

# Protections of Equal Rights Across Sexual Orientation and Gender Identity: An Analysis of 193 National Constitutions

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**ABSTRACT:** This article provides the first detailed global assessment of the ways in which constitutions protect equal rights based on sexual orientation and gender identity across the spheres of general equality and discrimination, employment and marriage rights. Drawing on global data from 193 U.N. member states, we examined how constitutional protections of equal rights varied according to the decade of constitutional adoption as well as the year of the most recent constitutional amendment as of May 2014. Regional variation and a comparison with constitutional protections on the basis of sex, race or ethnicity, religion, and disability are also conducted.

INTRODUCTION.....	150
I. METHODS.....	153
A. Data Source.....	153
1. Capturing Sexual Orientation and Gender Identity in Constitutions.....	154
2. General Equal Rights Protections that Do Not Explicitly Address Sexual Orientation.....	155
3. Constitutional Rights Examined.....	155
i. General Equality and Non-Discrimination.....	155
ii. Equal Protection in Employment Rights.....	155
iii. Restrictions on Same-Sex Marriage.....	156
B. Data Analysis.....	156
II. RESULTS.....	157
A. General Equality and Non-Discrimination.....	157

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1. Equal Rights in Employment.....	158
2. Marriage Rights .....	158
CONCLUSION .....	160

## INTRODUCTION

In recent years, the legal rights of lesbian, gay, bisexual, and transgender (LGBT) persons have received increased attention at the international and national levels. Although explicit international recognition of equal rights on the basis of sexual orientation and gender identity has occurred much more recently than protections based on characteristics such as sex, race, ethnicity, and religion, considerable progress has been made in a short period of time.<sup>1</sup> During the 1990s, United Nations (U.N.) human rights bodies began to express concern with widespread discrimination against LGBT individuals and criminalization of same-sex relationships at the national level.<sup>2</sup> Even though sexual orientation is not specifically listed as a prohibited basis of discrimination in the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights, the U.N. Human Rights Committee has ruled repeatedly that states have an obligation under international law to protect individuals from differential treatment on this basis.<sup>3</sup>

In 2007, a group of international human rights experts drafted the Yogyakarta Principles on the Application of International Human Rights Law

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1. See U.N. General Assembly, *Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, U.N. Doc. A/HRC/29/23 3-4 (May 4, 2015); Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights, art. 2, ¶ 2, U.N. Doc. E/C.12/GC/20 (May 25, 2009), <https://www1.umn.edu/humanrts/gencomm/escgencom20.html>. In section III, B 32, the Committee on Economic, Social and Cultural Rights refers to the legal duties of state parties to guarantee non-discrimination and equality under Article 2(2) of the International Covenant on Economic, Social and Cultural Rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The Committee notes that:

“Other status” as recognized in article 2(2) includes sexual orientation. States parties should ensure that a person’s sexual orientation is not a barrier to realising Covenant rights, for example, in accessing survivor’s pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the work place.

*Id.* ¶ 32.

2. See U.N. Office of the High Comm’r for Human Rights, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, U.N. Doc. HR/PUB/12/06 (2012), <http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>.

3. *Toonen v. Australia*, Comm. No. 488/1992, PP 8.1, U.N. Doc CCPR/C/50/D/488/1992 (Mar. 31, 1994), <http://www1.umn.edu/humanrts/undocs/html/vws488.htm>; *Young v. Australia*, Comm. No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (Sept. 18, 2003), <http://www1.umn.edu/humanrts/undocs/941-2000.html>; *X v. Colombia*, Comm. No. 1361/2005, P 7.2., U.N. Doc. CCPR/C/89/D/1361/2005 (Mar. 30, 2007), [http://www.worldcourts.com/hrc/eng/decisions/2007.03.30\\_X\\_v\\_Colombia.htm](http://www.worldcourts.com/hrc/eng/decisions/2007.03.30_X_v_Colombia.htm).

in relation to Sexual Orientation and Gender Identity, which outlined states' obligations to protect the equal rights of LGBT individuals in all spheres of life.<sup>4</sup> A year later, the General Assembly's Statement on Human Rights, Sexual Orientation and Gender Identity, which was supported by sixty-eight countries, recognized that "human rights apply equally to every human being regardless of sexual orientation or gender identity."<sup>5</sup> In 2011, the Human Rights Council reaffirmed this principle in a statement that was signed by eighty-five countries representing every region of the world.<sup>6</sup> A few months later, the Human Rights Council adopted the first U.N. resolution to address human rights based on sexual orientation and gender identity. Resolution 17/19 passed by a narrow vote, but received endorsement from countries in all regions.<sup>7</sup> As requested by Resolution 17/19, the Office of the High Commissioner for Human Rights released a report documenting discriminatory laws and rights violations on the basis of sexual orientation and gender identity. The report reaffirmed that LGBT persons were entitled to exercise the rights, and enjoy the protections, enshrined in international human rights law on an equal basis with others.<sup>8</sup> A year later, the Human Rights Council adopted a resolution condemning killings of individuals because of their sexual orientation or gender identity, among other characteristics.<sup>9</sup>

