SOMEWHERE OVER THE RAINBOW:
LGBTQ+ POLICY ADVANCEMENTS IN SOUTHERN AFRICA

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ABSTRACT

In recent years, LGBTQ+ legal reforms—including same-sex marriage laws and non-discrimination protections—have been increasingly enacted around the world. In many countries, this progress has occurred despite the presence of a disapproving public, an unsupportive legislature, and/or other unexpected factors. Why then do these rights progress, when the traditional behavioralist ingredients for legal reform are not present? To date, no major explanations have been substantiated in the existing literature. This dissertation proposes a novel way of conceptualizing these key policy advances. I demonstrate by way of a cross-national quantitative analysis, employing an original data set, that LGBTQ+ rights measures' success are driven by an interaction of judicial review with robust civil society participation. Activists' cogent organizing efforts, as well as their interactive work with independent judiciaries entrenched with judicial review powers, has significantly greater determinative capacity in advancing LGBTQ+ rights than what the public believes should be law or which party dominates the legislature. I explore these mechanisms in greater depth through three qualitative case studies of the Southern African region. In-depth interviews with activists, lawyers, journalists, and other elites in South Africa, Namibia, and Zimbabwe, as well as archival research in these countries, provide rich contextualization explaining the key processes at play. These three cases are ideal for comparison because they are broadly similar across a variety of metrics, including demographics and a history of racial apartheid, and yet have widely divergent outcomes, from the highly progressive laws of South Africa to the repression of Zimbabwe. My research challenges existing preconceptions of where and why LGBTQ+ rights succeed and proposes a new understanding of how activists can best advance their own equality agenda. More broadly, this dissertation also generates an innovative approach to understanding policy change that unites

social institutions with formal institutions. Finally, these findings also have implications for other rights movements, including abortion rights, as activists can advance countermajoritarian issue agendas through the courts.

To Jeremiah and our cats, and my parents, siblings, and grandparents.

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INTRODUCTION

“All human beings are born free and equal in dignity and rights.” The first sentence of the United Nations Declaration of Human Rights affirms the freedom and equality that is intrinsic to every person born on this planet. Nevertheless, around the world, the rights and freedoms of LGBTQ+[1] people are frequently abridged by national governments and curtailed by the actions of private citizens. The rights of sexual and gender minorities to live free from discrimination and harassment, to be able to express their identities without fear, and to have their love respected by their government, continue to be under threat.

Fortunately, in the closing decades of the twentieth century and the initial decades of the twenty-first, immense global progress has occurred in the area of human and civil rights for LGBTQ+ people. In most countries, these reforms have progressed incrementally and have included some or all of the following: the repeal of sodomy laws and other restrictions on same-sex sexual conduct, the passage of non-discrimination and hate crime laws inclusive of sexual orientation and gender identity, the enactment of same-sex marriage or civil union laws, and the promulgation of statutes facilitating the legal transition of transgender individuals. Some countries have gone further still and taken steps to ban so-called “conversion therapy” and ensure that all students learn about LGBTQ+ history in schools.

These changes have not come without struggle. Indeed, millions of LGBTQ+ people in every country in the world have taken courageous steps to come out, to build community with one another and with their allies, and to advocate for their legal rights and freedoms. In some cases, legal progress for this often-maligned community has advanced at a tepid pace; in other

[1] For the sake of consistency and simplicity, I use “LGBTQ+” throughout this dissertation, referring to lesbian, gay, bisexual, transgender, and queer. However, this is not to discount the identities or experiences of those who identify in a different way, including but not limited to asexual, intersex, genderqueer, nonbinary, or other.

cases, the pace can be better described as torrid. Like the immense diversity of the community itself, the variation in national policy toward LGBTQ+ rights has long been evident and constitutes a ripe avenue for academic inquiry and research. Not only is this variation intrinsically interesting prima facie, but an exploration of it can offer not only crucial lessons for activists and reformers, but also new lessons for researchers regarding social movements, the salience of public attitudes and beliefs, the political interplay among governmental branches, and more.

Existing Explanations Regarding LGBTQ+ Legal Evolutions and Transitions

Existing literature on the subject of LGBTQ+ equality tends to emphasize the primacy of traditional behavioralist explanations for legal change. Scholars have focused on economic development and modernization theory, favorable public opinion toward homosexuality, and waning religious values as leading justifications for this transition, all of which are profoundly interrelated. In some form or another, all of these components highlight the role of changing public attitudes and the complementary, if delayed, evolution in the official positions of elected officials in the legislative and executive branches of government.

