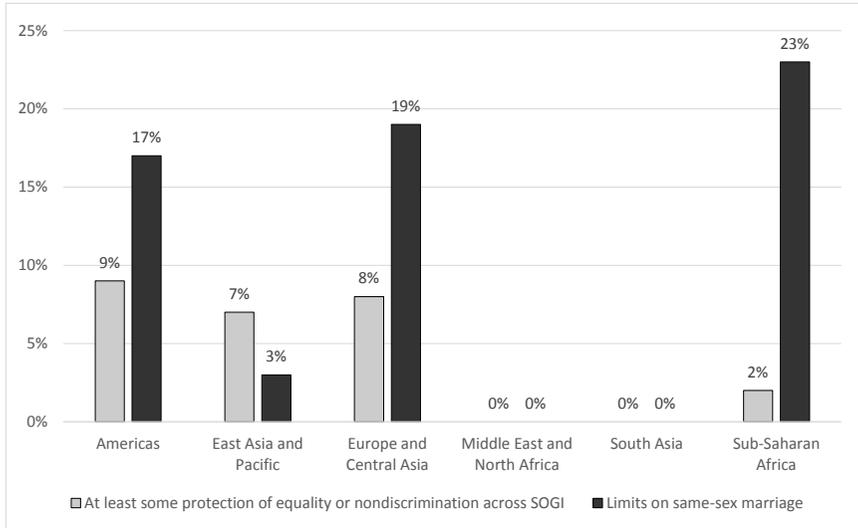


FIGURE 8. Explicit constitutional progress and backlash across sexual orientation and gender identity by region

resulted as part of the backlash to Honduras’s granting of legal status to three LGBT organizations, which 80 evangelical groups started a petition to revoke.<sup>43</sup> The congressman who proposed the bill, Jose Celin Discua, cited developments on equal rights in other countries as threats: “In various countries of the world—Holland, Spain, various states of the United States—there is already [same-sex] marriage. It is already coming, and it is already accepted.”<sup>44</sup>

#### EVALUATING PATHS FORWARD

As detailed in this chapter, progress has been made in passing SOGI equal rights in constitutions when there was wide public support or when participatory processes for constitution drafting supported the broad elimination of all forms of discrimination. But given that few constitutions to date explicitly protect equality on the basis of SOGI, other aspects of constitutions have also been used to advance equality.

##### *Leveraging Broad Equality Clauses*

Broad equality provisions, which do not explicitly mention sexual orientation or gender identity, can provide important tools for reform. As for other forms of discrimination, however, general guarantees of equal rights have yielded mixed results for LGBT+ equality. One example of a positive outcome from this approach comes from Canada’s 1998 case *Vriend v. Alberta*.

*Canada: Strengthening Protections from Employment Discrimination*

Delwin Vriend worked in a laboratory at King's University College, a Christian liberal arts school in Edmonton, Alberta. After he had worked there for several years, consistently receiving positive evaluations, the college president asked Vriend about his sexual orientation, and Vriend confirmed that he was gay. The following year, the college adopted a new policy on sexual orientation and the president requested that Vriend resign. When he refused, he was fired based on his failure to comply with the new policy.<sup>45</sup>

Vriend sought to file a complaint with the Alberta Human Rights Commission, but the commission informed him that he could not file a claim under the Individual's Rights Protection Act (IRPA), a statute banning discrimination by private employers, since it did not explicitly prohibit discrimination on the basis of sexual orientation. As Vriend recalled years later, "[t]o walk out of the human rights office and realize they couldn't do anything, it was such a shock."<sup>46</sup> As a result, he went to court and challenged the constitutionality of the IRPA on the basis of its exclusion of sexual orientation as a protected ground. But though he initially succeeded at trial in 1994, an appeals court overturned the ruling in 1996, finding that the general equality guarantee in the Canadian Charter of Rights and Freedoms "could not force the legislature to enact a provision dealing with a 'divisive' issue if it ha[d] chosen not to do so."<sup>47</sup>

Finally, the case reached the Supreme Court of Canada in 1998, where the key issue was whether the legislative omission of sexual orientation from the IRPA was unconstitutional government action. According to the Court, findings of unconstitutionality were not "restricted to situations where the government actively encroaches on rights," but could also apply in cases where the government failed to act to protect charter rights.<sup>48</sup>

In its reasoning, the Court emphasized the importance of both substantive and formal equality. Since the omission of "sexual orientation" meant that gay and lesbian workers were not specifically protected from discrimination by the act, they were not being treated equally with other marginalized groups that did receive explicit protection—a violation of formal equality. Assessing the effects of this omission, the Court found that:

[T]here is, on the surface, a measure of formal equality: gay or lesbian individuals have the same access as heterosexual individuals to the protection of the *IRPA* in the sense that they could complain to the Commission about an incident of discrimination on the basis of any of the grounds currently included. However, the exclusion of the ground of sexual orientation, considered in the context of the social reality of discrimination against gays and lesbians, clearly has a disproportionate impact on them as opposed to heterosexuals. Therefore the *IRPA* in its underinclusive state denies substantive equality to the former group.<sup>49</sup>

The Court then reasoned that as "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs," sexual

orientation was analogous to the other explicitly protected grounds in Section 15.<sup>50</sup> The Court also explained that the exclusion of sexual orientation from the IRPA had harmful effects by precluding those who had experienced discrimination from pursuing legal recourse, and by subtly sending a message that the government would tolerate discrimination on the basis of sexual orientation.<sup>51</sup> Finally, the Court concluded, “Even if the discrimination is experienced at the hands of private individuals, it is the state that denies protection from that discrimination.”<sup>52</sup>

Following this analysis, the Supreme Court ordered that Alberta “read in” the words “sexual orientation” to the prohibition of discrimination in the IRPA, rather than declaring the whole provision unconstitutional and leaving all Albertans unprotected from private-sector discrimination in the interim. Since then, the IRPA, now called the Alberta Human Rights Act, has been amended to explicitly prohibit discrimination on the basis of both sexual orientation and gender identity and expression.<sup>53</sup> The *Vriend* case has also served as a critical precedent in strengthening LGBT+ rights nationwide.<sup>54</sup>

Although it took seven years and a series of appeals to reach a positive outcome, *Vriend v. Alberta* provides a powerful example of how a general equality provision, particularly in a country where the top court applies a doctrine of “analogous grounds” to determine which groups receive protection, can be an important tool for advancing equal rights on the basis of SOGI and amending discriminatory or underprotective laws. Likewise, protections against gender discrimination have been interpreted by some courts and international legal bodies to encompass protections against discrimination on the basis of SOGI.

Other examples can be found around the world.<sup>55</sup> General equality provisions were used to strike down provisions of Colombia’s Standards for the Exercise of the Teaching Profession<sup>56</sup> and Peru’s Military Justice Code that discriminated on the basis of sexual orientation.<sup>57</sup> In Slovenia, general protections against discrimination were leveraged to extend equal inheritance rights to same-sex couples.<sup>58</sup> In India<sup>59</sup> and Pakistan,<sup>60</sup> overall guarantees of equality before the law provided the constitutional foundation to establish that transgender individuals have equal rights. Most recently, in Taiwan, the Supreme Court ruled in May 2017 that banning same-sex marriage was “incompatible with the spirit and meaning of the right to equality” in the constitution, making Taiwan the first in Asia to legalize same-sex marriage.<sup>61</sup> And a few months later, a high court in Botswana ruled that transgender citizens have a constitutional right to change their gender on official documents, even though the country still prohibits homosexual acts.<sup>62</sup>

### *Argentina: Inspiring Regional Progress through a Court Decision on Marriage Equality*

Court cases brought under broad equality clauses can also demonstrably accelerate national and regional change. In Argentina in 2009, Alex Freyre and José María Di Bello became the first same-sex couple to marry in Latin America after a

Buenos Aires judge ruled that it was unconstitutional for civil law to permit marriage only between a man and a woman.<sup>63</sup> While the case was decided just on a general equality clause, the decision accelerated more extensive legal progress on SOGI rights. Within a year, the Senate voted to legalize same-sex marriage nationwide, making Argentina the first country in the region to do so.<sup>64</sup> Over the next four years, nearly 10,000 same-sex couples married in Argentina.<sup>65</sup>

What's more, the successes across Latin America, in terms of both explicit constitutional rights and court victories, further affirm that progress is possible even before public opinion is fully aligned. World Values Surveys document a lack of popular acceptance of same-sex relationships prior to the court case and legislative reform in Argentina, and significant improvements afterward. The surveys similarly show that legal changes preceded widespread recognition of equality in Brazil and Mexico.<sup>66</sup> However, the region has emerged as a recognized leader in advancing equal rights on the basis of SOGI—a process that has been aided by rights-based constitutions, expansive access to the courts,<sup>67</sup> and the region-wide influence of groundbreaking court victories and laws like Argentina's.<sup>68</sup> In the words of Brazilian legislator Jean Wyllyss, "after passing this law, Argentina became a reference for the whole of Latin America."<sup>69</sup> Argentina itself had learned from Spain's legal reform process,<sup>70</sup> and "in turn sought to create a regional 'demonstration effect' and transfer its experience to other countries where debates on the topic were only beginning, such as Brazil, Chile, Colombia, and Uruguay."<sup>71</sup> Individual activists from other Latin American countries also employed a strategy of marrying in Argentina and then demanding that their own governments recognize their same-sex unions.<sup>72</sup>