There has been a similar wave of legal activity at the national level. Thirteen countries and several sub-national jurisdictions have legalized same-sex marriage since the Netherlands became the first to do so in 2001.<sup>10</sup> Between 1990 and 2013, fifty-nine countries passed laws prohibiting discrimination in employment on the basis of sexual orientation.<sup>11</sup> During the past decade,

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4. Int'l Comm'n of Jurists, *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (Mar. 2007), [http://www.yogyakartaprinciples.org/principles\\_en.pdf](http://www.yogyakartaprinciples.org/principles_en.pdf).

5. U.N. General Assembly, *Statement on Human Rights, Sexual Orientation and Gender Identity*, U.N. Doc. A/63/635 (Dec. 18, 2008).

6. See U.N. Human Rts. Council, *Joint Statement on Ending Acts of Violence Related Human Rights Violations Based on Sexual Orientation and Gender Identity* (Mar. 22, 2011), <http://www.refworld.org/docid/4eb8f32e.html>; see also Eddie Bruce-Jones & Lucas Paoli Itaborahy, *State-Sponsored Homophobia: A World Survey of Laws Criminalising Same-Sex Sexual Acts Between Consenting Adults*, INT'L LESBIAN, GAY, BISEXUAL, TRANSGENDER & INTERSEX ASS'N 4 (2011), [http://www.gaylawnet.com/ezone/crime/ilga\\_2011.pdf](http://www.gaylawnet.com/ezone/crime/ilga_2011.pdf).

7. See U.N. Human Rts. Council Res. 17/19, *Human Rights, Sexual Orientation and Gender Identity*, A/HRC/RES/17/19 (July 14, 2011), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/148/76/PDF/G1114876.pdf>.

8. See U.N. High Comm'r for Human Rts., *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*: Rep. of the High Comm'r, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011), [http://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41\\_English.pdf](http://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf).

9. See U.N. GAOR, Promotion and Protection of Human Rights, U.N. Doc. A/C.3/67/L.36 (Nov. 9, 2012), [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/C.3/67/L.36](http://www.un.org/ga/search/view_doc.asp?symbol=A/C.3/67/L.36) (draft resolution).

10. See LUCAS PAOLI ITABORAHY & JINGSHU ZHU, INT'L LESBIAN, GAY, BISEXUAL, TRANSGENDER & INTERSEX ASS'N, *STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS: CRIMINALISATION, PROTECTION AND RECOGNITION OF SAME-SEX LOVE* 30 (8th ed. 2013), [http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2013.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2013.pdf).

11. *Id.* at 25-26.

historic Supreme Court rulings recognizing legal rights based on gender identity were issued in Nepal and Pakistan;<sup>12</sup> the U.S. Equal Employment Opportunity Commission ruled that discrimination in employment based on gender identity violated the 1964 Civil Rights Act;<sup>13</sup> and a District Court in South Korea ruled that transgender individuals could change their gender on official documentation whether or not they had undergone surgery, among other legal milestones.<sup>14</sup>

While LGBT rights are receiving increased legal protection in some countries, a divergent trend is occurring in others. Seventy-six countries, including thirty-six in Africa, still had laws that criminalized consensual sexual activity between same-sex adults as of 2013; in five of these countries, such acts are punishable by death.<sup>15</sup> In 2009, the government of Burundi passed a law that criminalized consensual homosexual activity for the first time in the history of the country.<sup>16</sup> In 2012, Liberia's Senate approved a bill that would legally ban same-sex marriage, and the government was additionally considering laws that would increase the penalties for homosexual activity.<sup>17</sup> A year later, the government of Nigeria passed a law that prohibited same-sex marriage and outlawed homosexual clubs and organizations.<sup>18</sup> Several Eastern European jurisdictions have recently enacted or proposed laws restricting freedom of expression and assembly on the basis of sexual orientation or gender identity.<sup>19</sup>

The increased international and national attention that has been paid to LGBT rights in recent years has inspired numerous efforts to track rights protections on paper and monitor implementation on the ground. To our knowledge, however, there has been no detailed study examining the status and evolution of constitutional protections based on sexual orientation and gender identity in the spheres of equality and non-discrimination, employment, and marriage. Although governments may use a variety of legislative and policy channels to address rights in these areas, constitutions are particularly

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12. David W. Austin, *Sexual Orientation and Gender Identity*, 47 INT'L LAW. 469 (2013).

13. *Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995 (Apr. 20, 2012).

14. See Alessia Valenza, *Landmark Legal Ruling for South Korean Transgenders*, INT'L LESBIAN, GAY, BISEXUAL, TRANSGENDER & INTERSEX ASS'N (Apr. 8, 2013), <http://ilga.org/landmark-legal-ruling-for-south-korean-transgenders>.

