

IMPROVING THE ENVIRONMENT FOR LGBTI RIGHTS

TABLE OF CONTENTS

INTRODUCTION	277
I. STATE RESPONSIBILITIES TO THE LGBTI COMMUNITY.....	283
II. STATE DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND ACTIVITY.....	286
III. THE INTER-AMERICAN COURT OF HUMAN RIGHTS' ROLE IN HUMAN RIGHTS OBLIGATIONS.....	291
IV. THE CASE OF COSTA RICA	294
<i>A. Inter-American Court of Human Rights Advisory Opinion OC- 24/17</i>	295
<i>B. Non-compliance with the Inter-American Court of Human Rights' Opinion</i>	298
V. THE PARIS AGREEMENT AS A MODEL FOR ACHIEVING LGBTI RIGHTS.....	301
CONCLUSION	306

INTRODUCTION

Fifty years ago, most people misunderstood two broad issues: climate change and the rights of people who identify as Lesbian, Gay, Bisexual, Transgender, and Intersex¹ (“LGBTI”).² LGBTI rights hardly existed, and in many places throughout the Americas

1. Intersex people include the nearly one in every 2,000 people that are born with variations in reproductive or sexual anatomy or have a chromosome pattern that does not fit with what is typically considered male or female. Intersex people can identify as male, female, or neither. Along with LGBT people, intersex people are struggling in many places for recognition, equality, and human rights. *What does it mean to be intersex?*, SHAREAMERICA (Jun. 14, 2016), <https://share.america.gov/what-does-it-mean-to-be-intersex/>.

2. Respecting that different cultures use different terms to describe people who have same-sex relationships or who exhibit non-binary gender identities, the LGBTI acronym is consistently used herein to collectively refer to the LGBTQ+ community and is consistent with the term’s universal use by the Organization of American States, Inter-American Court of Human Rights, and Inter-American Commission on Human Rights.

expressing LGBTI identity was illegal. LGBTI people in the Americas did not have the right to marry, and countries criminalized same-sex intercourse under sodomy, buggery, and other laws.³ These laws, coupled with the absence of laws that protected LGBTI individuals from discrimination, continue to harm the health and welfare of LGBTI people today.⁴

As for climate change, governments generally accepted air pollution throughout much of the twentieth century, and an absence of laws protecting the earth from pollution gave rise to many environmental and societal harms.⁵ After scientific studies revealed the damaging effects of excessive greenhouse gas pollution, governments began creating laws and international agreements to combat climate change.⁶ By 2016, nearly every nation on earth agreed to take collaborative action to combat climate change by making a multilateral international agreement known as the Paris Agreement.⁷ Hence, deal-making and the rule of law became paramount in addressing international problems, including both environmental issues and human rights. Despite their subject matter differences, environmental and human rights concerns have been addressed by governments in like manner. That is, after learning of the damaging

3. Rosie Perper, *The 29 Countries Around the World Where Same-Sex Marriage is Legal*, BUS. INSIDER (May 27, 2020, 5:06 PM), <https://www.businessinsider.com/where-is-same-sex-marriage-legal-world-2017-11>; See also Sexual Offences Act, 1998, sec. 16 (Dominica), https://oig.cepal.org/sites/default/files/1998_dma_act1.pdf; Criminal Law (Offences) Act, 1998, sec. 352-54 (Guy.), https://www.oas.org/juridico/spanish/mesicic2_guy_criminal_law_act.pdf.

4. Cornell Chronicle, *Discrimination Impacts Health of LGBT People, Analysis Finds*, CORNELL UNIV. (Dec. 19, 2019), <https://news.cornell.edu/stories/2019/12/discrimination-impacts-health-lgbt-people-analysis-finds>.

5. See generally *Air Pollution: Current and Future Challenges*, U.S. EPA, <https://www.epa.gov/clean-air-act-overview/air-pollution-current-and-future-challenges> (last visited Sept. 23, 2021).

6. See e.g., Clean Air Act § 1857, 42 U.S.C. § 7401 (2017) [hereinafter Clean Air Act]; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol].

7. Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 13, 2015, in Rep. of the Conference of the Parties on the Twenty First Session, U.N. Doc. FCCC/CP/2015/10/Add.1, annex (Jan. 29, 2016) [hereinafter Paris Agreement].

effects of atmospheric pollution and discrimination,⁸ governments have attempted to combat these issues through lawmaking and international agreements.⁹ In other words, countries have responded to two very different issues, climate change and human rights, in the very same way.

Since the 1992 United Nations Framework Convention on Climate Change (“UNFCCC”), countries have been working to combat climate change using international agreements for nearly thirty years.¹⁰ The 1997 Kyoto Protocol succeeded the UNFCCC, and then became the 2009 Copenhagen Accord, before finally reaching the landmark 2015 Paris Agreement.¹¹ The Paris Agreement has since been ratified by 191 nations.¹²

Significantly, the Paris Agreement went through several iterations over the course of thirty years before the world had an almost unanimous climate change agreement. The Agreement represented a major accomplishment in the international arena and a similar framework could be applied to agreements for other issues, such as LGBTI rights and same-sex marriage in the Americas.

The links between climate change and human rights¹³ are not attenuated because they are both human issues that implicate each other. Quoting the Supreme Court in 1888, the United States District Court noted in 2016:

[T]here is no doubt that the right to a climate system capable of sustaining human life is fundamental to [life and any] free and ordered society. Just as a marriage is the “foundation of the

8. *E.g.*, sex, color, religion, etc.

9. *E.g.*, Clean Air Act, *supra* note 6; United Nations Framework Convention on Climate Change, June 4, 1992, 1771 U.N.T.S. 107; Kyoto Protocol, *supra* note 6; Paris Agreement, *supra* note 7; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

10. BARRY E. CARTER ET AL., INTERNATIONAL LAW 931-32 (RACHEL E. BARKOW ET AL. EDS., 7TH ED. 2018).

11. *Id.*

12. The number of nations that have ratified the Paris Agreement is current as of the date of this writing. U.N.F.C.C.C., Paris Agreement—Status of Ratification, <https://unfccc.int/process/the-paris-agreement/status-of-ratification> (last visited May 28, 2021); United Nations Treaty Collection, Status of Treaties, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en (last visited May 28, 2021).

13. *E.g.*, marriage. G.A. Res. 217 (III) A, *supra* note 9, art. 16.

family,” a stable climate system is quite literally the foundation “of society, without which there would be neither civilization nor progress.”¹⁴

Drawing on this connection between human rights and climate change, the Paris Agreement makes direct mention of this relationship in its recitals, [a]cknowledging that climate change is a common concern of humankind, parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights . . . and the right to . . . gender equality....¹⁵

As government practices have evolved to provide more protections for the environment and LGBTI persons, the overall global attitude and context surrounding the discussions on climate change and LGBTI rights have increasingly shifted in a positive direction. Now, there is widespread consensus that climate change is real and it poses an existential threat to humanity.¹⁶ Also, more than ever, widespread consensus exists that LGBTI individuals are dignified people who should be treated equally under the law just like the heteronormative population.¹⁷

Although there may be widespread consensus on certain international issues, such as climate change and human rights, there is also considerable debate when determining how to address these

14. *Juliana v. U.S.*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016) (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888)), rev'd and remanded, 947 F.3d 1159 (9th Cir. 2020).

15. Paris Agreement, *supra* note 7.

16. *Remarks by President Biden Before Signing Executive Actions on Tackling Climate Change, Creating Jobs, and Restoring Scientific Integrity*, THE WHITE HOUSE (Jan. 27, 2021, 1:37pm), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/27/remarks-by-president-biden-before-signing-executive-actions-on-tackling-climate-change-creating-jobs-and-restoring-scientific-integrity/>.