Economic development changes societies by changing the people who comprise them. As the health status, level of education, and standard of living of ordinary citizens evolve, so too do their concerns, beliefs, and hierarchies of prioritizations. Prior to the turn of the twentieth century, most humans' daily existence was primarily centered around the search for food and calories (Fogel, 2004). Most people were short and thin and had to, out of necessity, concern themselves chiefly with the material needs of feeding, housing, and clothing their families. As such, the overwhelming majority of humanity was, for the great preponderance of human history, caught up by sheer need on the bottom rungs of Maslow's Hierarchy of Needs, with little time

and energy to pursue creative or intellectual passions or to self-actualize, save perhaps for a weekly hour spent in the pews (Maslow, 1943). In the aftermath of the Industrial Revolution, however, increasingly large swaths of Western societies became comfortable in their material existence, pursued additional years of education, and saw their incomes and life expectancies rise. Scholar Ronald Inglehart posited that this transition has led to a "cultural evolution" in beliefs, one that has led many humans from holding "materialist" beliefs that are chiefly concerned with economic security, to adopting "postmaterialist" attitudes, which are associated more with rights, freedoms, and the pursuit of meaning (Inglehart, 1977; Inglehart and Welzel, 2005; Inglehart, 2018). These include not just LGBTQ+ rights, but also secularism and declining religiosity, feminism, ethnic minority rights, environmentalism, and others. Indeed, existing scholarship confirms that those with higher incomes are more likely to be supportive of LGBTQ+ rights, as are those with higher levels of education and those residing in urban areas (Corrales, 2015; Lodola and Corral, 2010).

The impact of public opinion on legislative behavior and public policy is substantial, especially when the salience of a given issue is high (Burstein, 2003). As a result, a change in public attitudes regarding LGBTQ+ rights eventually brings about—through a confluence of both electoral change and direct popular influence—a change in the stances of the legislative and executive branches. These attitudes interplay also with levels of religiosity, as most arguments in favor of denying equal rights to LGBTQ+ persons are grounded first and foremost in religious doctrine (van der Toorn et al, 2017). Indeed, one can see the power of secularization in opening up new space for LGBTQ+ rights support, as most center-right and right-wing parties in Europe now support these rights, while a small minority of religiously-oriented conservative parties continue to oppose them (Magni and Reynolds, 2023). Conversely, the rapid growth of

Evangelical and Pentecostal churches in Sub-Saharan Africa has heightened the salience of LGBTQ+ rights in that region and of morality politics in general, and it has sparked a backlash against the community (Grossman, 2015).

The Puzzle

Traditional behavioralist approaches to understanding the progression of LGBTQ+ rights certainly explain a great deal. However, they do not offer complete coverage. While in many countries, the adoption of LGBTQ+ rights measures roughly follows the progression noted above, in quite a lot of others it does not. Numerous states that have enacted legal reforms in this area in recent years, such as South Africa, Nepal, Mongolia, Cuba, Vietnam, Mozambique, and many others, are developing countries; some, in fact, are among the poorest in the world (Equaldex, 2023). Nepal, for instance, added robust constitutional protections for sexual orientation and third gender recognition following democratization in the late 2000s.[2] Mongolia also introduced LGBTQ+ anti-discrimination protections in 2017 despite low levels of urbanization and high levels of poverty.[3]

Some of these countries also have populaces that hold majority anti-LGBTQ+ views, and many remain overwhelmingly religious. Corrales (2015) describes how many Latin American states have made immense strides on LGBTQ+ law reform, despite the presence of strong veto players among religious actors. In addition, several countries in South America that in recent years have legalized same-sex marriage, including Colombia (2016) and Brazil (2013), did so at a time when fewer than 50% of the population supported this key reform.

