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# The strong global trend of prohibiting employment discrimination based on sexual orientation

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## Abstract

Over the last 30 years, more than 85 countries have prohibited sexual orientation discrimination in employment. Enacting such legal prohibitions has thereby become the most common form of legal recognition of homosexual orientation (more so than the decriminalisation of homosexual sex or the opening up of family law to same-sex partners). The trend is global (ten countries in Africa, more in Asia/Oceania, many in Europe and the Americas). The trend is reflected in supranational rules of the European Union and the Organisation of American States and also in decisions of international human rights bodies. On the basis of these numbers and developments, and in light of the various factors that help explain the strength of this global trend, the author argues that it is to be expected that the trend will continue to reach more and more countries. Explicit legal prohibitions of sexual orientation discrimination in employment can play a useful – perhaps central – role amongst other legal, educational, and social strategies aimed at increasing LGB inclusion.

**Keywords:** sexual orientation, comparative law, labour law, anti-discrimination law, employment, discrimination, international law, LGB inclusion

## A strong trend amongst the countries of the world

Over<sup>1</sup> the last 30 years, more than 85 countries have outlawed sexual orientation discrimination in employment (see Mendos et al., 2020, pp. 217–238).<sup>2</sup> Regions in four countries (USA, Canada, Australia, Brazil) had already done so in the 1970s or 1980s, but the first national legislation came in 1992 (see

Table 1, below). In that year, Israel, Namibia, and the Netherlands became the first three countries in the world to enact *national* legislation *explicitly* prohibiting *employment* discrimination based on *sexual orientation*.<sup>3</sup>

Since then, enacting such explicit prohibitions has become the most common form of legal recognition of homosexual orientation in the world. Over the same period since 1992, decriminalisation of homosexual sex between consenting adults only took place in less than 45 countries, while access to marriage or other forms of civil partnership for same-sex couples was also only gained in less than 45 countries (see Mendos et al., 2020). Decriminalisation and same-sex marriage may have hit more headlines, but the inclusion of sexual orientation in anti-discrimination legislation has globally been the main legal trend. This trend is global: already circa ten countries in Africa, circa fifteen in Asia/Oceania, circa 20 in the Americas, and more than 40 in Europe. In almost all of these countries, explicit legal prohibitions of sexual orientation discrimination are still in force today. It seems that Namibia (1992–2008) and Timor-Leste (2002–2012) are the only countries where the prohibition of sexual orientation discrimination in employment was repealed some years later (Mendos et al., 2020, pp. 219, 228).

A few countries had first prohibited sexual orientation discrimination only *outside* the field of employment – Norway was the first to do so (1981), followed by Denmark and Sweden (1987). In a few other countries, employment discrimination based on sexual orientation was at first only prohibited in collective labour agreements (for example in Belgium 1999–2003) or by judicial interpretation of general labour laws (for example in the Netherlands, where the highest appeals court for civil servants already found in 1982 that a member of the armed forces had been unlawfully discriminated against because of his sexual orientation (Centrale Raad van Beroep, case of *Kroon v X*, 17 June 1982). In some countries, the laws on discrimination have used a more general term to cover sexual orientation. France, for example, has used the word ‘moeurs’ (manners) since 1985 and added ‘sexual orientation’ in 2001; Switzerland uses ‘way of life’ (in its constitution) since 2000; and the USA Supreme Court, since 2020, relies on the word ‘sex’ in the Civil Rights Act of 1964 and sees sexual orientation discrimination as a form of sex discrimination (Mendos et al., 2020, pp. 230, 234, 225). In several countries, an explicit nationwide prohibition can only be found in an administrative order (as in the USA since 1998, in Argentina since 2006, and in El Salvador since 2010). Explicit legislation on sexual orientation discrimination may even lack an actual prohibition (as in South Korea since 2001; see Mendos et al., 2020, p. 206).