15. See ITABORAHY & ZHU, *supra* note 10, at 22.

16. See *Forbidden: Institutionalizing Discrimination Against Gays and Lesbians in Burundi*, HUM. RTS. WATCH 2 (2009), [http://www.hrw.org/sites/default/files/reports/burundi0709\\_brochure\\_web.pdf](http://www.hrw.org/sites/default/files/reports/burundi0709_brochure_web.pdf).

17. See *It's Nature, Not a Crime: Discriminatory Laws and LGBT People in Liberia*, HUM. RTS. WATCH 4 (2013), [http://www.hrw.org/sites/default/files/reports/liberia1113\\_ForUpload.pdf](http://www.hrw.org/sites/default/files/reports/liberia1113_ForUpload.pdf).

18. See *Nigeria Passes Law Banning Homosexuality*, TELEGRAPH (Jan. 14, 2014), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/nigeria/10570304/Nigeria-passes-law-banning-homosexuality.html>.

19. See Press Release, European Parliament, Parliament Strongly Condemns Homophobic Laws and Violence in Europe (May 24, 2012), <http://www.europarl.europa.eu/news/en/news-room/20120523IPR45696/Parliament-strongly-condemns-homophobic-laws-and-violence-in-Europe>; Austin, *supra* note 12, at 474; see also ITABORAHY & ZHU, *supra* note 10, at 80-82.

important tools. The symbolic and legal weight of constitutional rights can be leveraged to oppose or encourage the introduction of legislation. Because constitutions are typically more difficult to repeal or amend than other laws and policies, they may also be more resistant to reversal when governments change. Furthermore, constitutions often include specific mechanisms for redress when provisions are violated by states or private actors.

This article examines constitutional protection of equal rights across sexual orientation and gender identity as of May 2014. The methods section outlines the methodology used to build a quantitatively comparable data source that captures constitutional protections of equal rights for specific social groups across different spheres and the analyses conducted. The results section examines the prevalence of constitutional protections of general equality and non-discrimination and equal rights in employment based on sexual orientation and gender identity and compares these rights to protections for other groups. It goes on to examine how constitutions address equality in marriage. The variation in constitutional protections of equal rights is analyzed by region, year of constitutional adoption, and year of the last constitutional amendment.

## I. METHODS

### A. *Data Source*

To assess constitutional protections, a quantifiable database of constitutional rights was created by reviewing the national constitutions and amendments of 193 U.N. member states as of May 2014. We obtained constitutions from official government websites where possible. Constitutions were also collected from three additional resources: *Constitutions of the Countries of the World Online*;<sup>20</sup> *Constitution Finder*,<sup>21</sup> a database of world constitutions sourced by the University of Richmond; and HeinOnline's *World Constitutions Illustrated*.<sup>22</sup> When secondary sources were used to retrieve constitutional texts, we prioritized documents that were made available by the U.N., universities, and legal institutes. In cases where constitutions specified that additional legislation was part of the constitutional order, we obtained and reviewed those texts as well. For countries that do not have written codified constitutions or have several constitutional documents, such as the United Kingdom, Canada, New Zealand, and Israel, we reviewed any laws that are considered to have constitutional status.

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20. 18 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 2007).

21. *Constitutions Finder*, RICHMOND: U. RICHMOND SCH. L., <http://confinder.richmond.edu/index.html> (last visited May 30, 2014).

22. *World Constitutions Illustrated*, HEINONLINE, <http://heinonline.org/HOL/COW?collection=cow> (last visited May 30, 2014).

A coding framework was developed to assess the strength of constitutional provisions for fourteen specific social groups across fifty-one rights. The rights framework was based on internationally endorsed norms established by conventions and agreements of the United Nations and covers education, health, labor, family, and civil and political rights. These include the U.N. Universal Declaration of Human Rights;<sup>23</sup> International Covenant on Civil and Political Rights;<sup>24</sup> U.N. Convention on Economic, Social, and Cultural Rights;<sup>25</sup> and conventions that guarantee non-discrimination and equality to specific groups, such as the Convention on the Elimination of All Forms of Discrimination Against Women,<sup>26</sup> among others. Constitutional provisions were classified according to the type of right, social group protected,<sup>27</sup> and strength of constitutional protection<sup>28</sup> in a Microsoft Access database. Constitutional texts were read in their entirety in the original language or an English, Spanish, or French translation. Constitutional text was read and classified by at least two team members to ensure consistency. Systematic quality checks were conducted to reduce inconsistencies in coding across countries.

### *1. Capturing Sexual Orientation and Gender Identity in Constitutions*

For this article, we examined constitutional protections of equal rights based on sexual orientation and gender identity. We considered provisions to refer to sexual orientation when they mentioned homosexuality, sexual orientation, or sexual preference. We categorized provisions that referenced gender identity, gender reassignment, or transsexuals as protecting gender identity.