One country that stands out particularly strongly in this same regard is South Africa, which legalized same-sex marriage in 2006, at a time when less than 10% of the population

[2] See https://www.hrw.org/news/2017/08/11/how-did-nepal-become-global-lgbt-rights-beacon.
[3] See https://www.aljazeera.com/news/2019/10/9/charges-in-mongolia-lgbt-attack-hint-at-changing-attitudes.

supported marriage equality for same-sex couples, and opposition exceeded 80%[4] (Currier, 2012; Judge et al., 2008). In addition, the strong religious and moral conservatism of South African society stands in contrast with the dominant attitudes in states conventionally viewed as most friendly to LGBTQ+ rights, such as Sweden. South Africa is also one of only three countries to score a perfect 100 on Equaldex's measure of LGBTQ+ legal equality. The striking contrast between public opinion and public policy is one that merits further investigation, as it stands unincorporated with existing theories of LGBTQ+ rights advancement. These theories adroitly explain the emergence of such rights in many European and Western contexts, but they do a poor job in the African sphere—where surprising reforms are underway.

The Layout of the Dissertation

This dissertation seeks to untangle this puzzle by centering the experiences of the Southern African region. South Africa's similarities with other neighboring countries, most notably Namibia and Zimbabwe, offer a propitious opportunity to employ a most-similar systems case study design to elucidate the causal mechanisms at play. In addition, Sub-Saharan Africa constitutes the single most important forum in which LGBTQ+ rights are currently being debated,[5] as these rights stoke political energies and divides in a way that makes it the global locus of both pro- and anti-LGBTQ+ equality forces.

I begin in chapter 1 by identifying the crux of my theory: that an interaction of mass mobilization among activists with the actions of an independent and powerful judiciary explain the advancements of LGBTQ+ equality measures in countries such as South Africa, as well as their absence in countries similar in demography and history. I also explain my case selection

[4] See https://mg.co.za/article/2005-12-02-muslim-council-condemns-gaymarriage-judgement/.
[5] See https://www.reuters.com/world/africa/ugandas-museveni-approves-anti-gay-law-parliament-speaker-says-2023-05-29/.

strategy before undertaking a discussion of the interview and archival methods utilized in the qualitative portions of this study (chapter 2).

Chapter 3 represents the commencement of the substantive sections of the dissertation and presents quantitative evidence for the theoretical foundations outlined in chapter 1. I introduce an original dataset of six LGBTQ+ rights measures across all UN member states from 1990 to 2022 that is, in part, based on the Equaldex index. Drawing on civil society participation and judicial review data from V-Dem, I provide statistical evidence for my general theory of LGBTQ+ rights successes.

Chapters 4, 5, and 6 comprise the qualitative body of the work; these are the main case studies of South Africa and Namibia, respectively, as well as the secondary study of Zimbabwe. These chapters draw on rich interview and archival data that I collected, mostly in-person, during the summer of 2022. They provide not only substantive evidence for my scientific theory, but also ground the research in the lived experiences of real human beings. By closely comparing the South African case, which exhibits high levels of LGBTQ+ legal rights, with the much more legally conservative Namibian and Zimbabwean cases, I am able to demonstrate the importance of activists and judges in achieving these reforms.

Contributions

The existing body of social scientific work devoted to the study of LGBTQ+ people and their rights continues to center the United States and Western Europe. This work instead centers the experiences of LGBTQ+ people in Southern Africa, and further seeks to expand our understanding of the ways in which activists can find success in their own reform agenda. In addition to examining the key avenues social organizers pursue in advocating for change, this work also advances our understanding of comparative judicial politics and of African courts,

particularly in a post-colonial context. As a result, my research devises a new approach to these issues that ties together social and formal institutions; this approach has myriad applications to a host of rights issues, including abortion.

This dissertation specifically examines why LGBTQ+ rights reforms succeed in some places but fail in others. The need for studies on this topic is clear: not only are LGBTQ+ individuals' fundamental rights profoundly affected by the legal situations in their home countries, but existing research also finds a sharp decline in suicide attempts by LGBTQ+ youth in countries that legalize same-sex marriage (Raifman et al., 2017). Simply put, research that helps shine a light on how LGBTQ+ rights succeed in diverse environments can help activists win crucial reforms, reforms that have the power to shape the everyday lives of ordinary people around the world.