Further, the influence of Argentina's marriage decision reflects one example of a larger trend. Even before the push for full marriage rights, Latin American supporters of LGBT+ equality were citing legal progress in other countries on same-sex unions. For example, in 2000, as Uruguay was considering a bill to recognize same-sex civil unions, legislator Daniel Díaz Maynard argued: "Almost all European and Latin American legal systems have contained, for some time now, regulations which recognize civil union between same sex couples who have lived together for many years, some countries even formalizing it in their constitutions."<sup>73</sup>

Argentina's more recent progress on gender identity has also inspired similar efforts in other countries. In 2012, Argentina enacted legislation allowing people to self-define their gender identity without providing medical documentation.<sup>74</sup> In Colombia, the new law gave "a push among activists," according to Andrea Parra, director of the Action Program for Equality and Social Inclusion at the University of Los Andes School of Law.<sup>75</sup> Transgender activists in Colombia first pursued a strategy of seeking victories on individual cases in the Constitutional Court. One powerful ruling in favor of a transgender woman who had struggled to get her ID changed "was a green light for the ministry to proceed" with broader legal reform,

according to Parra.<sup>76</sup> In 2015, Colombia issued an executive decree echoing Argentina's law.<sup>77</sup>

While there is far to go on public opinion, these examples illustrate how advancing rights can precede full consensus on equality. Moreover, transnational activism on LGBT+ rights can provide a powerful mechanism for accelerating change.

*United States: The Risks of Failing to Clearly Address LGBT+ Rights*

Still, as in other areas of equal rights, the absence of language specifically prohibiting discrimination against a particular group, in both the constitution and other laws and policies, can allow for regress. For example, in 2014 the U.S. Department of Justice issued guidance stating that laws covering employment discrimination, specifically Title VII of the Civil Rights Act, protect against SOGI discrimination.<sup>78</sup> Three years later, however, after a change in administration, the department issued new guidance reversing this interpretation. According to the 2017 document, since the Civil Rights Act only explicitly prohibits workplace discrimination based on race, color, religion, sex, or national origin, LGBT+ workers are excluded. The memo urged that “[a]ny efforts to amend Title VII’s scope should be directed to Congress rather than the courts.”<sup>79</sup>

Meanwhile, fewer than half of U.S. states prohibit employment discrimination on the basis of sexual orientation,<sup>80</sup> and bills have been introduced across the country to effectively legalize SOGI discrimination claiming a religious freedom basis. Although the U.S. Constitution broadly establishes “equal protection of the laws,” this has been insufficient to fully guarantee the equal rights of the LGBT+ community.

*Ensuring Other Constitutional Guarantees Apply to Everyone  
Regardless of SOGI*

An additional approach that advocates and citizens have taken is going to court to ensure that other guarantees in constitutions—whether to privacy, dignity, liberty or otherwise—apply to all, regardless of sexual orientation or gender identity. As with general equality provisions, this approach has yielded some remarkable successes but provides far less reliable and consistent protections than specific guarantees of equal rights.

*India: The Right to Privacy*

For example, in an important case from 2009, the Delhi High Court ruled that the Penal Code’s criminalization of “carnal intercourse against the order of nature” was unconstitutional based on the rights to equality, nondiscrimination, and life and liberty. The decision was widely celebrated as a landmark case for the LGBT+ community.<sup>81</sup> Yet in 2013, after an appeal by religious groups,<sup>82</sup> a two-bench ruling by the Supreme Court, which is a case decided by just two

judges, overturned the decision. According to the Court, Section 377 of the Penal Code “does not criminalise a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation.”<sup>83</sup> The ruling also admonished the lower court for having “extensively relied upon the judgments of other jurisdictions” to protect the “so-called rights of LGBT persons,” whom they referred to as a “minuscule fraction of the country’s population.”