For example, Portugal's constitution stipulates that "[n]o one may be . . . deprived of any right . . . for reasons of . . . sexual orientation"<sup>29</sup> and goes on to state that "[e]veryone has the right to work."<sup>30</sup> In these cases where constitutions granted a right universally and separately guaranteed the enjoyment of rights regardless of sexual orientation or gender identity, we considered the universally-granted right to be specifically protected based on sexual orientation or gender identity. For this study, we coded Portugal's

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23. Universal Declaration of Human Rights, G.A. Res. 217 (III)A (Dec. 10, 1948).

24. Dec. 16, 1966, 999 U.N.T.S. 171.

25. Jan. 4, 1978, 993 U.N.T.S. 3.

26. Dec. 18, 1979, 1249 U.N.T.S. 13.

27. These are age, citizenship, sex/gender, race/ethnicity, religion, language, social position, national origin, sexual orientation/gender identity, parental, physical disability, intellectual disability or mental health condition, social disability, and prisoner status.

28. Measures of strength assessed whether rights were denied, permitted exceptions to guarantees, used non-authoritative language, were guaranteed, or allowed for potential or guaranteed positive action for the group.

29. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONSTITUTION], Aug. 12, 2005, art. 13 (Port.).

30. *Id.* art. 58.

protection as a specific guarantee of the right to work based on sexual orientation.

## *2. General Equal Rights Protections that Do Not Explicitly Address Sexual Orientation*

Some constitutions protected the rights examined in this study using universal language, without specifying separate protections or restrictions on the basis of sexual orientation or gender identity. While such provisions may not address the specific circumstances of these groups, universal guarantees should offer better protection than an absence of constitutional protection of these rights. We therefore present results in the tables for universal guarantees of constitutional rights as well as those specifically based on sexual orientation and gender identity.

## *3. Constitutional Rights Examined*

We identified three key areas of rights for constitutional protections based on sexual orientation or gender identity: general equality and non-discrimination, equal rights in employment, and the right to marry.

### *i. General Equality and Non-Discrimination*

Constitutions were considered to protect general equality and discrimination if they guaranteed at least one of the following: prohibition of discrimination, equality before the law, general equality, or equal rights. Our prohibition of discrimination variable encompassed the right to be protected from discrimination, to receive equal treatment, and not to be subject to any disadvantages because of sexual orientation or gender identity. Our second measure of constitutional protection included references to equal protection of, or equal treatment under, the law. Our third variable captured broad references to equality. Articles that guaranteed equal opportunities or formal equality were included under this right. Equal rights clauses were those that specified that everyone enjoys the same rights regardless of sexual orientation or gender identity.

### *ii. Equal Protection in Employment Rights*

Equal protection in employment rights in this study encompasses broad protections from discrimination in work; provisions granting equal treatment in hiring, promotion, pay or working conditions; and cases where the right to work is specifically guaranteed based on sexual orientation. Provisions that

allowed for the freedom of employment, the free choice of employment, or the right to practice professions were not captured.

### iii. Restrictions on Same-Sex Marriage

Our measure of constitutional restrictions on same-sex marriage included references to both the right to marry and definitions that marriage is between a man and woman. We did not consider the right to found a family to be an equivalent term for marriage. We considered the right to marry to be explicitly denied to same-sex couples when the constitution stated that marriage is limited to only one man and only one woman, marriage is prohibited between persons of the same sex, or marriage is only permitted to a member of the opposite sex.

Many constitutions did not explicitly deny the right to marry to same-sex couples, but used gendered wording when discussing marriage, such as by stating that “the family is founded on the freely consented marriage of husband and wife” or “men and women of marriageable age have the right to marry.” We categorized these provisions as not explicitly denied, but as using gendered language. We did not include references to husbands and wives being equal before the law or having a duty to practice family planning.

We considered the right to marry to be generally guaranteed, although not specifically to same-sex couples, when the constitution guaranteed the right to marry using inclusive language, such as “everyone” or “any person.” Provisions that stated that “marriage shall be based on the equality of spouses” but did not universally guarantee a right to marry were not included. Similarly, provisions that guaranteed everyone the right to marry, but then outlined the rights of “husband and wife” were coded as not explicitly denying marriage, but as using gendered language.

### *B. Data Analysis*

For the purpose of this study, we constructed comparable measures of the strength of protections of equal rights based on sexual orientation and gender identity in constitutions across countries, as outlined in detail in the previous section. We first measured the prevalence of explicit guarantees of equal rights based on sexual orientation and gender identity. We also examined differences according to the time period in which constitutions were adopted and last amended in order to account for the possibility that constitutional protections of equal rights based on sexual orientation became more prevalent with increased global recognition. We also analyzed region-specific constitutional provisions to reveal any variations that may be due to regional trends. We then assessed how equality protections based on sexual orientation and gender identity compared to other groups, specifically equal rights based on sex, race or

ethnicity, religion, and disability. Finally, we investigated constitutional restrictions on the right to marry for same-sex couples by region and by constitutional adoption and last amendment date.<sup>31</sup> All analyses were conducted in Stata 14.