Furthermore, this study also identifies the power of an activist-judicial nexus in achieving a particular legal change in contexts where political support is lacking or where the opinion of the public is unsupportive. While these certainly *can* be progressive changes, they do not have to be. The U.S. Supreme Court decisions in *Dobbs v. Jackson Women's Health Organization*[6] (2022) and *303 Creative v. Elenis*[7] (2023) are prime examples of social movements working in concert with the judiciary to achieve unpopular reform in a *conservative* direction on the issues of abortion and discrimination against LGBTQ+ customers in public accommodations. The present study therefore challenges traditional behavioralist discourse by proposing an avenue through which public opinion and political support for an issue can be overridden.

[6] See https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/.
[7] See https://www.lwv.org/legal-center/303-creative-llc-v-elenis.

CHAPTER 1: ACTIVISTS AND JUDGES AS ACTORS IN LGBTQ+ STRUGGLES

In recent years, LGBTQ+ rights have been expanded across a range of countries. As explained in the introduction, many of these changes have come in surprising places: countries that are economically developing, majority anti-LGBTQ+ rights, and/or highly religious, among other factors. For example, Nepal's constitution explicitly bans discrimination on the basis of sexual orientation. Anti-discrimination and hate crime laws covering *both* sexual orientation and gender identity were passed in Mongolia in 2017. Several countries in Sub-Saharan Africa—from Botswana to Mozambique—have decriminalized homosexuality, mostly since 2012. Perhaps most notably, several countries where opposition to same-sex marriage exceeds support have legalized it anyway, including Colombia.

Why do LGBTQ+ rights sometimes succeed in contexts where we would not expect these rights to be extended? This often entails the presence of negative public opinion, which also typically brings with it a hostile political environment. To answer this question, I look toward the work of two groups at the margins of the formal political space who work in mutually reinforcing ways: activists and judges. I then provide evidence for these mechanisms by exploring both quantitative and qualitative evidence.

Activism and Social Movements

Existing literature in political science and sociology studying the nature and effects of social movements has identified several strands of inquiry, according to Vráblíková (2017). First, modern-day social and protest movements are primarily predicated not on the ideology of the actors involved, but on cultural and expressive characteristics that separate them from other political power-players (Melucci, 1996). Whereas traditional understandings of social movements, primarily derived from labor organizing, were economic in nature, post-1960s

studies have examined primarily how identity-based groups, such as women, racial and ethnic minorities, and LGBTQ+ people, have mobilized and expressed their identities, both as a community-building tool and as a force for achieving political and social change. Indeed, studies examining the question of *who* protests have found that those who are marginalized and suppressed in contexts of "lack of accountability and irresponsible governance" are most likely to mobilize (Norris et al., 2005). In addition, some scholars have drawn connections between this cultural understanding of movements and the development of civil society spaces, which in turn provide broad opportunity for democratic and rights reforms (Cohen and Arato, 1994).

Whereas these movements can achieve change through their myriad influences on social and cultural spaces, they also interact directly with traditional political actors. Through protest actions, they can demand and win reforms from political officeholders (Giugni et al, 1999). In addition, social movements can also shift public opinion, which in turn also results in political change. Extant scholarship has found that strategies that aid activists' mobilizational ability, including the quality of their tactics and their level of organization, also positively affects the likelihood that they will be able to successfully pressure political actors to adopt particular reforms (Amenta et al., 2010).

A robust and growing literature applies a magnifying glass specifically to LGBTQ+ movements, often but certainly not exclusively in relation to the work of women's movements. Much of this work focuses on shining a spotlight on particular countries or contexts rather than proposing a sweeping, cross-national theoretical paradigm. However, there are a few key ways in which this literature adds to the broader body of social movement literature. First, LGBTQ+ organizers are intrinsically divided not just by sexual orientation and gender identity, but also by race, gender, and class (Adam, 2017). In order to win political reforms, they must first either a)

organize themselves effectively and coherently despite these divisions, or b) find a motivational issue that unites people of all identities, backgrounds, and beliefs. Second, LGBTQ+ activists are often forced to pursue creative strategies of organizing in contexts where it may be physically dangerous for them to be publicly visible, and their ability to do so determines their ultimate success or failure (Chua and Gilbert, 2015; Currier, 2012). This can take the form, for instance, of identifying as an HIV/AIDS or women's activist group rather than an LGBTQ+ NGO. Finally, sexual and gender minority organizers often have to navigate delicate transnational or foreign policy concerns, as receiving aid or support from abroad may foment backlash at home (Buyantueva, 2021; Nuñez-Mietz and Iommi, 2017).