It is remarkable that at least sixteen countries started to prohibit sexual orientation discrimination in employment at a moment in time when

homosexual sex between consenting adults was still a criminal offence in their national legislation. This is further evidence that, during the last 30 years, the trend of enacting laws against sexual orientation discrimination has been much stronger than the trend to decriminalise homosexual sex. Eight of these sixteen countries either decriminalised homosexual sex in the same year as they enacted the anti-discrimination rule (Ireland, Nicaragua, Angola) or a few years later (South Africa, Fiji, Seychelles, Mozambique, Botswana).<sup>4</sup> The other eight countries, however, have continued to prohibit simultaneously both (some forms of) homosexual sex between consenting adults and (some forms of) employment discrimination based on sexual orientation (St. Lucia, Barbados, Mauritius, Liberia, Tuvalu, Kiribati, Samoa, and, until 2008, Namibia). Somehow, these countries were ready for prohibiting anti-homosexual discrimination but not yet for ending the prohibition of homosexual sex. This already hints at one of the possible explanations for the strength of the global trend (see below).

## A growing trend in international law

The aforementioned trend amongst countries around the world to enact laws against sexual orientation discrimination is also reflected in international law. Once a growing number of countries had started to ban sexual orientation discrimination (in employment and/or beyond), various political, judicial, and quasi-judicial bodies in the international field began to do so as well.

Firstly, many international human rights bodies started to include sexual orientation in their understanding of the human right to non-discrimination. In 1994, the UN Human Rights Committee was the first international body to do so (case of *Toonen v Australia*, 31 March 1994, para. 8.7). The *Toonen* decision is also the first ever international decision that considers sexual orientation discrimination to be a form of sex discrimination. Because the words 'sexual orientation' are still missing in many existing national and international prohibitions of discrimination but the word 'sex' (and/or 'gender') is included, such an interpretation of the prohibition of sex discrimination can have great potential in many contexts, and has already been applied by courts in several countries (see Thomas & Weber, 2019, pp. 22–25, 31–33).

The European Court of Human Rights recognised sexual orientation as a forbidden ground of discrimination in 1999 (case of *Mouta v Portugal*, 21 December 1999, paras. 35–36), with the UN Committee on Economic,

Table 1: Time of first law explicitly prohibiting sexual orientation discrimination in employment

	Africa	Americas	Asia/Oceania	27 EU countries	Rest of Europe
<b>1971–1980</b>		part of the USA & part of Canada			
<b>1981–1990</b>		part of Brazil	part of Australia Israel, New Zealand	France* Netherlands, Ireland, Finland, Slovenia, & part of Germany	
<b>1991–1995</b>	Namibia**, South Africa				
<b>1996–2000</b>		Canada, Costa Rica, Ecuador, USA*, Venezuela*, & part of Argentina	Australia, Fiji	Spain, Denmark, Luxembourg, Sweden, Czechia, Romania*	Iceland, Norway, Switzerland*, & part of Bosnia & Herzegovina
<b>2001–2005</b>		Mexico, Peru, Uruguay	South Korea*, Timor-Leste**	Belgium, Croatia, Lithuania, Portugal, Malta, Italy, Hungary, Slovakia, Bulgaria, Austria, Estonia, Cyprus, Poland, Greece	Bosnia & Herzegovina, United Kingdom, Kosovo, Andorra, Serbia, North Macedonia
<b>2006–2010</b>	Seychelles, Mozambique, Cape Verde, Mauritius, Botswana	Argentina*, Nicaragua, Bolivia, El Salvador*	Taiwan & part of China	Germany, Latvia	Georgia, Albania, Montenegro
<b>2011–2015</b>	Liberia	Colombia, Chile, Saint Lucia, Honduras, Cuba, Suriname	Samoa, Nepal, & part of the Philippines		Moldova, Ukraine, Liechtenstein, San Marino
<b>2016–2021</b>	Sao Tome & Principe, Angola	Barbados	Kiribati, Mongolia, Tuvalu, Micronesia, Marshall Islands, & part of Japan		

Main source: Mendos et al., 2020, pp. 217–238. Additional information: dataset for *Global Index on Legal Recognition of Homosexual Orientation* (see Badgett, Waaldijk, & Van der Meulen Rodgers, 2019, pp. 6–8 and Appendix A).