## II. RESULTS

### A. *General Equality and Non-Discrimination*

Increased global recognition of the equal rights of LGBT individuals has been reflected in recent constitutional developments. South Africa's post-apartheid constitution prohibited discrimination on "one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."<sup>32</sup> In Portugal, "[n]o one may be privileged, favoured, prejudiced, deprived of any right or exempted from any duty on the basis of ancestry, sex, race, language, territory of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation."<sup>33</sup> Bolivia's 2009 constitution specified that "[t]he State prohibits and punishes all forms of discrimination based on sex, color, age, sexual orientation, gender identity, . . . 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>

Globally, ten constitutions (five percent) specifically guaranteed equality or prohibited discrimination on the basis of sexual orientation as of May 2014 and five constitutions (three percent) guaranteed some aspect of equality or non-discrimination on the basis of gender identity.<sup>35</sup> In comparison, eighty-four percent of countries explicitly guaranteed equality or banned discrimination on the basis of sex, seventy-six percent on the basis of race or ethnicity and religion, and twenty-four percent on the basis of disability.<sup>36</sup> The constitutions that protected equality and non-discrimination on the basis of sexual orientation were adopted during different decades (five before 1980, one each in the 1980s and 1990s, and three between 2000 and 2014).<sup>37</sup> However, all of these constitutions were last amended after 2000,<sup>38</sup> and all of the protections were introduced to these countries' constitutions during the 1990s or later.

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31. If a constitution had not been amended since its adoption, the year of adoption was considered the year of last amendment.

32. S. AFR. CONST, 1996, *as amended*, Mar. 26, 2009, § 9(3).

33. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONSTITUTION], Aug. 12, 2005, art. 13 (Port.).

34. Constitución política del estado Plurinacional de Bolivia, Feb. 7, 2009, art. 14 (Bol.).

35. Appendix 1, tbl.2.

36. *Id.*

37. *Id.* at tbl.1.2.

38. *Id.* at tbl.1.3

Of the ten countries that constitutionally prohibited discrimination or guaranteed equal rights on the basis of sexual orientation, three are in the Americas (Bolivia, Ecuador, and Mexico), four in Europe and Central Asia (Malta, Portugal, Sweden, and the United Kingdom), two in East Asia and the Pacific (Fiji and New Zealand), and one in Sub-Saharan Africa (South Africa).<sup>39</sup> Among these, Bolivia, Ecuador, Fiji, Malta, and the United Kingdom additionally prohibited discrimination based on gender identity. None of the constitutions of South Asia or the Middle East and North Africa contained any guarantees of equality or non-discrimination based on sexual orientation or gender identity.

### *1. Equal Rights in Employment*

Five of the constitutions that took an approach to equality or non-discrimination based on sexual orientation (Bolivia, Ecuador, New Zealand, Portugal, and the United Kingdom) additionally guaranteed equal treatment in some aspect of employment on this basis, either directly or indirectly. New Zealand's Human Rights Act makes it illegal to "refuse or omit to employ [an] applicant on work of that description which is available; or [t]o offer or afford the applicant or the employee less favorable terms of employment, conditions of work, superannuation or other fringe benefits, and opportunities for training [or] promotion" based on the prohibited grounds of discrimination, which include sexual orientation.<sup>40</sup> Ecuador's constitution bans discrimination in the "recognition, enjoyment or exercise of rights" on the basis of, among other characteristics, "gender identity" and "sexual orientation," and goes onto guarantee that "work is a right and a social duty, as well as an economic right."<sup>41</sup> In comparison to the infrequent protection of LGBT rights in employment, forty-five percent of constitutions included such protections on the basis of sex, twenty-three percent on the basis of race or ethnicity, twenty-two percent on the basis of religion, and twelve percent on the basis of disability.<sup>42</sup>

### *2. Marriage Rights*

Constitutions also addressed sexual orientation in the realm of marriage. None of the constitutions in our study explicitly protected the right to same-sex marriage, while thirteen (seven percent worldwide) prohibited same-sex marriages or permitted legislation to do so.<sup>43</sup> Eight of these countries are in

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39. *Id.* at tbl.1.1

40. Human Rights Act 1993, 2011, ss 21, 23 (N.Z.).

41. CONSTITUCIÓN POLITICA DE LA REPÚBLICA DEL ECUADOR, Oct. 20 2008, art. 11, 33.

42. Appendix 1, at tbl.3.

43. *Id.* at 4.1.