Commonplace among the whole of this literature is the notion that well-organized social movements have the power to transform societies (Grey, 2002). They can illuminate fundamental injustices, argue on behalf of aggrieved minority communities, and apply significant pressure onto political leaders. Conversely, poorly run activist networks can do worse than fail to change policies or institutions—they can foment backlash and end up hampering their own cause. With regards to LGBTQ+ rights, activism has varied widely across time and contexts; some advocates are politically oriented while others focus on providing healthcare or social services to the community. Nevertheless, LGBTQ+ activist movements that are well-organized, well-resourced, adaptable, historically long-lived, and transnationally connected have the capacity to achieve transformational political and legal change.

Powerful social movements enjoy a multitude of avenues through which they can influence laws and policies. They can seek to convince the broader population of the moral righteousness of their cause. They can apply direct pressure on parliamentarians to change laws legislatively. Or, if elected politicians are intransigent to change, they can even bring court cases

on behalf of aggrieved individuals through the country's judiciary. Therefore, the stronger a country's LGBTQ+ rights movement is, the greater the likelihood that policy reform will be achieved, independent of public opinion or economic development.

H_1: The strength of activist networks is predictive of LGBTQ+ policy changes in a liberalizing direction.

LGBTQ+ rights activism can and does change public attitudes toward LGBTQ+ rights by heightening visibility (Garretson, 2018). As more LGBTQ+ individuals see themselves reflected in mass media and in positions of agency and power, more of them come out to friends and family, and respondents who say they know one or more LGBTQ+ people are much more likely to say that they support legal equality measures (Lewis, 2006). Nevertheless, heightened public visibility can also foment backlash and prime citizens to adopt more negative attitudes, especially in more religious contexts (Grossman, 2015). As a result, the work of rainbow activists in these conservative areas is often centered around winning reforms through judicial decisions, or occasionally on attempts to sway individual politicians through targeted appeals. This kind of work requires not just extensive legal expertise, but also an exemplary level of institutional organization and discipline.

Evidently, there is a definite possibility of endogeneity here, as strong LGBTQ+ social movements may emerge in places that are already primed to expand LGBTQ+ rights. However, my main focus in this dissertation is explaining the expansion of LGBTQ+ rights precisely in places where public opinion is unsupportive of these reforms. As a result, these activists often rightfully fear for their lives, and they certainly do not engage in organizing as a result of the support they discern from their countries or local communities. If anything, these could be places where civil society, social capital, and a culture of activism are more prevalent. They are not,

however, places where LGBTQ+ rights had previously, or even concurrently, found much popularity or success.

At the same time, what does it mean for an activist network or social movement to have organizational "strength"? Scholars have proposed a variety of potential metrics. According to Amenta (2014), the broader literature points to the primacy of movement infrastructure, resourcefulness, and strategic adaptability, as well as historical institutionalism. In addition, transnational ties between LGBTQ+ rights movements in different countries can enhance their organizational capacity and improve their core strategies.

The level of organization, resourcefulness, and adaptability of an LGBTQ+ activist network is predictive of LGBTQ+ rights advancements in that same country.

Existing works explain that the presence of an organized and well-resourced movement infrastructure goes a long way toward helping activists influence and alter elite norms, thereby increasing the likelihood that political change will come (Amenta, 2014; Grey, 2002). LGBTQ+ organizations require both personnel and monetary resources to be able to do their work and to apply pressure on political actors. Without organizational capacity and funding, they are unable to mobilize members of the LGBTQ+ community to participate in rallies, letter-writing campaigns, or other forms of targeted activism.

Furthermore, successful social movements are flexible and adaptable to changing environments. They are able to identify the most persuadable and targetable political leaders and engage with them, recognizing that elections, resignations, and other political changes may necessitate a shift in strategy. LGBTQ+ social movements in particular often need to walk a fine line between public visibility and member endangerment, a line that may shift at a moment's notice. The most advantageous avenue for political change may also evolve given new

circumstances, and activists must respond to this. As noted previously, sometimes it is not the people or the elected politicians who are most receptive to the demands of LGBTQ+ activists, but judges. In this case, activist organizations must have at their disposal the lawyers and legal knowledge necessary to engage with this often-opaque branch of government.