17. E.g., in the Americas sexual orientation is now expressly protected under the national constitutions of Bolivia, Ecuador, and Mexico. Mark E. Wojcik et al., *Sexual Orientation and Gender Identity*, 53 YEAR IN REV. (ABA) 263, 264-65 (2019); on February 25, 2021, the United States 117th congress passed a bill known as the Equality Act that prohibits discrimination based on sex, sexual orientation, and gender identity in areas including public accommodations and facilities, education, federal funding, employment, housing, credit, and the jury system. Equality Act, H.R. 5, 117th Cong. (as passed by the House of Representatives, Feb. 25, 2021) [hereinafter Equality Act].

problems.¹⁸ On both fronts, cases are increasingly brought into domestic and international courtrooms by private and State actors who desire change and are no longer willing to adhere to the status quo.¹⁹ Despite the courtroom success of LGBTI activists in shifting the perception of LGBTI rights in a favorable way, some nations of the Americas (“countries” or “States”)²⁰ are refusing to comply with the Inter-American Court of Human Rights’ (“IACHR”) decision on human rights equality, non-discrimination of same-sex couples, and the right to same-sex marriage.²¹

In 2017, the IACHR held for the first time that the American Convention on Human Rights (“American Convention” or “the Convention”) requires member countries of the Organization of American States (“OAS”) to allow same-sex marriage and stop discrimination on the basis of sexual orientation.²² Eight countries complied with the IACHR’s holding on same-sex marriage, but sixteen countries which are subject to the Convention did not.²³ Although the primary issue for the IACHR is whether the Convention required State parties to provide for same-sex marriage, other

18. CARTER ET AL., *supra* note 10, at 931.

19. *E.g.*, Complaint, *Juliana v. U.S.*, 217 F. Supp. 3d 1224 (D. Or. 2016) No. 6:15-cv-01517-TC, 2015 WL 4747094 (lawsuit seeking to force the U.S. government to reduce greenhouse gas emissions); Ana Helena Chacón Echeverría, Gov’t of the Republic of Costa Rica, Request for Advisory Opinion, “Considering,” ¶ B (Inter-Am. Ct. H.R. May 18, 2016), https://www.corteidh.or.cr/docs/solicitud/solicitud_17_05_16_eng.pdf (requesting an opinion on whether parties to the American Convention must provide same-sex marriage) [hereinafter Costa Rica’s Request].

20. Unless specifically discussing United States law and any of the fifty States in the United States of America, the term “States” herein generally refers to countries of the North and South American continents that are part of the Organization of American States.

21. Agence France-Presse, *Costa Rica Legalizes Same-Sex Marriage*, COURTHOUSE NEWS SERV. (May 26, 2020), <https://www.courthousenews.com/costa-rica-legalizes-same-sex-marriage/> (revealing that as of May 26, 2020, only eight countries in the Americas recognize same sex marriage).

22. Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples, Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24, ¶¶ 199, 228 (Nov. 24, 2017), https://www.corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf [hereinafter Advisory Opinion].

23. France-Presse, *supra* note 21; *Multilateral Treaties*, ORG. AM. STATES, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited May 28, 2021).

consequential issues have arisen from its decision. Mainly, while States varied on non-discrimination protections for people who identified as LGBTI, many States had no protections, and still today many States have laws criminalizing LGBTI expression.²⁴ The legal issues explored in this paper are whether States must comply with the Convention and, if so, how the Convention should be enforced.

International environmental laws, which have been used to effectively combat climate change could, in turn, be used to combat LGBTI discrimination and help countries achieve compliance with the IACHR's order. Specifically, the Paris Agreement requires countries to set goals and report their progress on lowering greenhouse gas emissions in an effort to improve the environment.²⁵ A similar model can be used in international law to improve the environment for LGBTI rights. Focusing on regional international and domestic law in the Americas, and the specific issue of legal protections for LGBTI individuals and same-sex couples, this comment proposes a form of the Paris Agreement in which countries of the Americas agree to set goals and report their progress on achieving LGBTI equality. The proposed model could help achieve compliance with the IACHR's order and help advocate against discrimination of LGBTI individuals.

The process in which the Paris Agreement was created follows a similar structure on how the American Convention on Human Rights was created. The OAS is a chartered international organization,²⁶ just like the United Nations.²⁷ The OAS created the American Convention to affirm, reinforce, and implement its purpose and objectives, which includes the protection of human rights.²⁸ Similarly, the United

24. See *UN: Eastern Caribbean States Called Out Over Anti-LGBT Bias*, HUM. RTS. WATCH (May 28, 2021), <https://www.hrw.org/news/2021/01/21/un-eastern-caribbean-states-called-out-over-anti-lgbt-bias> [hereinafter Eastern Caribbean States]; see also *LGBTQ Americans Aren't Fully Protected From Discrimination in 29 States*, FREEDOM FOR ALL AMS., <https://freedomforallamericans.org/states/> (last visited May 28, 2021).

25. Melissa Denchak, *Paris Climate Agreement: Everything You Need to Know*, NRDC (Feb. 19, 2021), <https://www.nrdc.org/stories/paris-climate-agreement-everything-you-need-know>.

26. Charter of the Organization of American States art. 1, 143, Feb. 27, 1967, O.A.S.T.S. No. A-41, 119 U.N.T.S. 3 [hereinafter OAS Charter].

27. U.N. Charter art. 1, ¶1.

28. Organization of American States, American Convention on Human Rights preamble, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

Nations created the “United Nations Framework Convention on Climate Change” and its successors to carry out its objectives, which included the protection of the environment, and incidentally, human rights.²⁹ Just as climate change poses a vexing existential threat to human life, many governments around the world have been posing a vexing existential threat to LGBTI lives. Even today, some communities in Europe are “LGBT Free Zones” where they have declared themselves, by resolutions, free of “LGBT ideology.”³⁰

This comment merges LGBTI rights and climate change within international law to propose an unexplored method to foster equal human rights and non-discrimination of LGBTI people. Part I describes North and South American countries’ legal obligations to LGBTI people as members of the OAS and parties to the American Convention. Part II analyzes the United States judicial history of persecution based on sexual orientation and sexual activity. Part III discusses the IACHR’s role in interpreting human rights legislation and adjudicating human rights violations. Part IV analyzes the IACHR’s 2017 landmark opinion on LGBTI rights and will provide reasons why some countries are not complying with the opinion. Part V proposes a multilateral international agreement designed to protect LGBTI rights and equality under the law using the Paris Agreement’s concept of nationally determined contributions.

I. STATE RESPONSIBILITIES TO THE LGBTI COMMUNITY

The OAS is the oldest regional international organization in the world.³¹ The organization came under charter in 1948 but existed as far back as 1889 when the first International Conference of American States took place.³² Today, the OAS has thirty-five member countries

29. CARTER ET AL., *supra* note 10, at 931-32; U.N.F.C.C.C., *What is the United Nations Framework Convention on Climate Change?*, <https://unfccc.int/process-and-meetings/the-convention/what-is-the-united-nations-framework-convention-on-climate-change> (last visited May 28, 2021).

30. Lucy Ash, *Inside Poland’s ‘LGBT-free zones’*, BBC (Sep. 21, 2020), <https://www.bbc.com/news/stories-54191344>.

31. *Who We Are*, ORG. AM. STATES, http://www.oas.org/en/about/who_we_are.asp (last visited May 28, 2021).