Sub-Saharan Africa (seventeen percent of constitutions in the region), three in the Americas (nine percent of constitutions in the region), one in East Asia and Pacific (three percent of constitutions in the region), and one in Europe and Central Asia (two percent of constitutions in the region). For example, Uganda's constitution explicitly stated that "marriage between persons of the same sex is prohibited."<sup>44</sup> In Honduras, "[m]atrimony and the common law union between persons of the same sex is prohibited. Matrimonies or common law unions between persons of the same sex celebrated or recognized under the laws of other countries will have no validity in Honduras."<sup>45</sup> The constitution of Seychelles

"recognises . . . the right of everyone to form a family" but goes on to state that this right "may be subject to such restrictions as may be prescribed by law and necessary in a democratic society including the prevention of marriage between persons of the same sex or persons within certain family degrees."<sup>46</sup>

Prohibitions of same-sex marriage were concentrated in constitutions adopted after 1980, and all of the constitutions containing these prohibitions were last amended during after 2000.<sup>47</sup> Each of the denials was introduced to the respective country's current constitution after 2000, while the one provision that permitted future legislation to establish such a denial was introduced in 1993.

An additional twenty-two percent of constitutions did not directly address same-sex marriage but defined or referred to marriage in gendered terms. Such language was found in thirty-one percent of the constitutions of the Americas, thirty percent of the constitutions of Europe and Central Asia, twenty-three percent of Sub-Saharan African constitutions, and thirteen percent of those in East Asia and the Pacific (Table 4.1). For instance, the Bulgarian constitution specified that "[m]atrimony shall be a free union between a man and a woman,"<sup>48</sup> and in Nicaragua, "[m]arriage and stable de facto unions are protected by the State; they rest on the voluntary agreement between a man and a woman."<sup>49</sup> In Ethiopia, "[m]en and women, without any distinction as to race, nation, nationality or religion, who have attained marriageable age as defined

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44. CONST. OF THE REPUBLIC OF UGANDA (1995), art. 31 (as amended, Dec. 30, 2005).

45. CONSTITUCION POLITICA DE LA REPUBLICA DE HONDURAS, Jan. 11, 1982, art. 112 (as amended Feb. 4, 2014).

46. CONST. OF THE REPUBLIC OF SEYCHELLES, June 18 1993, art. 32 (as amended, May 31, 2000)..

47. Appendix 1, tpls.4.2, 4.3.

48. KONSTITUTSIA NA REPUBLIKA BULGARIA [CONSTITUTION], July 13, 1991, art. 46 (as amended Feb. 6, 2007).

49. Constitución Política de la República de Nicaragua [Cn.], art. 72, La Gaceta, Diario Oficial [L.G.] 19 November 1986 (as amended, Feb. 8, 2014).

by law, have the right to marry and found a family.”<sup>50</sup> Similarly, Turkmenistan’s constitution states that “[m]en and women having reached the marriageable age have the right, by mutual consent, to marry and create families.”<sup>51</sup>

Another eight countries (four percent) guaranteed the right to marry using universal terms. In Albania, for example, “[e]veryone has the right to get married and have a family.”<sup>52</sup> Among the ten constitutions that prohibited discrimination or guaranteed equality on the basis of sexual orientation, six did not address the right to marry in their constitutions (Fiji, Malta, Mexico, New Zealand, South Africa, and Sweden), one defined marriage in universal terms (Portugal), and three referred to marriage in gendered terms (Bolivia, Ecuador, and the UK).<sup>53</sup>

### CONCLUSION

Rising international affirmation of the rights of LGBT individuals has been paralleled by an increase in constitutional provisions addressing these rights. Ten countries introduced protections of equality or non-discrimination based on sexual orientation to their constitutions between 1990 and 2014, the first such guarantees at the constitutional level. Overall, however, constitutional provisions that explicitly address rights based on sexual orientation or gender identity remain rare, particularly in comparison to provisions against discrimination based on sex, race or ethnicity, religion, and disability. For example, although the UN Convention on the Rights of Persons with Disabilities was adopted only recently, in 2006, forty-seven constitutions (twenty-four percent worldwide) guaranteed some aspect of equality or non-discrimination based on disability in May 2014, compared to five percent protecting this right based on sexual orientation and three percent based on gender identity.

Moreover, the increase in constitutional protections based on sexual orientation and gender identity does not signal a growing global consensus on the rights of LGBT individuals. Countries’ divergent reactions to the rising international awareness of LGBT rights are clearly reflected in constitutional developments. While ten countries have introduced constitutional protections against discrimination or guarantees of equality based on sexual orientation since 1990, thirteen have introduced constitutional prohibitions of same-sex marriage or provisions allowing legislation to prohibit same-sex marriage

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50. CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, Dec. 8, 1994, art. 34, §1.