The more historically institutionalized an LGBTQ+ activist network is, the greater its efficacy and liberalizing effect on the law.

A major reason why social movements often fail to achieve the changes they seek to make in society is because they are too newly formed. Newer organizations do not have the benefit of deep institutional knowledge that older organizations have, nor do they have all aspects of their infrastructure in place. They may also be organized around one charismatic leader and lack the "glue" necessary to hold that network together when this individual inevitably departs. Well-established organizations, on the other hand, may have long-developed membership and mailing lists in place stretching back years; they may also have extensive contacts among political and economic elites as well as broad name recognition. All of these elements work in concert to make the passage of time a key variable in explaining the success or failure of a certain social movement.

LGBTQ+ social movements with strong transnational ties are more likely to succeed in shifting a country's legal environment.

Activist movements also learn from other activist movements. In particular, LGBTQ+ rights networks in countries with more nascent political struggles can greatly enhance the efficacy of their strategies by collaborating with, and learning from, their counterparts overseas. Through such an exchange, they may learn to revise their appeals to make them more receptive to moderate members of society. They may also gain the benefit of deeper institutional

knowledge, which would in turn help them interact with the political system in more beneficial ways. Transnational ties can help especially when it comes to interactions with the courts, as more established groups in other countries can suggest legal strategies and arguments that have enjoyed success in their respective judiciaries.

In brief, activist movements that are well-resourced and well-connected have the greatest potential to positively influence judges, political actors, and the people themselves. Organizations that have been in existence for a longer span of time enjoy greater occasion to develop their strategies, messages, and cross-national and international ties. Most crucially, in contexts where the elected branches and the broader population have not adopted majority support for LGBTQ+ rights, activists' ability to lobby and persuade the judiciary to pursue these reforms is crucial to their success.

The Judiciary

Courts play a major role in advancing LGBTQ+ equality in contexts lacking political support for the same (Keck, 2009). Given a failure to persuade elected politicians to act on issues of importance to the community, activists can ask the judiciary to intervene and take actions including, but not limited to, invalidating sodomy bans, legalizing same-sex marriage, and extending non-discrimination protections to include sexual orientation and gender identity. In all countries where same-sex marriage was legalized at a time when support for the practice had not yet reached a critical mass of 60% of the population, the legalization came from the judiciary, not the legislature (Equaldex). Corrales (2015), in a study of LGBTQ+ rights in Latin America, finds that one of the reasons why the region was able to vault ahead of more developed countries in the adoption of pro-LGBTQ+ policy measures was the presence of courts that were willing to act on this issue.

Martine Valois (2013) describes judicial independence as "keeping law at a distance from politics." Political systems characterized by a high degree of judicial independence see relatively little interference from the elected branches in the judiciary. Judgments are typically respected and implemented, and while judges may be appointed by politicians, the work of the judiciary can proceed in a fashion unencumbered by the political leanings of the incumbent administration (Tarr, 2012). Lacking independence, judges would not be able to rule in favor of unpopular minorities that do not have the backing of the political branches. In addition, those same judges must be willing to exercise their judicial power and challenge the existing policies of the legislature and the executive if LGBTQ+ rights are to advance in contexts where they lack political support. This combination of judicial independence with judicial power is described by Corrales (2015) as "judicial assertiveness":

Judicial independence + judicial power = judicial assertiveness

Inherently present in any system exhibiting judicial assertiveness is the power of judicial review, which allows the courts to invalidate and hold unconstitutional any law passed by the legislature that violates the constitution or basic law of the state. This is also regularly referred to in the American and British courts literature as "judicial supremacy" (Haines, 1932; Campbell and Allan, 2019). While these concepts of judicial review, assertiveness, and supremacy are regularly studied in connection to LGBTQ+ rights topics, courts regularly apply constitutional review to laws pertaining to many issues, from abortion to school prayer to guns (Becker, 2014; Faizer, 2013; Bridges, 2013; Keynes and Miller, 1989; Card, 2009). These concepts are also not inherently "progressive" or "conservative" in their understanding and application.

H_2: The greater a court's assertiveness and willingness to apply judicial review, the greater the chance that it will act to invalidate restrictions on LGBTQ+ freedoms.