In 2017, however, the Supreme Court of India issued a lengthy judgment confirming that the constitution guarantees the right to privacy, and directly addressed the implications of this analysis for the 2013 ruling. In so doing, the nine-judge bench noted that “[t]he purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular.”<sup>84</sup> And in 2018, the Supreme Court built on this decision in a groundbreaking ruling that overturned Section 377 once again, based on both the right to privacy and the general guarantee of equality in the constitution.<sup>85</sup>

The 2018 decision was a landmark for equality, and a testament to the effectiveness of India’s LGBT+ community in advancing fundamental human rights. Justice Indu Malhotra recognized the judgment’s profound significance after such a long struggle for equality, saying, “History owes an apology to members of the community for the delay in ensuring their rights.”<sup>86</sup> Likewise, Menaka Guruswamy, one of the lawyers challenging the law, commented on the ruling’s powerful message: “This decision . . . is basically saying: ‘You are not alone. The court stands with you. The Constitution stands with you. And therefore your country stands with you.’”<sup>87</sup> Still, the dismissive language of the 2013 ruling, which questioned the very premise that members of the LGBT+ community have constitutional rights, plainly illustrates why explicit constitutional rights matter for protecting against judicial retrenchment.

### *United States: The Right to Liberty*

Another example of successfully—but narrowly—leveraging other rights comes from the United States. In 2015, the Supreme Court made marriage equality the law of the land in *Obergefell v. Hodges*. The momentous ruling was premised on the Court’s finding that “[t]he 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 couples of the same-sex may not be deprived of that right.”<sup>88</sup> While the ruling was a remarkable step forward for LGBT+ rights in the U.S., the Court stopped short of declaring that sexual orientation discrimination receives the same level of constitutional protection as discrimination on the basis of gender, race, religion, or national origin.<sup>89</sup> Although the decision was widely

celebrated, even supporters lamented that its reasoning was “dubious,” and argued that it was a missed opportunity to establish a stronger precedent specifically condemning sexual orientation discrimination.<sup>90</sup>

*Costa Rica, Tunisia, and Turkey: The Right to Freedom of Association*

Beyond individual rights, the rights to free association and freedom of assembly have played an important role in combatting discrimination on the basis of SOGI, and particularly in ensuring that advocacy groups in countries where LGBT+ populations face state oppression can continue operating. For example, in Costa Rica, a gay rights group was shut down in 1995 due to a legal prohibition on groups that “undermine good customs and morality.” In response, the organization contacted the new ombudsman’s office and threatened to sue the Registry of Associations for a violation of the right to free association. The registry backed down, paving the way for the registration of a dozen other gay and lesbian advocacy groups.<sup>91</sup> Likewise, in Tunisia, advocates cited constitutional and international commitments to freedom of association in challenging the government’s suspension of the country’s first official LGBT organization in 2016.<sup>92</sup> Although they continue to face repression, Tunisia’s LGBT+ groups have made important strides in advancing equal rights, and are currently actively involved in a coalition campaign to end the criminalization of homosexuality.<sup>93</sup>

Similarly, in Turkey, the Istanbul offices of Lambda, an international LGBTI rights group, were closed after a complaint that the organization’s activities conflicted with Turkish “moral values and family structure.” However, after a lengthy legal battle, the Supreme Court of Appeals ruled that the closure violated the rights to free association and assembly. The case was not an isolated incident; according to Yasemin Öz, a lawyer who drafted a report on homophobia and transphobia in Turkey for the Danish Institute of Human Rights, “whenever an LGBT organisation has been established in Turkey, the Directory of Associations has requested the closure of the organisations.”<sup>94</sup> As a result, she argues that the constitution’s equality provision, Article 10, must also be “amended to specifically guarantee the equal rights of LGBT persons. . . . Although Article 10 of the Constitution looks like guaranteeing equality among all citizens, since the equality among citizens regardless of sexual orientation and gender identity is not guaranteed explicitly, the LGBT community face discrimination in practice.”<sup>95</sup>

*Across Contexts: Evaluating the Range of Constitutional Approaches*

While all these court victories merit celebration, it is important to note the distinctions in their constitutional justifications and the potential limitations of a more roundabout approach to equality. For example, protecting same-sex relationships solely through the right to “privacy” may reinforce notions that these relationships do not deserve public or state recognition. In presentations to the U.N., for instance, Namibia’s government asserted: “Article 13 of the Constitution protects

the right to privacy. No person is requested to disclose his or her preferred sexual orientation in any official Government form or document and no person can be refused access to public or private services based on their preference. The laws do not make provision for marriage between same sex adults.”<sup>96</sup>

Likewise, the “don’t ask, don’t tell” policy, which prohibited U.S. service members from disclosing that they were gay or engaging in same-sex sexual conduct, was based in part on the concept of “privacy,” further underscoring how this right on its own does not necessarily lead to greater equality or freedom.<sup>97</sup> When a federal court finally deemed the policy unconstitutional after 17 years, it was on the basis not of equality but of free speech.<sup>98</sup>

Similarly, the right to dignity is powerful due to its broad scope. Lawyers and judges have successfully invoked the right to dignity not only to advance rights on behalf of the LGBT+ community but also in a wide range of cases advancing social and economic rights. Yet the concept’s breadth also gives courts substantial discretion to determine in what circumstances it applies.