51. CONSTITUTION OF TURKMENISTAN, May 18, 1992, art. 27 (amended 2012).

52. CONSTITUTION OF THE REPUBLIC OF ALBANIA, Nov. 22, 1998, art. 53, §1 (amended 2013).

53. See *Constitutions Database*, WORLD POLICY ANALYSIS CENTER, <http://worldpolicycenter.org/maps-data/data-download/world-areas> (last visited Nov. 11, 2015).

during this time. These different trajectories often take place across sub-national jurisdictions within countries, as demonstrated by the virulent debate over same-sex marriage in the United States.

The very recent nature of global recognition of LGBT rights and the few protections that exist at the constitutional level preclude us from drawing strong conclusions on the trajectory of rights in this area. Moreover, this study has only considered explicit constitutional protections or prohibitions based on sexual orientation and gender identity. As illustrated in the introduction, national and sub-national laws as well as litigation and case law are also critical to consider when evaluating the legal protection of LGBT individuals at the national level. However, the symbolic and practical weight of constitutional protections makes them powerful legal tools for advancing equality in practice. Constitutional provisions, either universal or specific to sexual orientation, have formed the basis of successful court cases to decriminalize consensual homosexual activity in Ecuador;<sup>54</sup> to strike down provisions of Colombia's *Standards for the Exercise of the Teaching Profession* and Peru's *Military Justice Code* that discriminated on the basis of sexual orientation;<sup>55</sup> to extend marital rights to same-sex couples in Canada and South Africa;<sup>56</sup> to extend equal inheritance rights to same-sex couples in Slovenia;<sup>57</sup> and to recognize the equal rights of transgender individuals in Pakistan,<sup>58</sup> among other examples. Constitutional cases addressing discrimination on the basis of other characteristics have also demonstrated the power of constitutional rights to effect broad societal change; for example, these have been used to end de jure racial segregation in schools in the United States and to overturn laws that discriminated against women in the realms of property ownership in Swaziland, citizenship in Botswana, and family law in Uganda.<sup>59</sup>

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54. Constitutional Tribunal of Ecuador, Nov. 17, 1997, No. 111-97-TC, <http://www.icj.org/sogicasebook/case-no-111-97-tc-constitutional-tribunal-of-ecuador-27-november-1997> (last visited Mar. 25, 2014).

55. Corte Constitucional [C.C.] [Constitutional Court], Sept. 9, 1998, Sentencia C-481/98, (Colom.), <http://www.icj.org/sogicasebook/sentencia-c-48198-constitutional-court-of-colombia-9-september-1998> (last visited Mar. 25, 2014); Constitutional Tribunal of Peru, June 9, 2004, Sentencia 0023-2003-AI/TC, <http://www.icj.org/sogicasebook/sentencia-0023-2003-aitc-constitutional-tribunal-of-peru-9-june-2004> (last visited Mar. 25, 2014).

56. *M v. H.*, [1999] 2 S.C.R. 3 (Can.), <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1702/index.do> (last visited Mar. 25, 2014); Clare Nullis, *Same-Sex Marriage Law Takes Effect in S. Africa*, WASH. POST (Dec. 1, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/30/AR2006113001370.html>.

57. *Blažič & Kern v. Slovenia* (Const. Ct. Rep. Slovn.), July 2, 2009, <http://www.icj.org/sogicasebook/blazic-and-kern-v-slovenia-constitutional-court-of-the-republic-of-slovenia-2-july-2009> (last visited Mar. 25, 2014).

58. See Austin, *supra* note 12.

59. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954); see Justice Unity Dow, *How the Global Informs the Local: The Botswana Citizenship Case*, 22 HEALTH CARE FOR WOMEN INT'L 319 (2001); see also Manisuli Ssenyonjo, *Women's Rights to Equality and Non-Discrimination: Discriminatory Family Legislation in Uganda and the Role of Uganda's Constitutional Court*, 21 INT'L J.L., POL'Y & FAM. 341 (2007); *Swaziland: Some Women Can Now Own Property*, IRIN (Feb. 25, 2010),

Just as each successful court case can be a building block for future success, however, each new restriction can deal a critical blow to equality. Continued mobilization at the national and international levels for the explicit protection of rights based on sexual orientation and gender identity, and for the repeal of laws that discriminate on these bases, will therefore be essential to reverse the setbacks and leverage the successes that have emerged in parallel during the past two decades.