\* In these countries, there is – or was at first – not really an explicit prohibition in legislation, because (a) the law uses vague terms (in Switzerland, and in France until 2001), or (b) the law lacks an actual prohibition (South Korea), or (c) the prohibition can be found only in an administrative order (USA, Argentina, El Salvador; in Romania until 2005, and in Venezuela until 2012).

\*\* In Namibia, the inclusion of sexual orientation in the prohibition of discrimination ended in 2008, and in Timor-Leste in 2012.

Social and Cultural Rights following in 2005 (*General Comment No. 18: The Right to Work*, 2005, para. 12) and the African Commission on Human and Peoples' Rights in 2006 (case of *Zimbabwe Human Rights NGO Forum v Zimbabwe*, 11–15 May 2006, para. 169).<sup>5</sup>

More recently, the UN Human Rights Council followed as well (resolution on *Human rights, sexual orientation and gender identity*, 2011), as did the Inter-American Court of Human Rights in 2012 (case of *Atala v Chile*, 24 February 2012, paras. 83–93).

Secondly, both the European Union and the Organization of American States now have binding legal rules that require the enactment of legislation against sexual orientation discrimination in employment: in the EU, the *Employment Equality Directive* (2000/78/EC) had to be implemented by 2003 in each member state (see Waaldijk & Bonini-Baraldi, 2006), while the *Inter-American Convention Against all Forms of Discrimination* (A-69) of 2013 entered into force in 2020.

And, thirdly, more and more UN bodies have started to urge or demand that countries adopt such legislation (for references, see Amy, 2019, pp. 19–31; Thomas & Weber, 2019, pp. 7–14; and Office of the UN High Commissioner for Human Rights, 2019, pp. 7–11, 63–65). It is still unclear if there is a global obligation for countries to adopt legislation against sexual orientation discrimination in employment. Such a global obligation has been recognised in several 'soft law' documents by the UN Committee that supervises (without powers that are legally binding) the implementation of the *International Covenant on Economic, Social and Cultural Rights* of 1966.<sup>6</sup> In spite of the strong trend, it is arguably still too early to speak of a customary rule of international law that would require all countries to enact a prohibition of employment discrimination based on sexual orientation (Amy, 2019, pp. 53–59).

These emerging norms of international law have contributed to the evergrowing number of countries that have outlawed (some forms of) employment discrimination based on sexual orientation. However, these international norms are not the only factor that has contributed to the strength of this global trend as will be explored in the next section.

## Factors explaining the strength of the trend

It is useful to distinguish three categories of factors that may have contributed to the strong global trend of prohibiting employment discrimination based on sexual orientation: encouraging factors, contextual factors, and flexibility factors. Together, these factors offer explanations why the trend

has become so strong around the world. These factors also suggest that there must be scope for prohibiting employment discrimination on grounds of sexual orientation in even more countries – also in countries where decriminalisation of homosexual sex or recognition of same-sex families remains a distant ideal.

The almost global inclusion of sexual orientation as one of the grounds covered by the right to non-discrimination in international human rights law, resulting in regional and emerging global obligations for countries to prohibit sexual orientation in employment (see above), is not the only factor to have encouraged more and more countries towards prohibiting sexual orientation discrimination. Another encouraging factor is formed by the very fact that more and more countries have enacted such prohibitions. In the development, codification, and reform of law, countries often are examples for each other, offering each other inspiration for and knowledge about possible further legal steps. As the table above shows, before international obligations to prohibit sexual orientation discrimination emerged, some countries were already voluntarily following the examples set in other countries. The same phenomenon can be observed in many other areas of law.<sup>7</sup> We can conclude that both *foreign* laws and *international* norms have intensified the global trend of legislating against employment discrimination based on sexual orientation.