For these reasons, although creative legal arguments leveraging other fundamental rights can and have yielded transformative victories, there is no substitute for an explicit protection against discrimination on the basis of SOGI in the constitutional text.

### *Building Up from States and Municipalities*

In moving to strengthen LGBT+ rights, some countries with federalist systems, such as the United States and Brazil, have had success with implementing state-level reforms to build momentum for national reforms. For example, after facing roadblocks to enacting national legislation, LGBT+ activists in Brazil began focusing on getting antidiscrimination laws passed by state and municipal governments, with remarkable success: over 80 municipalities had passed antidiscrimination legislation by the early 2010s, while at least two states have prohibited sexual orientation discrimination in their own constitutions.<sup>99</sup> These reforms can also help shift norms and build consensus about LGBT+ rights before broader changes are implemented. In the U.S., 2011 marked the first time more Americans supported rather than opposed gay marriage;<sup>100</sup> at that point, same-sex marriage had been legalized in six states, followed by three more the following year and another seven the next.<sup>101</sup>

Although neither country has yet to enact a national constitutional protection of equal rights on the basis of SOGI, state-level progress on laws and public opinion signals an increasingly favorable climate for national reforms, and may have contributed to changes in case law and constitutional interpretation. Moreover, studies show local laws can have important effects. For example, in a 2013 study of Texas cities with and without legislation prohibiting sexual orientation discrimination, researchers found that gay and lesbian job applicants experienced less discrimination when people believed protective laws were in place.<sup>102</sup>

## IMPORTANT—AND IMPERFECT—PROGRESS

In a range of countries, steps forward on equal rights regardless of SOGI have been followed by steps back. Sometimes a transformative court case is followed by struggles to implement its ruling. Other times, countries miss the opportunity to enact strong constitutional protections when they otherwise have momentum to advance LGBT+ rights. Finally, in some countries, guarantees of equal rights still coexist with other laws denying full equality to same-sex couples. In each circumstance, the successes still matter—yet these cases illustrate the importance of ongoing efforts to advance equality following successes and setbacks alike. A few examples follow.

*Mexico: Major Steps Forward on Marriage Equality,  
but Challenges in Implementation*

In 2011, Mexico amended its constitution to explicitly prohibit discrimination based on “sexual preference” in Article 1.<sup>103</sup> Four years later, the Supreme Court ruled that all state laws banning same-sex marriage were unconstitutional—effectively legalizing same-sex marriage nationwide.<sup>104</sup>

The sweeping and unanimous decision was directly based on Article 1’s new protection of equal rights on the basis of sexual orientation. It also referenced struggles against discrimination in other countries, citing famous case law like *Brown v. Board of Education* and its powerful conclusion that “separate but equal” was unconstitutional. And like the South African Constitutional Court in the *Home Affairs* case, the Mexican Supreme Court noted that discriminatory marriage laws both rested on and tacitly condoned bigotry: “Just as racial segregation was based on the unacceptable idea of white supremacy, the exclusion of gay couples from marriage is also based on prejudices that historically have existed against homosexuals. Their exclusion from the marriage institution perpetuates the notion that same-sex couples are less worthy of recognition than heterosexuals, thus offending their dignity as persons.”<sup>105</sup>

Finally, the Court cited Mexico’s obligations to uphold equal rights under international law, and noted that the Constitution required “adopting the most favorable interpretation of the human right in question.”<sup>106</sup>

In 2010, when same-sex marriage was legal only in Mexico City, 689 same-sex marriages took place, according to government records; in 2016, by which point ten states had legalized same-sex marriage, this number increased to 2,378.<sup>107</sup> Same-sex marriages have by now occurred in every state, enabling couples nationwide to not only make their partnerships official, but also access all the benefits and protections often linked to marriage.