32. *Id.*

throughout the North and South American continents.³³ With over a billion people residing in about a quarter of the world's habitable area, the OAS is thirteen percent of the world's population and represents nearly a third of the global economy.³⁴ Given these statistics, the OAS is a very prominent actor in the international community. Thus, its actions have the ability to influence policy as well as customary and binding international law. This is especially true for LGBTI rights, because there is increasing State practice in legislating LGBTI protections and abolishing laws that discriminate on the basis of sexual orientation and sexual activity.³⁵

The OAS was created with three primary goals: (a) to promote peace, security, and solidarity between countries; (b) to promote social, cultural, and economic development; and (c) to solve problems that may arise among member countries.³⁶ In addition, the OAS served to provide for the common good and protect human rights.³⁷ These bedrock principles were then affirmed in the OAS Charter and reinforced by the American Convention.³⁸ Among the twenty-five OAS countries that ratified the American Convention, most of the

33. Antigua and Barbuda; Argentina; Barbados; Belize; Bolivia; Brazil; Canada; Chile; Columbia; Costa Rica; Cuba; Dominca; Dominican Republic; Ecuador; El Salvador; Grenada; Guatemala; Guyana; Haiti; Honduras; Jamaica; Mexico; Nicaragua; Panama; Paraguay; Peru; Saint Kitts and Nevis; Saint Lucia; Saint Vincent and the Grenadines; Suriname; The Bahamas; Trinidad and Tobago; United States of America; Uruguay; and Venezuela. *Member States*, ORG. AM. STATES, http://www.oas.org/en/member_states/default.asp (last visited May 28, 2021).

34. *Member of the OAS—Organization of American States*, WORLD DATA, <https://www.worlddata.info/alliances/oas-organization-of-american-states.php> (last visited May 28, 2021) [hereinafter *Member of the OAS—Organization of American States*].

35. *See e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating a Colorado constitutional amendment that prohibited passing laws to protect LGBTI as a protected class from discrimination); *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a Texas law that criminalized same-sex intercourse); Equality Act, *supra* note 18.

36. *Purpose*, ORG. AM. STATES, <http://www.oas.org/en/about/purpose.asp> (last visited May 28, 2021).

37. *See generally id.*

38. *Basic Documents in the Inter-American System*, ORG. AM. STATES, <https://www.oas.org/en/iachr/mandate/Basics/intro.asp> (last visited May 28, 2021).

countries expressly recognized the Convention as a binding document and agreed to the IACHR's jurisdiction for its interpretation.³⁹

Unfortunately, some countries have not lived up to their commitments under the Convention or the Charter. Providing for the common good includes protecting LGBTI community members. However, countries cannot seriously maintain they provide for the common good when they fail to provide equally to the LGBTI community. Moreover, many countries refuse to treat their LGBTI citizens as equal members of the community. Instead, State discrimination on LGBTI rights and equality impedes their overall social, cultural, and economic development.⁴⁰ Furthermore, the issue of LGBTI discrimination and inequality in the Americas is certainly and evidently a problem that has arisen among OAS member countries.

In view of State solidarity, countries have an obligation to address these issues. While some countries are not bound by the American Convention because they are not parties to it or do not adhere to it,⁴¹ they must still fulfill their obligations under the OAS Charter.⁴² Otherwise, the Inter-American system loses respect within the international sphere and is degraded by a lack of faithful cooperation and international order.

The OAS Charter requires countries to “cooperate fully among themselves, independently of the nature of their political, economic, and social systems.”⁴³ According to the Charter's proclamations, all countries have “equal duties”⁴⁴ and “the duty to respect the rights

39. *Ratifications of the Convention*, ORG. AM. STATES, <https://www.cidh.oas.org/basicos/english/Basic4.Amer.Conv.Ratif.htm> (last visited May 28, 2021) [hereinafter *Convention Ratifications*].

40. See Christy Mallory et al., *The Economic Impact of Stigma and Discrimination Against LGBT People in Georgia*, UCLA SCH. L. WILLIAMS INST. (Jan. 2017), <https://williamsinstitute.law.ucla.edu/publications/impact-lgbt-discrimination-ga/>; Kathy Gurchiek, *LGBT Bias Hurts U.S. Economic Growth*, *Fed President Says*, SHRM (June 28, 2019), <https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/pages/lgbt-bias-hurts-u.s.-economic-growth-fed-president-says.aspx>.

41. American Convention, *supra* note 28, art. 62.

42. See generally OAS Charter, *supra* note 26, art. 2, 143.

43. *Id.* art. 3(e).

44. *Id.* art. 10.

enjoyed by every other State in accordance with international law.”⁴⁵ This duty cannot be met if some countries recognize the gender identity and marital statuses of LGBTI people, while others criminalize or stigmatize people for expressing LGBTI identity.

Additionally, countries agree that they have a responsibility for establishing a more just social order that contributes to the fulfillment of the individual.⁴⁶ LGBTI persons are individuals, yet many cannot live fulfilling lives due to their governments’ refusal to treat them equally with the same dignity, respect, and rights afforded to heteronormative populations. For instance, sexual intercourse is a natural human activity qualifying as contributing to the fulfillment of an individual’s life. However, LGBTI people are stigmatized and criminalized by governments for having same-sex intercourse. In Saint Lucia, a country that has been a member of the OAS since 1979,⁴⁷ sexual anal intercourse between men is called “buggery” and is prohibited by their Criminal Code.⁴⁸ Similarly, ten other OAS countries have laws that criminalize same-sex intercourse: Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Kitts and Nevis, Saint Vincent and the Grenadines, and Trinidad and Tobago.⁴⁹ Such laws are prejudicial, discriminatory to the LGBTI community, and a blatant persecution of the individual.

II. STATE DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND ACTIVITY

LGBTI individuals have been the object of persecution and discrimination on the basis of sexual orientation and sexual activity by governments for decades. The United States, a member of the OAS

45. *Id.* art. 11.

46. *Id.* art. 33.

47. *A-41 Signatories and Ratifications*, ORG. AM. STATES, http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS_signatories.asp (last visited May 28, 2021).

48. Criminal Code, 2005, c. 3.01 ¶ 133 (St. Lucia), <http://www.govt.lc/www/legislation/Criminal%20Code.pdf>.

49. *Violence against Lesbian, Gay, Bisexual, Trans, and Intersex Persons in the Americas*, FN 151, Inter-Am. Comm’n H.R., OAS/Ser.L/V/II.rev.1, Doc. No. 36 (Nov. 12, 2015), <http://www.oas.org/en/iachr/reports/pdfs/ViolenceLGBTIPersons.pdf>.

since 1948,⁵⁰ whose population represents nearly a third of the organization,⁵¹ has a judicial history of discriminating based on sexual orientation and sexual activity. For example, two notable turn of the century United States Supreme Court (“SCOTUS”) cases, *Romer v. Evans* and *Lawrence v. Texas*, exhibit government animus towards LGBTI people and pushback in legislating protections for the LGBTI community.⁵²

Near the turn of the twenty-first century, LGBTI activists began succeeding in shifting the perception of LGBTI rights more favorably and communities began adopting protective measures aimed at discriminating against LGBTI people. Unfortunately, activists in Colorado quickly faced government backlash in the form of a referendum known as Amendment 2.⁵³ By amending Colorado’s constitution, Amendment 2 eradicated LGBTI protections in two ways: (1) Amendment 2 prohibited all legislative, executive, or judicial action at any level of State or local government from passing laws to protect gays, lesbians, and bisexuals as a protected class of people from discrimination; and (2) it repealed all existing laws that protected them from discrimination.⁵⁴ For example, Amendment 2 invalidated local ordinances in the Colorado cities of Denver, Aspen, and Boulder that protected LGBTI persons from discrimination in housing, employment, healthcare, public accommodations, and health and welfare services.⁵⁵

In *Romer*, SCOTUS considered whether a law that would essentially make it impossible to legislate protections for LGBTI people was permissible. In striking down Amendment 2, the Court held it violated equal protection by classifying “homosexuals”⁵⁶ as

50. *A-41 Signatories and Ratifications*, *supra* note 47.

51. *Member of the OAS – Organization of American States*, *supra* note 34.

52. *See generally* *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003).

53. *Romer*, 517 U.S. at 624-25.

54. *Id.* at 624.

55. *Id.* at 623-24.