However, those big *global* stories are not the only encouragement because there are also *local* stories in each country, consisting of specific local demands, ideas, and pushes for certain legislation. In some countries, there have been long debates and controversies about prohibiting sexual orientation discrimination in employment (in the Netherlands, it took two decades before a General Equal Treatment Act covering sexual orientation was finally adopted in 1994). In other countries, a specific situation, event, or discrimination case may have encouraged such a prohibition; in Chile, for example, the adoption of a law on discrimination in 2012 was triggered by the brutal torture and murder of a young gay man that year, in whose honour this law is informally referred to as the ‘Zamudio Law’ (Mendos et al., 2020, p. 221). This is not the place to characterise the more than 85 stories of how national laws against sexual orientation discrimination in employment came into being. Different combinations of local, foreign, and international encouragements have pushed towards the adoption of such legislation in more than 85 countries.

Contextual factors are a second category of contributing factors. Enacting prohibitions of sexual orientation discrimination often seemed easier and sometimes happened faster than getting rid of old criminal provisions

about homosexual sex or than opening up family law to same-sex partners. Both these other two big issues in sexual orientation law tend to evoke a lot of religiously inspired opposition; for example, when, in 2009, the Delhi High Court had decriminalised homosexual sex, it was not the government but a combination of religious organisations that lodged an appeal to the Supreme Court of India (see the references in Mendos et al., 2020, p. 101). In fact, in quite a few countries, the prohibition of homosexual sex uses traditional-religious terms and/or ideas ('sodomy', '*liwat*', 'unnatural', etc.), and so does the regulation of marriage and other family issues in many countries (church weddings, 'adultery', 'illegitimacy', etc.). Compared to deeply entrenched religious opposition, introducing a prohibition of sexual orientation discrimination into the labour law was often easier and less controversial; see, for example, the countries (mentioned above) where a prohibition of sexual orientation discrimination was enacted before the decriminalisation of homosexual sex. This further explains why prohibitions of discrimination have been adopted in so many countries already.

A related contextual factor is that, in many countries, laws against discrimination on grounds of race, sex, or religion already existed. In such a context, adding sexual orientation to existing legal provisions can be less of a challenge, especially when other new grounds of discrimination (such as disability, age, gender identity) are about to be included in the national laws against discrimination at the same time. In such a context, it is easier for the proponents of outlawing sexual orientation discrimination to find allies amongst those campaigning against discrimination on other grounds. Furthermore, where employment discrimination is concerned, allies can often be found amongst trade unions eager to strengthen the rights of workers – and sometimes amongst organisations of employers convinced of the human and economic advantages of diversity and inclusion (on such economic advantages, see Cortez, Arzinos, & De la Medina Soto, 2021, p. 57; Badgett, Waaldijk, & Van der Meulen Rodgers, 2019, pp. 2–5). This is quite a different context than that of campaigning for law reform regarding homosexual offences or regarding same-sex families. For people remaining opposed to homosexual sex or love, it may be easier to grasp that lesbian, gay, and bisexual human beings will also need to work to earn a living and to contribute to society and the economy.

The third category of contributing factors is about flexibility. We already saw that different ways and different routes for prohibiting sexual orientation discrimination have been chosen or have become the outcome of law reform in various countries. In most of the 85+ countries, such prohibitions have been enacted by the national parliament, but in quite a few countries it was



first the courts or the administration or organised labour or some regions that created such prohibitions. And in other countries, the prohibitions were at first implicit or mostly symbolic. These choices are also open to campaigners and lawmakers in countries where sexual orientation discrimination is not yet (fully) prohibited.