Yet challenges remain for ensuring all people can effectively exercise their right to marry. Under Mexico’s civil law system, court decisions are generally binding only on the parties.<sup>108</sup> With its 2015 ruling, the Supreme Court essentially instructed lower courts how they had to rule, but did not directly invalidate contradictory

state legislation; the process of actually changing laws and enforcing the right to marry will require continued effort.<sup>109</sup> Despite the ruling, as of April 2017 just 12 of Mexico's 32 states had enacted laws to allow same-sex marriage, while others maintain discriminatory laws on the books.<sup>110</sup> Consequently, while same-sex marriage is now a legal right, couples have reported being refused licenses by state registrars, especially in areas where political opposition to same-sex marriage remains significant.<sup>111</sup> One lawyer, Alex Alí Méndez, has been strategically filing cases in every state to strengthen the right around the country; once a court finds the same law unconstitutional in three separate cases, the law is invalidated for all.<sup>112</sup> Following the Supreme Court ruling, Méndez explained: "[D]iscrimination will continue as long as the normative framework around marriage is not changed throughout the country in order to eliminate the obstacles that prevent same-sex couples from marrying."<sup>113</sup>

To strengthen the right to marry nationwide, on the International Day Against Homophobia and Transphobia in May 2016, President Enrique Peña Nieto sent legislation to Congress to amend Mexico's constitution to "incorporate clearly the judgment of the Supreme Court so that people can marry without discrimination" on the grounds of "gender or sexual preference."<sup>114</sup>

Public opinion data illustrated growing support for LGBT+ rights in tandem with the 2011 constitutional amendment and the municipal- and national-level marriage decisions. Just 23% thought same-sex marriage should be legal in 2000, increasing to 55% at the time Peña Nieto proposed the constitutional amendment in 2016; over the same period, opposition to same-sex marriage decreased from 62% to 25%.<sup>115</sup> Some of the increase in support clearly corresponded with the court rulings: between November 2009 (the month before same-sex marriage was legalized in Mexico City) and March 2010, the share of people saying they supported full marriage equality increased by five percentage points, while the share saying same-sex marriage should not be legal decreased by 12 percentage points.<sup>116</sup> In another poll, 69% of respondents said they were in favor of the marriage equality amendment.<sup>117</sup>

Nevertheless, the amendment was ultimately defeated in the legislature due to pressure from religious groups.<sup>118</sup> So although same-sex marriage is indeed legal throughout Mexico, and public support has grown significantly over the past two decades, implementation challenges create ongoing barriers to the full realization of marriage equality.

*Nepal: Major Progress on LGBT+ Rights in the Courts,  
but Smaller Gains in the Constitution*

As a second example, in 2007, Nepal's constitutional guarantee of gender equality provided the basis for a landmark case advancing equal rights for the LGBT+ community. The case was initiated by Sunil Pant, a lawyer who had spent years documenting the human rights abuses faced by other LGBT+ people throughout

the country—often at the hands of government security forces. By the time he brought a public interest litigation claim to fight this widespread mistreatment, Pant had piles of photographs and medical reports offering indisputable proof of the systematic discrimination facing LGBT+ people in Nepal.<sup>119</sup> In a far-reaching decision that drew on the constitution's protection against sex-based discrimination, the Supreme Court not only ordered the state to abandon all laws that discriminated based on sexual orientation or gender identity, but also formally recognized a third gender category. Further, the Court called for the new constitution to explicitly protect against discrimination on the basis of SOGI, using the South African Constitution as a model.<sup>120</sup>

Since then, Pant has become the first openly gay member of Nepal's Parliament, and Nepal has become the first country to include a third gender category on the census.<sup>121</sup> Still, the fight for full equal rights continues, with the 2015 constitution prohibiting discrimination on "similar grounds" to those explicitly listed and allowing for special measures to protect "gender and sexual minorities," but not explicitly protecting the equal rights of the LGBT+ community.<sup>122</sup>

*Ecuador: Progress on Equal Rights, but Inconsistent Provisions*

Finally, in Ecuador, the 2008 constitution built on the inclusion of sexual orientation in its 1998 predecessor to specifically prohibit discrimination on the basis of both sexual orientation and gender identity. It also articulated a more expansive definition of family using the term *familia diversa*, now widely understood across Ecuador to encompass same-sex couples, single-parent families, and migrant households.<sup>123</sup> At the same time, the constitution stated that "marriage is the union of man and woman" and that "adoption shall only be permitted for different-gender couples."<sup>124</sup>