56. The Court uses the term “homosexuals” to refer to members of the LGBTI community. However, the term “homosexual” does not collectively define the LGBTI community. Moreover, it can be derogatory or offensive. Thus, “homosexual” is replaced herein with the term “LGBTI” to collectively refer to the LGBTI community.

unequal to everyone else.⁵⁷ The Court rejected the State's argument that Amendment 2 simply denied LGBTI people special rights and did nothing more than put them in the same position as all other persons.⁵⁸ Rather, the Court recognized that the law puts LGBTI people in a solitary class from the rest of the general population, and takes protections from injuries caused by discriminations away from LGBTI people.⁵⁹ In reaching its holding, the Court reasoned that Amendment 2 lacked a rational relationship to any legitimate State interest and appeared to be motivated by nothing more than animus towards LGBTI people.⁶⁰

Following *Romer*, SCOTUS struck down another LGBTI discriminatory law in the State of Texas. In the early 1990s, Texas passed a law that made it illegal for people of the same sex to engage in oral or anal sex, or to use any objects to penetrate another person's genitals or anus.⁶¹ Late in the evening of September 17, 1998,⁶² Texas police responded to a false report of a weapons disturbance and, without permission, entered the residence of a man named John Lawrence, where they found him having sex with another man named Tyron Garner.⁶³ The police officers arrested the men and they were charged with deviant sexual intercourse with a member of the same sex, which was a violation of the Texas Penal Code.⁶⁴ In *Lawrence*, SCOTUS considered the validity of the Texas LGBTI sexual conduct law⁶⁵ to determine whether it violated individual rights to equal protection, liberty, and privacy.⁶⁶

In a five to four majority opinion, the Court held that the Texas LGBTI sexual conduct law violated the liberty of free people.⁶⁷ It reasoned that a State is not permitted to define the meaning of a

57. *Id.* at 636.

58. *Id.* at 626.

59. *Id.* at 627.

60. *Id.* at 632.

61. TEX. PENAL CODE ANN. § 21.06 (West,1994); *Lawrence*, 539 U.S. at 563.

62. Brief of Petitioners at 2, *Lawrence v. State*, 41 S.W.3d 349 (Tex. App. 2001), rev'd, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152352, at *2.

63. *Id.* at 562-63.

64. *Id.* at 563.

65. PENAL § 21.06.

66. *Lawrence*, 539 U.S. at 564.

67. *Id.* at 567.

relationship or set relationship boundaries unless it causes injury or harm to a person or abuses an institution protected under the law.⁶⁸ The Court stated that LGBTI people are entitled to respect for their private lives and States cannot demean LGBTI existence or control their destiny by criminalizing their private sexual conduct.⁶⁹ Additionally, an LGBTI person's right to liberty includes their right to engage in sexual conduct without governmental interference or invasion.⁷⁰ In reaching its holding, the Court reasoned that the liberty of free people includes an adult's right to choose a partner and their right to express intimacy in the privacy of their own home.⁷¹ LGBTI sexual conduct laws implicate the most private human conduct in the most private of places: sexual behavior in the home.⁷² The Court found that the State sought to control consenting personal relationships that are within the liberty of people to choose, and that people should not be punished as criminals for that conduct.⁷³

In striking down the Texas law, the Court also considered the historical context concerning the validity of such laws.⁷⁴ Despite these laws' roots in history, going back several hundred years to English criminal laws and colonial times, early American sodomy laws were not directed at LGBTI persons.⁷⁵ Instead, early American sodomy laws sought to prohibit nonprocreative sexual activity more generally.⁷⁶ They were designed to protect people from sexual predatory acts when they could not or did not consent, but these laws were not enforced against consenting adults acting in private.⁷⁷ In contrast, the Texas LGBTI sexual conduct law differed from historical sodomy laws because the law was enforced specifically against consenting same-sex adults acting in private.⁷⁸ Moreover, laws targeting same-sex activity did not develop until the late 1800's, and

68. *Id.*

69. *Id.* at 578.

70. *Id.*

71. *Id.* at 567.

72. *Id.*

73. *Id.*

74. *Id.* at 567-73.

75. *Id.* at 568-69.

76. *Id.*

77. *Id.* at 569.

78. *Id.* at 569-70.

they involved conduct in public places rather than the privacy of the home.⁷⁹ It was not until the 1970s that States began targeting LGBTI activity in the home, and at least nine States in the United States had done so before *Lawrence*.⁸⁰ In *Lawrence*, the Court ruled that States do not have any legitimate interest in justifying a law banning same-sex sexual activity, and thus States could not prohibit it.⁸¹

In *Romer* and *Lawrence*, SCOTUS found discriminatory laws against LGBTI people violate the human rights of liberty and equal protection.⁸² These landmark cases marked a major positive shift in the perception of LGBTI rights. They also paved the way for the Court's holding in *Obergefell v. Hodges* which granted same-sex couples the right to marry in all fifty United States.⁸³ The Court's foregoing opinions were consistent with the OAS Charter and the American Convention on Human Rights which declared all human beings, without distinction as to sex or social condition, had rights to liberty and equality of opportunity.⁸⁴

79. *Id.* at 570.

80. *Id.* These nine States include Arkansas, Kansas, Kentucky, Missouri, Montana, Nevada, Tennessee, Texas, and Oklahoma.

81. *Id.* at 578-79.

82. *Romer*, 517 U.S. at 636; *Lawrence*, 539 U.S. at 567, 579.

83. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

84. *Compare* OAS Charter, *supra* note 26, art. 45 (“All human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material well-being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity. . . .”), *with* American Convention, *supra* note 29, art. 1 (“The State Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”); *Compare Romer*, 517 U.S. at 635 (“[Amendment 2] is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit . . . A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause. . . .”), *with Lawrence*, 539 U.S. at 564-71 (holding a State statute making it a crime for two persons of the same sex to engage in intimate sexual conduct was unconstitutional as impinging on their exercise of liberty protected by the Constitution).

III. THE INTER-AMERICAN COURT OF HUMAN RIGHTS' ROLE IN HUMAN RIGHTS OBLIGATIONS

The American Convention on Human Rights was formed to reaffirm American State solidarity and consolidate a system of individual rights throughout the North and South American continents.⁸⁵ Adopted in 1969, the American Convention is a *binding* multilateral human rights treaty.⁸⁶ Until 1969, the OAS did not have a binding human rights treaty. Instead, it generally observed the American Declaration of the Rights and Duties of Man (“Declaration”), which set forth a variety of individual rights and State duties.⁸⁷ States adopted the Declaration in 1948 at the same time they adopted the OAS Charter.⁸⁸ Unlike the binding nature of the American Convention, the Declaration is a *non-binding* instrument.⁸⁹ Hence, the Convention effectively superseded the Declaration by solidifying States human rights obligations throughout the inter-American system. However, through the late twentieth century, the Declaration arguably “evolved from a non-binding declaration of principle into a binding source of legal obligation” through the pronouncement of advisory opinions by the IACHR.⁹⁰

Under both the Declaration and the Convention, States recognized that certain rights are attributes of human personality and should be given to all individuals regardless of where they live and their country of citizenship.⁹¹ The enumerated rights in the Convention include the individual rights to life,⁹² liberty,⁹³ privacy,⁹⁴ assembly,⁹⁵ family,⁹⁶

85. American Convention, *supra* note 28, pmb1.

86. *See American Convention, supra* note 28.

87. Organization of American States, American Declaration of the Rights and Duties of Man (May 2, 1948) *adopted by* the Ninth International Conference of American States, Bogotá, Colombia, 1948, <http://www.oas.org/en/iachr/mandate/Basics/declaration.asp>.

88. CARTER ET AL., *supra* note 10, at 812-14.

89. *Id.*

90. Mark E. Wojcik, *Using International Human Rights Law to Advance Queer Rights: A Case Study for the American Declaration of the Rights and Duties of Man*, 55 OHIO ST. L.J. 649, 652-56 (1994) (discussing cases that have invoked the Declaration as a source of legal obligation).

91. American Convention, *supra* note 28, pmb1.

92. *Id.* art. 4.