There are also other forms of flexibility that offer such campaigners and lawmakers a range of choices.<sup>8</sup> Will the prohibition of sexual orientation discrimination in employment be regulated in a specific law or in a more general law that also covers other grounds? Will the prohibition be given a place in the constitution, in the penal code, in the labour code, or in some other already existing law? Will the prohibition apply to all forms of public and private employment and to all or just some stages, from recruitment and selection to dismissal and pension? Will all forms of discrimination (including direct and indirect discrimination, harassment, victimisation) be prohibited or just a few? Will the prohibition entail specific sanctions or procedures or just the general ones of labour law or criminal law? What bodies will be given a task in monitoring and enforcing the operation of the prohibition of sexual orientation discrimination in employment?

It is no surprise that only very minimalistic prohibitions have been adopted in some countries at first. This may be disappointing but was to be expected given the range of flexible options for prohibiting discrimination on such a controversial ground. At the same time, even such minimal or even incomplete prohibitions of sexual orientation discrimination can be – and often have been – very useful first steps, paving the way for more comprehensive and more enforceable legislation at a later stage. For example, in Ireland, sexual orientation was at first (in 1993) only included in the rules on unfair dismissal, while later more comprehensive protection was provided by the Employment Equality Act 1998 and by further legislation; and, in the Netherlands, sexual orientation was at first (in 1992) only inserted in a few articles in the Penal Code, while two years later the General Equal Treatment Act introduced more specific protection against sexual orientation discrimination, plus monitoring and enforcement by the Equal Treatment Commission (see Waaldijk & Bonini-Baraldi, 2006, pp. 93–94). A recent report of the International Labour Organization concludes that, in most countries, the protection in this field has developed incrementally (Thomas & Weber, 2019, pp. 20–21).

In short, there has been a wide range of options available to campaigners and lawmakers wishing to start or improve legislation on this topic. All this flexibility helps to further explain and understand why prohibiting employment discrimination based on sexual orientation could become such a strong global trend in such a relatively short time.

## Conclusions

It is a remarkable success story. In less than 30 years, more than 85 countries in the world have outlawed at least some forms of employment discrimination based on sexual orientation and this is now reflected in rules and documents of international law.

In themselves, these legal prohibitions will not eradicate all homophobia at work or make work fully inclusive for lesbians, gays, and bisexuals. However, a formal legal prohibition of sexual orientation discrimination can contribute to both goals. Such a prohibition can help to make more visible the situations in which workers experience disadvantages because of sexual orientation. Such a prohibition can help to establish in court that the hidden motive behind a negative employment decision or treatment is indeed homophobic. Such a prohibition can give more workers just enough confidence and legal certainty to make their own sexual orientation visible at work. Such a prohibition can also make visible for everyone that sexual orientation is one of the grounds covered by the human right to non-discrimination. Therefore, there are all kinds of reasons why explicit legal prohibitions of sexual orientation discrimination can play a useful – perhaps central – role amongst other legal, educational, and social strategies aimed at increasing LGB inclusion and at combating homophobia.

The trend of enacting such prohibitions is indeed very global and very strong (see the numbers and examples above). The encouraging factors (international, foreign, local), the contextual factors (less traditional opposition, existing legal frameworks, more potential allies), and the flexibility factors (terminology, routes of law reform, scope of legislation, level of enforceability) that have all contributed to this trend suggest that it will continue to reach more and more countries. In many countries, this will not be easy – just as it was not easy in most of the 85+ countries where sexual orientation discrimination in employment is already forbidden.