This apparent tension in the constitutional text resulted from a political compromise, with equal rights activists championing the *familia diversa* while religious opponents protested to demand language referencing God and protecting the traditional family.<sup>125</sup> In the end, President Rafael Correa conceded, and reassured the opposition before the 2008 referendum vote that "marriage will continue to be the union of a man and a woman."<sup>126</sup> In 2013, an activist named Pamela Troya initiated a lawsuit challenging the ban on same-sex marriage as unconstitutional, which worked its way up the courts but stalled at the Constitutional Court for four years.<sup>127</sup> Finally, in June 2019, the Court ruled that the ban on same-sex marriage was discriminatory. The Court left the responsibility for amending the constitution with the National Assembly and did not eliminate the ban on same-sex adoption.<sup>128</sup>

These examples illustrate how progress is often iterative. Countries sometimes move forward quickly, as when Ecuador progressed from decriminalizing same-sex relationships in 1997 to constitutionally prohibiting sexual orientation discrimination in 1998, but then regress in the face of political pushback. Nevertheless, as

the examples from Mexico and Ecuador illustrate most acutely, taking the first strong step of establishing equal rights in the constitution provides a foundation for further advances.

### THE URGENCY OF ACTION

The evidence of ongoing discrimination and violence that LGBT+ people face around the globe speaks to the urgency of action. As observed by the U.N. High Commissioner on Human Rights: “In all regions, people experience violence and discrimination because of their sexual orientation or gender identity. In many cases, even the perception of homosexuality or transgender identity puts people at risk. Violations include—but are not limited to—killings, rape and physical attacks, torture, arbitrary detention, the denial of rights to assembly, expression and information, and discrimination in employment, health and education.”<sup>129</sup>

While global data on violence against LGBT+ individuals is far from comprehensive,<sup>130</sup> statistics from individual countries affirm this account. In the United States, for example, the government recorded 1,470 incidents of violence motivated by SOGI in 2017.<sup>131</sup> Across Europe, over a quarter of respondents to a survey of LGBT citizens reported that they had been victims of violence within the past five years, 59% of whom believed the violence was solely or partly motivated by their sexual orientation or gender identity.<sup>132</sup> Similarly, according to a 2015 U.N. report that cited data from an independent global NGO, over 1,600 transgender people were murdered across 62 countries between 2008 and 2014, or one person every two days.<sup>133</sup> These vulnerabilities are compounded by state-sponsored discrimination and violence in some countries, and the unwillingness of leaders in others to acknowledge LGBT+ residents’ experiences.

#### *Toward a Global Agreement on LGBT+ Rights*

Despite some encouraging national developments, one critical missing piece for equal rights on the basis of SOGI is a binding global agreement. There is no explicit protection of equal rights on the basis of SOGI in the Universal Declaration of Human Rights (UDHR) or any fundamental treaty, although there have been some recent and important international developments. In November 2006, a group of international human rights experts drafted the Yogyakarta Principles, which articulate how existing international human rights law should be applied to SOGI-related issues.<sup>134</sup> A decade later, the U.N. Human Rights Council passed a resolution to appoint an independent expert on “protection against violence and discrimination based on sexual orientation and gender identity.”<sup>135</sup> This development built on a resolution passed in 2011, which called for a study of discriminatory laws on the basis of SOGI, and a second passed in 2014, which requested that the High Commissioner for Human Rights provide best practices for preventing this discrimination.<sup>136</sup> Still, in the absence of a binding global agreement, states

have no obligation to report what steps they are taking to ensure the equality, safety, and full citizenship of their LGBT+ populations.

At the regional and international levels, the question of whether existing treaties fully cover discrimination on the basis of SOGI—which is not explicitly referenced—has been a subject of debate for several decades. In a landmark 1994 case, *Toonen v. Australia*, the U.N. Human Rights Committee determined that the protections against sex discrimination in the International Covenant on Civil and Political Rights (ICCPR) extended to sexual orientation discrimination, finding that the ICCPR was a “living document.”<sup>137</sup> The decision led to the repeal of a provision in Tasmania’s criminal code that prohibited sexual relationships between men, and more recent U.N. guidance has clarified that the ICCPR and other global treaties do indeed prohibit SOGI discrimination under their “other status” category.<sup>138</sup> Similarly, in a 1996 ruling, the European Court of Justice found that the prohibition on sex discrimination in the U.K.’s Sex Discrimination Act, its employment discrimination law in place at the time, extended to gender identity discrimination.<sup>139</sup> A range of countries, however, reject these interpretations, and refuse to acknowledge the application of global or regional human rights treaties to SOGI discrimination without explicit textual protections.<sup>140</sup>