93. *Id.* art. 7.

equal protection,⁹⁷ and humane treatment.⁹⁸ The Convention also protects the freedoms of conscience,⁹⁹ expression,¹⁰⁰ residence,¹⁰¹ and association.¹⁰² States are required to respect and ensure their citizens were afforded these rights absent discrimination based on “race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, *or any other social condition.*”¹⁰³ (emphasis added) While being part of the LGBTI community was not enumerated, LGBTI individuals certainly fell within this list. The IACHR found “that by including the expression ‘or any other social condition’ the wording of [the American Convention] left the grounds of discrimination open in order to recognize other categories that were not explicitly listed but were analogous to [explicitly listed categories].”¹⁰⁴

Today, twenty-five out of the thirty-five OAS member countries have ratified the Convention.¹⁰⁵ Those that have ratified it have agreed to abide by its provisions, including the interpretation of its provisions by the IACHR. Those that have not ratified the Convention are nonetheless obligated under the OAS Charter and arguably the Declaration, to abide by the overlapping rights of liberty and equality under law, construed in all three instruments.

The IACHR is a branch of the Organization of American States whose purpose is to interpret and apply the American Convention.¹⁰⁶ The Organization of American States was created following World

94. *Id.* art. 11.

95. *Id.* art. 15.

96. *Id.* art. 17.

97. *Id.* art. 24.

98. *Id.* art. 5.

99. *Id.* art. 12.

100. *Id.* art. 13.

101. *Id.* art. 22.

102. *Id.* art. 16.

103. *Id.* art. 1.

104. Advisory Opinion, *supra* note 22, ¶ 67.

105. *Multilateral Treaties*, *supra* note 23; *History*, INTER-AM. CT. H.R., <https://www.corteidh.or.cr/historia.cfm?lang=en> (last visited May 28, 2021); *see also Member of the OAS – Organization of American States*, *supra* note 34.

106. *What is the I/A Court H.R.?*, INTER-AM. CT. H.R., https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en (last visited May 28, 2021).

War II due to concerns over essential rights of human beings and it aimed to ensure States' adherence to the American Convention.¹⁰⁷ The IACHR is comprised of seven judges¹⁰⁸ who serve no more than two six-year terms.¹⁰⁹ They are democratically elected by State parties to the Convention.¹¹⁰ The Court's authority derives from the American Convention and gives them the power to make advisory opinions, issue provisional measures, and resolve contentious cases.¹¹¹

Essentially, contentious cases are litigated and occur when two or more parties to the Convention have a dispute. In these cases, the IACHR determines whether a particular State has any responsibility for violating a right enshrined in the Convention, or any other inter-American treaty.¹¹² An advisory opinion is a court's advice. States can ask the IACHR questions related to the American Convention, and the Court answers those questions in the written form of an advisory opinion.¹¹³ Specifically, the IACHR responds to State inquiries regarding "the compatibility of internal norms with the Convention" and "the interpretation of the Convention or of other treaties concerning the protection of human rights in the American States."¹¹⁴ Notably, these opinions are not binding on OAS member States or State parties to the Convention, whereas the IACHR's judgments on contentious cases are binding.¹¹⁵

107. *History*, *supra* note 105.

108. American Convention, *supra* note 28, art. 52.

109. *Id.* art. 54.

110. *History*, *supra* note 105.

111. *What is the I/A Court H.R.?*, *supra* note 106.

112. *ABC The Inter-American Court of Human Rights 2019, What, How, When, Where, and Why of the Inter-American Court of Human Rights: Frequently Asked Questions*, INTER-AM. CT. H.R. 10 (2019), https://www.corteidh.or.cr/sitios/libros/todos/docs/ABCCorteIDH_2019_eng.pdf.

113. *What are the Advisory Opinions?*, INTER-AM. CT. H.R., https://www.corteidh.or.cr/que_son_las_opiniones_consultivas.cfm?lang=en (last visited May 28, 2021).

114. *Id.*

115. Separate Opinion of Judge Eduardo Vio Grossi, Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples, Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24, ¶ 69 (Nov. 24, 2017), https://www.corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf [hereinafter Grossi Opinion].

IV. THE CASE OF COSTA RICA

As of 2016, non-discrimination and equal human rights for LGBTI citizens of the Americas had been relatively inconsistent and “uneven” among OAS member States.¹¹⁶ Some States fully recognized equal rights of LGBTI people, while others still have laws that prohibit LGBTI lifestyle and expression.¹¹⁷

In particular, the inconsistent variation of LGBTI rights throughout the Americas caused Costa Rica uncertainty and concern about its (and other States’) obligations to LGBTI people under the American Convention.¹¹⁸ As a result, Costa Rica asked the IACHR to weigh in and provide an opinion concerning individual gender identity rights and patrimonial rights of same-sex couples.¹¹⁹ Essentially, Costa Rica requested an advisory opinion for the Court to interpret:

- (1) whether the American Convention provides protection for State recognition of a person’s name change to accommodate their self-identified gender identity;
- (2) whether Costa Rica’s name change laws comply with the American Convention; and
- (3) whether the American Convention provides protection for State recognition of same-sex couple patrimonial rights.¹²⁰

Specifically, Costa Rica asked the Court to answer three questions on gender identity and two questions on same-sex couple patrimonial rights:

- (1) If gender identity is protected by the American Convention, is Costa Rica required to recognize and facilitate name changes for citizens whose self-identified gender identity does not conform to their assigned gender at birth?
- (2) If the answer to the first question is yes, then does Costa Rica violate the American Convention by not having a name change

116. Costa Rica’s Request, *supra* note 19.

117. *Id.*

118. See *id.*

119. *Id.* ¶¶ B-C.

120. *Id.*

administrative procedure and requiring a person seeking a name change to go through a court proceeding?

- (3) Can Costa Rica's name change law, under the American Convention, be interpreted in the sense that individuals who want to change their name based on gender identity are not required to go through a court proceeding, but rather must be provided a no-cost, speedy and accessible administrative procedure to exercise their name change right?
- (4) Does the American Convention require Costa Rica to recognize all patrimonial rights of same-sex couples?
- (5) If the answer to the fourth question is yes, is Costa Rica required to have a law that regulates same-sex couples for it to recognize their patrimonial rights?¹²¹

Costa Rica's request concluded with a corollary that the Court invite interested parties to submit opinions on the issues.¹²²

*A. Inter-American Court of Human Rights Advisory
Opinion OC-24/17*

Following receipt of Costa Rica's request for an advisory opinion, the IACHR invited all OAS members and affiliates to submit written briefs regarding the issues addressed in the request.¹²³ The Court received briefs with observations and documents from nine OAS member States,¹²⁴ seven State agencies, twenty-six private citizens, the United Nations, the Inter-American Commission on Human Rights, and forty-seven non-governmental organizations, academic institutions, and associations.¹²⁵

121. *Id.* ¶ D.

122. *Id.* ¶ E. For clarity, this paper does not discuss Costa Rica's questions and concerns related to name changes, but nonetheless includes Costa Rica's entire request for context because all the issues implicate each other.

123. Roberto F. Caldas, Request for Advisory Opinion, Provisional Measures, Order of the President of the Court, "Having Seen," ¶¶ 2-3 (Inter-Am. Ct. H.R. Mar. 31, 2017), https://www.corteidh.or.cr/docs/asuntos/solicitud_31_03_17_eng.pdf.

124. Argentina, Bolivia, Brazil, Columbia, Guatemala, Honduras, Mexico, Panama, and Uruguay. *Id.* ¶ 4.

125. *Id.* ¶¶ 4, 6; Advisory Opinion, *supra* note 22, ¶¶ 6-7.