## Notes

1. The author is grateful for the research assistance provided by Waruguru Gaitho LLM and Raimundo Vives López LLM during the preparation of this paper, and to Gabriel Amy LLM for his inspiring master thesis on the international law aspects of this topic (Amy, 2019).
2. For some details on those 85+ countries, see the annual *State-Sponsored Homophobia* report of ILGA World report (latest edition: Mendos et al.,

2020). In that report, only the member states of the UN are counted, but developments in other countries and jurisdictions are mentioned. Additionally, I have used information from my dataset for the *Global Index on Legal Recognition of Homosexual Orientation* (see Badgett, Waaldijk, & Van der Meulen Rodgers, 2019, pp. 6–8 and Appendix A). Please note that non-independent jurisdictions are not included in the number of 85, and neither are countries (such as Argentina, Japan, and the Philippines) where sexual orientation discrimination in employment is only prohibited in some regions. Unfortunately, comprehensive data do not yet seem available on the legal prohibitions of gender identity discrimination in the countries of the world (but see Thomas & Weber, 2019, pp. 46–58). Therefore, this article only covers sexual orientation.

3. For Israel and Namibia, see Mendos et al., 2020, pp. 219, 225. However, their report (p. 232) only refers to the Dutch General Equal Treatment Act, which entered into force in 1994, and which provides protection against sexual orientation discrimination in addition to the protection the Penal Code of the Netherlands already provides since 1992, when sexual orientation was inserted in several of the anti-discrimination provisions in the Penal Code. Furthermore, Mendos et al. (2020, p. 234) suggest that, in 1987, Sweden was the first country to outlaw employment discrimination based on sexual orientation; however, the provision of the Swedish Penal Code that was amended in 1987 (art. 9 of chapter 16) did and does not deal with employment but with providing goods and services to customers (see Ytterberg, 2004, pp. 445, 448; and see the text of the provision at <https://www.government.se/government-policy/judicial-system/the-swedish-criminal-code>
4. In November 2021, the highest court of Botswana rejected the appeal against the 2019 judgement, which had decriminalised homosexual sex.
5. In 2014, the African Commission of Human and Peoples' Rights adopted its *Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity* (2014); this resolution speaks of discrimination but not specifically about employment.
6. This UN Committee on Economic, Social and Cultural Rights already appeared to recognise such an obligation in its *General Comment No. 18: The Right to Work* (2005, paras. 12, 19, 25). It does so more clearly in *General Comment No. 20: Non-Discrimination* (2009, paras. 7–8, 32, 37) and in *General Comment No. 23: The Right to Just and Favourable Conditions of Work* (2016, paras. 31, 65).
7. For instance, after France became the first country to decriminalise homosexual sex in 1791, other countries followed its example, and not only countries that were conquered by France (such as the Netherlands, where France decriminalised homosexuality in 1811), but also countries that voluntarily used the French legislation as an inspiring example (such as the Ottoman Empire in 1858 and Poland in 1932, see Mendos et al., 2020, pp. 107–108). Similarly, after the Netherlands (1911), Denmark (1933), and Switzerland (1942) had become the first countries to introduce a higher age of consent for homosexual

- sex than for heterosexual sex, many countries followed their (bad) example (such as Sweden in 1944, France in 1945, Hungary in 1962, England in 1967, Canada in 1969, and Russia in 1993). More recently, the Dutch example of opening up marriage in 2001 has been followed by more and more countries.
8. For examples of the choices that many countries have made regarding the form, route, terminology, scope, and enforceability of legislation prohibiting sexual orientation discrimination in employment, see Cortez, Arzinos, & De la Medina Soto, 2021, pp. 57–64; Thomas & Weber, 2019, pp. 20–31; Waaldijk & Bonini-Baraldi, 2006, pp. 91–201.

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of the book *Sexual Orientation Discrimination in the European Union*. His inaugural lecture was about *The Right to Relate*, which, like most of his publications, is online available at [www.law.leidenuniv.nl/waaldijk](http://www.law.leidenuniv.nl/waaldijk). The *Global Index on Legal Recognition of Homosexual Orientation* that he has been developing was used in the article 'The Relationship Between LGBT Inclusion and Economic Development', which he co-authored in 2019. He runs the annual Summer School on Sexual Orientation & Gender Identity in International Law in The Hague & Amsterdam.