## Protections of Equal Rights Across Sexual Orientation and Gender Identity: Appendix 1

*Table 1.1: Constitutional Protection of Equality and Non-Discrimination Based on Sexual Orientation by Region*

Level of Constitutional Protection	Globally	Americas	East Asia and Pacific	Europe and Central Asia	Middle East and North Africa	South Asia	Sub-Saharan Africa
Constitution does not include any relevant protections	20 (10%)	7 (20%)	6 (20%)	1 (2%)	2 (11%)	0 (0%)	4 (8%)
Constitution guarantees equality generally, but does not explicitly address sexual orientation	163 (84%)	25 (71%)	22 (73%)	48 (91%)	17 (89%)	8 (100%)	43 (90%)
Constitution guarantees equality based on sexual orientation	10 (5%)	3 (9%)	2 (7%)	4 (8%)	0 (0%)	0 (0%)	1 (2%)

*Table 1.2: Constitutional Protection of Equality and Non-Discrimination Based on Sexual Orientation by Year of Constitution's Adoption*

Level of Constitutional Protection	All Years	Before 1980	1980 - 1989	1990 - 1999	2000 - 2014
Constitution does not include any relevant protections	20 (10%)	16 (24%)	1 (5%)	3 (5%)	0 (0%)
Constitution guarantees equality generally, but does not explicitly address sexual orientation	163 (84%)	47 (69%)	20 (91%)	57 (93%)	39 (93%)
Constitution guarantees equality based on sexual orientation	10 (5%)	5 (7%)	1 (5%)	1 (2%)	3 (7%)

*Table 1.3: Constitutional Protection of Equality and Non-Discrimination Based on Sexual Orientation by Year of Most Recent Constitutional Amendment*

Level of Constitutional Protection	All Years	Before 1980	1980 - 1989	1990 - 1999	2000 - 2014
Constitution does not include any relevant protections	20 (10%)	2 (40%)	3 (38%)	3 (18%)	12 (7%)
Constitution guarantees equality generally, but does not explicitly address sexual orientation	163 (84%)	3 (60%)	5 (63%)	14 (82%)	141 (87%)
Constitution guarantees equality based on sexual orientation	10 (5%)	0 (0%)	0 (0%)	0 (0%)	10 (6%)

*Table 2: Constitutional Protection of Equality and Non-Discrimination for Other Groups*

Level of Constitutional Protection	Sexual Orientation	Gender Identity	Sex	Race or Ethnicity	Religion	Disabilities
Constitution does not include any relevant protections	20 (10%)	22 (11%)	9 (5%)	7 (4%)	8 (4%)	21 (11%)
Constitution guarantees equality generally, but does not explicitly address the group	163 (84%)	166 (86%)	21 (11%)	39 (20%)	39 (20%)	125 (65%)
Constitution guarantees equality for the group	10 (5%)	5 (3%)	163 (84%)	147 (76%)	146 (76%)	47 (24%)

*Table 3: Constitutional Protection of Equal Rights in Employment*

Level of Constitutional Protection	Sexual Orientation	Gender Identity	Sex	Race or Ethnicity	Religion	Disabilities
Constitution does not include any relevant protections	80 (41%)	81 (42%)	73 (38%)	79 (41%)	79 (41%)	76 (39%)
Constitution guarantees equal rights in employment generally, but does not explicitly address the group	108 (56%)	109 (56%)	34 (18%)	69 (36%)	71 (37%)	94 (49%)
Constitution guarantees equal rights in employment for the group	5 (3%)	3 (2%)	86 (45%)	45 (23%)	43 (22%)	23 (12%)



*Table 4.2: Constitutional Treatment of Right to Marry for Same-Sex Couples by Year of Constitution's Adoption*

Level of Constitutional Protection	All Years	Before 1980	1980 - 1989	1990 - 1999	2000 - 2014
Constitution explicitly denies or allows for legislation to deny the right to marry to same-sex couples	13 (7%)	2 (3%)	2 (9%)	4 (7%)	5 (12%)
Constitution does not explicitly deny the right to marry to same-sex couples, but uses gendered language to describe marriage	42 (22%)	7 (10%)	2 (9%)	22 (36%)	11 (26%)
Constitution does not explicitly address right to marry or definition of marriage	130 (67%)	57 (84%)	18 (82%)	32 (52%)	23 (55%)
Constitution does not explicitly address right to marry for same-sex couples, but guarantees the right to marry universally without gendered language	8 (4%)	2 (3%)	0 (0%)	3 (5%)	3 (7%)
Constitution explicitly guarantees the right to marry to same-sex couples	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)

*Table 4.3: Constitutional Treatment of Right to Marry for Same-Sex Couples by Year of Most Recent Constitutional Amendment*

Level of Constitutional Protection	All Years	Before 1980	1980 - 1989	1990 - 1999	2000 - 2014
Constitution explicitly denies or allows for legislation to deny the right to marry to same-sex couples	13 (7%)	0 (0%)	0 (0%)	0 (0%)	13 (8%)
Constitution does not explicitly deny the right to marry to same-sex couples, but uses gendered language to describe marriage	42 (22%)	1 (20%)	0 (0%)	2 (12%)	39 (24%)
Constitution does not explicitly address right to marry or definition of marriage	130 (67%)	4 (80%)	8 (100%)	15 (88%)	103 (63%)
Constitution does not explicitly address right to marry for same-sex couples, but guarantees the right to marry universally without gendered language	13 (7%)	0 (0%)	0 (0%)	0 (0%)	13 (8%)
Constitution explicitly guarantees the right to marry to same-sex couples	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)