A public hearing was held where forty of those who submitted briefs made oral comments.¹²⁶ Nine supplemental briefs were submitted to the Court after the hearing.¹²⁷ In making its opinion, the Court considered every brief and oral opinion¹²⁸ as well as a breadth of historical context concerning discrimination, violence, and fundamental rights violations against LGBTI citizens throughout the Americas.¹²⁹ Additionally, the Court considered international legal standards, human rights law regarding LGBTI persons, and other relevant agreements OAS member States are parties to.¹³⁰

After nearly a year of deliberation, the IACHR finally issued its advisory opinion.¹³¹ The Court held the Convention's protection against non-discrimination based on sexual orientation does require Costa Rica to "recognize all patrimonial rights derived from a relationship between persons of the same sex."¹³²

More generally, the Court concluded that "the American Convention protects the family ties that may derive from a relationship between persons of the same sex."¹³³ The Court based its holding on "the right to protection of private and family life" found in Article 11(2) of the Convention.¹³⁴ Article 11(2) of the Convention provided that no individual "may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation."¹³⁵ The Court also relied on "the right to protection of the family" found in Article 17 of the Convention.¹³⁶ Article 17 of the Convention provided that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State," and

126. Advisory Opinion, *supra* note 22 ¶ 7-10.

127. *Id.* ¶ 10.

128. *Id.* ¶ 11.

129. *Id.* ¶ 33.

130. *Id.* ¶¶ 59-60.

131. *See generally* Advisory Opinion, *supra* note 22 (establishing that the IACHR issued its advisory opinion on November 24, 2017).

132. *Id.* ¶ 199.

133. *Id.*

134. *Id.*

135. American Convention, *supra* note 29, art. 11.

136. Advisory Opinion, *supra* note 22, ¶ 199.

that States must recognize the right of men and women to marry without discrimination.¹³⁷

Specifically, the Court found that Article 1(1) and Article 24 of the Convention required “that all the patrimonial rights derived from a protected family relationship between a same-sex couple must be protected, with no discrimination as regards to heterosexual couples, pursuant to the right to equality and non-discrimination.”¹³⁸ According to Article 1(1) of the Convention, States must “respect the rights and freedoms recognized” in the Convention and ensure all individuals’ “free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”¹³⁹ Additionally, Article 24 reaffirmed the right to equal protection providing that “[a]ll persons are equal before the law.”¹⁴⁰ Finally, the Court emphasized that despite the foregoing, States’ obligations go “beyond mere patrimonial rights and includes all the internationally recognized human rights, as well as the rights and obligations recognized under the domestic law of each State that arise from the family ties of heterosexual couples.”¹⁴¹

Costa Rica’s last concern questioned whether “a law that regulates relationships between persons of the same sex [is] required in order for [Costa Rica] to recognize all patrimonial rights that derive from this relationship.”¹⁴² The Court confirmed the requirement, holding that “[s]tates must ensure access to all the legal institutions that exist in their domestic laws to guarantee the protection of all the rights of families composed of same-sex couples, without discrimination in relation to families constituted by heterosexual couples.”¹⁴³ In order to comply with the Court’s holding to extend marriage to same-sex couples, some States would be required to “amend existing institutions by taking administrative, judicial or legislative measures.”¹⁴⁴ Lastly,

137. American Convention, *supra* note 29, art. 17.

138. *Id.* art.199.

139. *Id.* art. 1.

140. *Id.* art. 24.

141. Advisory Opinion, *supra* note 22, ¶ 199.

142. Costa Rica’s Request, *supra* note 19, ¶ D 2.1.

143. Advisory Opinion, *supra* note 22, ¶ 228.

144. *Id.*

the Court noted that if States “encounter institutional difficulties to adapt the existing provisions, on a transitional basis, and while promoting such reforms in good faith, [States] still have the obligation to ensure to same-sex couples, equality and parity of rights with respect to heterosexual couples without any discrimination.”¹⁴⁵

In comparison, the IACHR’s opinion was wholly consistent with SCOTUS’ nearly twenty-year-old holdings in *Romer* and *Lawrence*. Specifically, all three opinions recognized LGBTI rights to liberty, privacy, and equality under law.¹⁴⁶ The main difference between the IACHR and SCOTUS cases were the sources of law upon which these rights were based. The IACHR used the American Convention to establish these rights whereas SCOTUS found the basis of these rights in the U.S. Constitution.¹⁴⁷ Despite the differences in the sources of authority, the OAS Charter, American Convention, Declaration, and U.S. Constitution all have the same individual rights to liberty, privacy, and equality under law. Unfortunately, even though there is this consensus on individual rights, some governments throughout the Americas still maintain strong resistance when recognizing that these rights extend equally to both their heteronormative and LGBTI populations.

B. Non-compliance with the Inter-American Court of Human Rights’ Opinion

Two main reasons explain States’ non-compliance with the IACHR’s ruling. First, advisory opinions are not binding.¹⁴⁸ Thus, States are not required or compelled to comply with these opinions. Second, the American Convention is not binding on States that have not ratified the Convention or ratified it with express rejection of the IACHR’s jurisdiction over interpreting the Convention.¹⁴⁹ One of the reasons States have not ratified the Convention is because it requires States to implement domestic legislation, which can conflict with

145. *Id.*

146. See Advisory Opinion, *supra* note 22, ¶¶ 89-90, 99, 132; *Romer*, 517 U.S. at 633-35; *Lawrence*, 539 U.S. at 567, 579.

147. Advisory Opinion, *supra* note 22, 1; *Romer*, 517 U.S. at 633-34; *Lawrence*, 539 U.S. at 578-79.

148. Grossi Opinion, *supra* note 115, ¶¶ 10-12, 69.

149. *Convention Ratifications*, *supra* note 39.

existing domestic laws and principles of State sovereignty.¹⁵⁰ Some nontechnical reasons for non-compliance may be grounded in emotions, religious convictions,¹⁵¹ and notions of morality.¹⁵²

The United States Supreme Court's majority opinions in *Romer* and *Lawrence* determined that animosity towards the LGBTI community was among the reasons why States enacted legislation that circumscribed LGBTI expression.¹⁵³ In both cases, Justice Scalia's dissenting opinions (joined by Justice Rehnquist and Justice Thomas) exhibited the type of anti-LGBTI moral viewpoint shared by States like St. Lucia that chose to criminalize LGBTI expression.¹⁵⁴ These

150. Joseph Diab, *United States Ratification of the American Convention on Human Rights*, 22 DUKE J. COMP. & INT'L L. 323, 328 (1992) <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1318&context=djcil> (discussing why the United States should ratify the American Convention).

151. E.g., Anastasia Moloney, *Barbados Pledges Same-Sex Marriage Vote, But Supporters Doubt Reform*, REUTERS (Sep. 16, 2020, 4:49PM), <https://www.reuters.com/article/us-barbados-lgbt-rights-vote-trfn/barbados-pledges-same-sex-marriage-vote-but-supporters-doubt-reform-idUSKBN2673PG> (discussing how the Catholic Church and evangelical groups in Barbados have strong influence and oppose LGBTI rights and same-sex marriage).

152. *Lawrence v. Texas*, 539 U.S. 558, 589-90 (2003) (Scalia, J., dissenting) Justice Scalia asserted, "Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation. See, e.g., *Williams v. Pryor*, 240 F.3d 944, 949 (C.A.11 2001) (citing *Bowers* in upholding Alabama's prohibition on the sale of sex toys on the ground that "[t]he crafting and safeguarding of public morality . . . indisputably is a legitimate government interest under rational basis scrutiny"); *Milner v. Apfel*, 148 F.3d 812, 814 (C.A.7 1998) (citing *Bowers* for the proposition that "[I] legislatures are permitted to legislate with regard to morality . . . rather than confined to preventing demonstrable harms"); *Holmes v. California Army National Guard*, 124 F.3d 1126, 1136 (C.A.9 1997) (relying on *Bowers* in upholding the federal statute and regulations banning from military service those who engage in homosexual conduct); *Owens v. State*, 352 Md. 663, 683, 724 A.2d 43, 53 (1999) (relying on *Bowers* in holding that "a person has no constitutional right to engage in sexual intercourse, at least outside of marriage"); *Sherman v. Henry*, 928 S.W.2d 464, 469-473 (Tex.1996) (relying on *Bowers* in rejecting a claimed constitutional right to commit adultery). We ourselves relied extensively on *Bowers* when we concluded, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569, 111 S. Ct. 2456, 115 L.Ed.2d 504 (1991), that Indiana's public indecency statute furthered 'a substantial government interest in protecting order and morality,' *ibid.* (plurality opinion)...."