Further, evidence from individual countries shows that the presence—and absence—of international guidance and standards on discrimination can importantly shape national constitutions. For example, during the process of drafting Uganda’s constitutional equality provision, delegates argued that the constitution should prohibit discrimination on the grounds of religion, race/ethnicity, age, color, and birth, because these protections were included in the UDHR and African Charter. Meanwhile, “[i]t was submitted that some forms of discrimination should be permitted in the Constitution because they were also permitted in international law.” Only one delegate suggested prohibiting discrimination on the basis of sexual orientation and was interrupted and dismissed.<sup>141</sup> By contrast, while discussing whether to include sexual orientation in South Africa’s constitutional equality provision, drafters cited four prior determinations by international human rights bodies that sexual orientation was a ground for protection.<sup>142</sup>

Likewise, Mexico’s 2011 constitutional reforms show that international law matters not only in drafting but also in amending constitutions. The addition of sexual orientation to Mexico’s equality provision was part of a series of “human rights amendments” designed to advance the “adoption of . . . international human rights standards.”<sup>143</sup>

In other words, international-level progress on SOGI provided support for reforms in South Africa and Mexico, both of which broadly consulted international law, but the lack of an explicit protection in a binding treaty inhibited progress in Uganda, which more narrowly focused on formal agreements. An international treaty on LGBT+ rights, like those established to advance equal rights on the

basis of gender, race, and disability, would create a stronger basis for advocating for national-level SOGI protections.

### *Addressing a History of Deep Discrimination*

In recorded human history, nearly every group treated in this book faced a period of extreme, widespread discrimination. Different racial and ethnic groups were enslaved through the ravages of war and commerce. Religious groups coalesced to segregate, oppress, and kill members of other religious groups who would not convert. Marriage between racial groups and cohabitation across religions were outlawed.

But for the majority of groups discussed in this book, the use of laws to actively segregate, discriminate, and disadvantage has dramatically declined. There are three groups for which this is not yet true across countries. Migrants are treated as having given up their human rights after crossing borders. People with disabilities are treated as if conditions affecting one aspect of their lives somehow affect all aspects—and that the disadvantages they face stem entirely from these conditions, rather than society’s responses. Finally, being a sexual or gender minority is treated as an identity incompatible with full citizenship, and acts of love are treated as actions worthy of punishment. It is long past time to eliminate legal discrimination.

Religious groups have disproportionately been involved in opposing progress to equality and passing laws that add layers of legal discrimination. Yet removing these historic and violent forms of discrimination will no more threaten religion than the removal of past forms of profound discrimination for which religious justifications were used against racial/ethnic groups or women. The significance of religion in people’s lives survived what was perceived as a cataclysmic threat to the church when science determined the world was not flat. Religion will continue to provide meaning and solace in people’s lives long after the removal of discrimination against all groups.

Moreover, some religious groups have actively embraced the equal rights of the LGBT+ community. In 2012, the Union for Reform Judaism issued a resolution “affirm[ing] its commitment to the full equality, inclusion and acceptance of people of all gender identities and gender expressions,” nearly 40 years after adopting a similar statement affirming “the rights of homosexuals.”<sup>144</sup> In 2013, a coalition of religious groups across the United States, including the country’s largest Islamic organization, submitted a letter to Congress supporting a proposed law that would have prohibited SOGI discrimination in employment.<sup>145</sup> And just in 2018, the National Council of Churches, a network of 30 Christian member churches that represents 14 million people across India, issued a statement on the court case addressing the criminalization of same-sex relationships, noting that “our call is to reject all laws that demonize, criminalize, and exclude human beings, and work to facilitate just inclusive and loving communities.”<sup>146</sup>

Neither the absence of an international agreement nor delays in public opinion's recognition of equal rights is reason not to pursue guarantees of equal treatment for all regardless of SOGI. Countries in all regions, and with varying degrees of public consensus, have shown that it is possible and that it makes a difference. Justice Albie Sachs made this case powerfully in the decision that brought marriage equality to South Africa:

[T]he antiquity of a prejudice is no reason for its survival. Slavery lasted for a century and a half in this country, colonialism for twice as long, the prohibition of interracial marriages for even longer, and overt male domination for millennia. All were based on apparently self-evident biological and social facts; all were once sanctioned by religion and imposed by law; the first two are today regarded with total disdain, and the third with varying degrees of denial, shame or embarrassment. Similarly, the fact that the law today embodies conventional majoritarian views in no way mitigates its discriminatory impact. It is precisely those groups that cannot count on popular support and strong representation in the legislature that have a claim to vindicate their fundamental rights through application of the Bill of Rights.<sup>147</sup>