153. *Romer*, 517 U.S. at 632; *Lawrence*, 539 U.S. at 574, 583.

154. Canada: Immigration and Refugee Board of Canada, *Saint Lucia: Situation and treatment of bisexuals, including social attitudes; availability of state*

same sentiments are still shared by some today. Justice Scalia reasoned that States were entitled to be hostile toward LGBTI sexual conduct because same-sex activity is socially harmful and moral disapproval of such conduct was supported by centuries-old criminal laws.¹⁵⁵ In addition, he argued that prohibiting LGBTI sexual conduct was within the right of the government.¹⁵⁶

In *Lawrence*, Justice Scalia wrote a blistering dissent that was full of animosity toward the LGBTI community. Although he agreed with the Court's majority that same-sex intercourse was an exercise of liberty, he did not agree that it was a form of liberty protected under law.¹⁵⁷ Justice Scalia put bigamy, incest, prostitution and bestiality on the same moral plane as same-sex marriage and sexual conduct between two people of the same sex.¹⁵⁸ He inferred that LGBTI sexual conduct was a "moral choice,"¹⁵⁹ that it was impossible to distinguish LGBTI sexuality from other traditional "morals offenses," and that striking down a law that criminalized LGBTI sexual conduct was a "disruption of the current social order."¹⁶⁰

Justice Scalia opined that many Americans do not want people "who openly engage in same-sex intercourse as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home."¹⁶¹ He suggested that Americans viewed anti-LGBTI sexual conduct laws as "protecting themselves and their families from a lifestyle that they believe[d] to be immoral and destructive."¹⁶² Justice Scalia further wrote, "[but] let me be clear that I have nothing against homosexuals" and qualified his statement by stating they could "promot[e] their agenda through

protection, UNHRC (Oct. 28, 2011), <https://www.refworld.org/docid/4ecdeb842.html> ("In a national report to the United Nation's (UN) Human Rights Council, St. Lucia acknowledges that 'deeply rooted religious, cultural and moral values and practices on the island create a formidable challenge towards mobilization and general acceptance of "gay rights"' (St. Lucia 12 Nov. 2010, para. 123, emphasis in original)).

155. *Romer*, 517 U.S. at 644-45.

156. *Lawrence*, 539 U.S. at 603.

157. *Id.* at 586-93.

158. *Id.* at 590.

159. *Id.*

160. *Id.* at 590-91.

161. *Id.* at 602.

162. *Id.*

normal democratic means.”¹⁶³ Justice Scalia opined that if LGBTI people wanted society to accept their sexual conduct, they would have to go through the legislature, and if the legislature did not create laws that embraced their conduct, then so be it.¹⁶⁴ Justice Scalia reasoned that criminalizing LGBTI sexual conduct was within the right of government, and therefore States possessed the right to have LGBTI sexual conduct laws.¹⁶⁵

V. THE PARIS AGREEMENT AS A MODEL FOR ACHIEVING LGBTI RIGHTS

The Paris Agreement provides a unique framework that can help countries achieve LGBTI rights and equality. Ultimately, the Paris Agreement’s framework can also help achieve compliance with the IACHR’s advisory opinion on human rights equality, non-discrimination of same-sex couples, and the right to same-sex marriage. Unlike the IACHR’s non-binding advisory opinion,¹⁶⁶ the Paris Agreement is a *binding* multilateral international agreement.¹⁶⁷ At its core, the Paris Agreement aims to solidify the global response to the threat of climate change by pursuing efforts to keep the global average temperature from rising above two degrees Celsius.¹⁶⁸ Recognizing that global temperature control would reduce the adverse effects of climate change, the main effort countries agree to make is to reduce their greenhouse gas emissions released into the atmosphere.¹⁶⁹ All parties to the Paris Agreement have agreed that this greenhouse gas reduction method will reduce the global average temperature and is “an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge.”¹⁷⁰

163. *Id.* at 603.

164. *Id.* at 603-04.

165. *Id.*

166. Grossi Opinion, *supra* note 115, ¶¶ 10-12.

167. The Paris Agreement, U.N.F.C.C.C., <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> (last visited May 28, 2021).

168. Paris Agreement, *supra* note 7, art. 2.

169. *Id.*

170. *Id.* at 1.

At the heart of the Paris Agreement is the concept of nationally determined contributions (“NDCs”).¹⁷¹ NDCs are plans submitted by each country that demonstrate the actions they will take to address climate change at home.¹⁷² In other words, each country sets and plans its own unilateral contributions to combat climate change.¹⁷³ The Paris Agreement does not dictate or prescribe how each country is required to go about reducing its greenhouse gas emissions, nor does it specifically state how a country needs to contribute to the effort to mitigate climate change. Rather, it permits each country to decide for itself how it will reduce emissions and contribute to the Paris Agreement’s goals.¹⁷⁴ Thus, each country simply pursues its own domestic mitigation efforts with the aim of achieving the Paris Agreement’s objectives.¹⁷⁵

NDCs take a different approach to the usual top-down, rigid approach upon which multilateral agreements typically rely.¹⁷⁶ Instead of having a top-down agreement with an overarching body informing its parties what to do and how to do it, an agreement with NDCs take a bottom-up, flexible approach by which each country determines for itself what actions it will take to achieving the agreement’s goals.¹⁷⁷ The actions contained in all NDCs present a collective multi-country effort that will ultimately determine whether they achieve the long-term goal of keeping global temperatures below two degrees Celsius.¹⁷⁸

Although the Paris Agreement gives countries plenty of latitude, there are some strict requirements. Countries must undertake ambitious efforts while being transparent and honest with their

171. Nationally Determined Contributions (NDCs), U.N.F.C.C.C., <https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs/nationally-determined-contributions-ndcs> (last visited May 28, 2021).

172. Project Syndicate, *PS. In Theory: Nationally Determined Contributions*, YOUTUBE (June 23, 2017), <https://www.youtube.com/watch?v=jGccAyt1d8A>.

173. Paris Agreement, *supra* note 7, art. 4.

174. *Id.*

175. *Id.*

176. Project Syndicate, *supra* note 172.

177. InforMEA Initiative, *Nationally Determined Contributions Under the Climate Change Regime*, YOUTUBE (Jan. 26, 2021), <https://www.youtube.com/watch?v=IS-6M-5R7EE>.

178. *Id.*

actions.¹⁷⁹ Being transparent requires each country to keep track of their emission levels and to communicate the NDCs that they intend to achieve every five years.¹⁸⁰ Following each five-year period, countries must increase their goals.¹⁸¹ In other words, NDCs should be progressively ambitious and each five-year round of NDCs should show greater action with greater commitment to achieve the Paris Agreement's goals.¹⁸²

This NDC model can be used to achieve greater LGBTI protections in the Americas and eventually compliance with the IACHR's order on same-sex marriage. Like the Paris Agreement, OAS member countries can make a multilateral international agreement and agree to take steps towards achieving equality for LGBTI people in their communities. The issue such an agreement would address is the existence of varying protections for LGBTI people throughout the Americas. Some countries fully recognize equal rights of LGBTI people, while others still have laws that discriminate on the basis of sexual orientation and gender identity in housing, employment, finance, education, healthcare, public accommodations, and other areas. In addition, another angle of State discrimination is the omission of laws that ban discrimination against LGBTI people.¹⁸³ The goal of an LGBTI agreement would be equality under the law for all citizens, regardless of sexuality or gender identity.

Recognizing that legal inequality among domestic populations throughout the Americas is a common concern, and “[a country] that does not seek to benefit from the full spectrum of human talent is weaker for it,”¹⁸⁴ while also acknowledging that some countries are not quite ready to provide total equality, each country can set and plan its own unilateral contributions to the effort to combat inequality. NDCs would include commitments such as developing research and advocacy bodies. In addition, legislative committees could create statutes that prohibit discrimination, banning employers from firing

179. Paris Agreement, *supra* note 7, arts. 3-4.

180. *Id.* art. 4.

181. *Id.*

182. InforMEA Initiative, *supra* note 177.

183. German Lopez, *How Most States Allow Discrimination Against LGBTQ People*, VOX (Aug. 19, 2016), <https://www.vox.com/2015/4/22/8465027/lgbt-nondiscrimination-laws>.

184. *Larry Fink's 2021 Letter To CEOs*, BLACKROCK, <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter> (last visited May 28, 2021).

people because they are LGBTI, permitting same-sex couples to adopt children, and other regulations addressing areas of inequality. Every few years, States would submit their progress on the actions that they have taken to achieve equal protection under law and progressively increase their efforts with time.

The NDC model has worked for the Paris Agreement because it is helping reduce overall global greenhouse gas emissions since its inception six years ago,¹⁸⁵ albeit it has not been as successful as it is supposed to be. On the one hand, not all countries are living up to their NDCs, and the world is not on track to meeting the Paris Agreement's main goal of keeping global temperatures from rising above two degrees Celsius.¹⁸⁶ Instead, temperatures are projected to rise well above two degrees Celsius by the end of the century.¹⁸⁷ On the other hand, the overall global greenhouse gas emissions have fallen since 2015,¹⁸⁸ indicating the climate is better with the Paris Agreement than without it because of its effect in reducing greenhouse gases more than if there was no agreement.

Further, the Paris Agreement has garnered the support of the heads of several dozen leaders of global businesses, committing themselves in an open letter to helping governments combat climate change.¹⁸⁹ Also, hundreds of businesses, including top companies such as Google, McDonalds, Wal-Mart, and Exxon Mobil, have pledged to do their part to combat climate change by reducing greenhouse gas emissions consistent with the goals of the Paris Agreement.¹⁹⁰ These activists are an essential component of the

185. *Temperatures*, CLIMATE ACTION TRACKER, <https://climateactiontracker.org/global/temperatures/> (last visited July 1, 2021).

186. Warren Cornwall, *The Paris climate pact is 5 years old. Is it working?*, AM. ASS'N ADVANCEMENT SCI. (Dec. 11, 2020), <https://www.sciencemag.org/news/2020/12/paris-climate-pact-5-years-old-it-working>.

187. *Id.*

188. *Id.*

189. Alliance of CEO Climate Leaders, *An open letter from business to world leaders: "Be ambitious, and together we can address climate change"*, WORLD ECON. F. (Nov. 29, 2018), <https://www.weforum.org/agenda/2018/11/alliance-ceos-open-letter-climate-change-action/>.

190. Lisa Friedman, *Executives Call for Deep Emission Cuts to Combat Climate Change*, N.Y. TIMES (Apr. 13, 2021), <https://www.nytimes.com/2021/04/13/climate/business-executives-climate-change.html>; *Energy & Carbon Summary*, EXXON MOBIL, <https://corporate.exxonmobil.com/Sustainability/Emissions-and-climate> (last visited May 28, 2021).

collective effort to combat climate change because governments cannot do it alone with agreements—they need the help of the people. But the Paris Agreement is the instrument that generated progress and is what the people and countries rallied around. Thus, a similar LGBTI human rights equality agreement can garner like activism.

There are several strong indications that countries would be willing to join an LGBTI human rights equality agreement; three are particularly noteworthy. First, eight OAS member countries, who happen to be the founding members of the OAS LGBTI Core Group, have already indicated a commitment to making such an agreement in a 2016 joint statement released at the 46th Regular OAS General Assembly.¹⁹¹ There, the governments of Argentina, Brazil, Canada, Chile, Columbia, Mexico, United States, and Uruguay acknowledged that “LGBTI persons . . . are subject to various forms of violence and discrimination based on the perception of their sexual orientation, gender identity or expression,” and that “these situations of violence and discrimination are a clear violation of their human rights”¹⁹² These countries have all agreed to commit “to support regional and OAS efforts aimed at ensuring that all people can exercise their right to live free from violence and discrimination, recognizing the need to address the multiple forms of discrimination [LGBTI people] face due to different factors.”¹⁹³ These eight countries’ collective populations total just over 827 million people, which is about 81 percent of all people living in OAS member countries.¹⁹⁴

Second, countries that refuse same-sex marriage and otherwise maintain laws that discriminate against LGBTI people are facing pressure from other countries due to their anti-LGBTI bias.¹⁹⁵ In a 2019 Universal Periodic Review¹⁹⁶ meeting, United Nations member

191. *Joint Statement by the Founding Members of the OAS LGBTI Core Group*, OAS (Jun. 15, 2016), <http://www.oas.org/es/cidh/lgtbi/docs/JointDeclaration-FoundingMembers-OAS-LGBTI-CoreGroup.pdf>.

192. *Id.*

193. *IACHR Welcomes Creation of LGBTI Core Group at the OAS*, OAS (Jul. 25, 2016), https://www.oas.org/en/iachr/media_center/preleases/2016/097.asp.

194. *Member of the OAS—Organization of American States*, *supra* note 34.

195. Eastern Caribbean States, *supra* note 24.

196. As part of the United Nations Human Rights Council, the Universal Periodic Review (“UPC”) is a process that involves a review of the human rights records of all United Nations member countries. The UPC provides the opportunity for countries “to declare what actions they have taken to improve the human rights

countries said those countries that criminalize LGBTI sexual conduct and otherwise discriminate on the basis of sexual orientation and gender identity are in violation of international human rights law.¹⁹⁷ As a result, State LGBTI activists have been urging countries to decriminalize same-sex relations and adopt comprehensive anti-discrimination legislation that protects LGBTI people.¹⁹⁸

Third, on February 25, 2021, the United States House of Representatives passed a bill known as the Equality Act that “prohibits discrimination based on sex, sexual orientation, and gender identity in areas including public accommodations and facilities, education, federal funding, employment, housing, credit, and the jury system.”¹⁹⁹ Furthermore, the Equality Act would amend existing United States civil rights laws to explicitly include sexual orientation and gender identity as protected characteristics.²⁰⁰ Although it remains to be seen whether the U.S. Senate will also vote to pass the Equality Act, President Biden believes it is “the best vehicle for ensuring equal rights under law” for LGBTI people and has made it “a top legislative priority.”²⁰¹

CONCLUSION

States must ultimately provide same-sex marriage and ensure total equality that includes the right to non-discrimination based on sexual orientation and gender identity in all sectors of society. The law requires that governments stop treating LGBTI as a distinct class of people with less rights and protections than the heteronormative population. Creating a multilateral international agreement to address and promote LGBTI rights and equality is a way of encouraging

situations in their countries and to fulfil their human rights obligations.” *Universal Periodic Review*, UNITED NATIONS HUM. RTS. COUNCIL, <https://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx> (last visited May 28, 2021).

197. Eastern Caribbean States, *supra* note 24.

198. *Id.*

199. Equality Act, *supra* note 17.

200. *Id.*

201. *The Biden Plan to Advance LGBTQ+ Equality in America and Around the World*, BIDEN HARRIS, <https://joebiden.com/lgbtq-policy/> (last visited May 28, 2021).

2021] IMPROVING THE ENVIRONMENT FOR LGBTI RIGHTS 307

States to take actions without prescribing how to do it. Resembling the Paris Agreement, by placing a multilateral commitment in the international sphere, the agreement would gain the attention of activists and promote greater awareness and increase protection for LGBTI individuals throughout the Americas. An agreement that gets States to coincide in acknowledging inequality is a shared issue that

308 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52

must be addressed, and as States commit to taking action, it is a step in a positive direction. LGBTI rights are human rights and full acceptance of LGBTI people is in the best interest of all States.

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