Absent pre-existing political support, a court is unlikely to rule in favor of LGBTQ+ rights if it does not meet the definition of being judicially assertive. Given a judiciary that lacks either independence from the political branches or the willingness to challenge political actors, it is not probable that it will produce a judgment that departs from the views of those branches. Helmke and Rosenbluth, in a 2009 review article, explain the myriad ways in which judiciaries, when constrained by the other branches or by public opinion, will modulate their decisions.

A court is much more likely to advance LGBTQ+ rights in contexts where the country's constitution includes an explicit equality or non-discrimination clause.

In addition to a court's willingness to wield the review power, constitutional frameworks also command great importance. After all, if a country's judiciary meets the definition of judicial assertiveness, it does not guarantee that it would rule in favor of LGBTQ+ equality if a relevant case were to come before it. The judges may have ruled in highly controversial ways previously; nevertheless, they may be unpersuaded by the need to liberalize the laws surrounding the rights of LGBTQ+ people. In particular, courts with a majority subscribing to an ideology of judicial "restraint" may balk at the prospect of altering aspects of family or anti-discrimination law, particularly without the expressed consent of the people. They may see taking such a step as differing in scope from other forms of assertive behavior, including for instance challenging the government's water regulation powers. In this situation, more is required to provide an impetus for the judges to take this potentially radical step. Courts may be provided with just such motivation to act on this question if the constitution of the country (or a sub-national jurisdiction) includes an explicit equality or non-discrimination clause. In these cases, courts will feel a need

to act in order to preserve their own legitimacy as balanced and impartial arbiters of the law; since courts lack any enforcement power, they must act in a way that commands respect. A ruling against LGBTQ+ rights by a court in a country where the constitution contains an equality clause may very well color the court's decision politically motivated.

These non-discrimination clauses do not have to be inclusive of sexual orientation and/or gender identity, and presupposing a system where LGBTQ+ rights are besieged by the political branches, it is unlikely that they would be. Nevertheless, anti-discrimination protections on the basis of gender and/or race can provide strong argumentative parallels laying the groundwork for similar future protections for LGBTQ+ people. Furthermore, the words "gender" and "sex" can sometimes be read by judiciaries to include sexual orientation and gender identity.

Courts that have a history of issuing controversial judgments (i.e. those that challenge either the political branches or public opinion) with relatively little backlash are more likely to issue such judgments again in the future.

In instances in which a given court has a history of issuing major judgments on contentious issues of national importance, particularly those on which its decisions depart from the policy views of the elected branches, it will feel empowered to do so again. Judges are constrained by the legislature and the executive even in countries where the judiciary is solidly independent; if they stray too far outside the bounds of public opinion, they can face calls for punishment or reform (Solberg, 2019). With specific regards to LGBTQ+ rights, judges are more likely to rule favorably if they have a history of invalidating restrictive laws in other domains pertaining to sexual and/or reproductive rights. For example, if a country's judiciary previously legalized abortion, it is more likely to legalize same-sex marriage in a future judgment for two main reasons: lawyers, advocates, and activists will be able to make a stronger argument based

on that court's precedents; and judges will feel that they can make bold decisions without drawing significant backlash from voters or politicians (Keck, 2009).

Courts that accept legal arguments with a basis in international or foreign law are more likely to rule in favor of LGBTQ+ rights.

Particularly in new democracies, the judiciary often lacks a large body of precedent on which to base future decisions and therefore must accept a degree of reliance on other countries' rulings. For instance, in post-apartheid South Africa, the courts could not continue to cite the legal rulings that had been issued during a time of enforced legal separation of people of different racial groups. As a result, that country's Constitutional Court had to look overseas to the U.S., Canada, and India for ideas regarding individual rights jurisprudence (Thoreson, 2008).

In such instances, courts are likely to come across decisions favorable to LGBTQ+ rights. In democratizing contexts, courts often look to the decisions and precedent of U.S. and Canadian jurists; both of these countries' judicial systems have a long history of expanding LGBTQ+ rights via judicial review (Groppi and Ponthoreau, 2014). Furthermore, lawyers and activists will be able to incorporate those foreign rulings in their legal arguments as well, significantly bolstering their cause. If courts do not legitimize or allow such transnational approaches, the advocate's argument becomes more challenging, and they will have to craft a creative argument based solely on precedent from that same country's judicial system.

Judiciaries that face greater public accountability are less likely to rule in favor of LGBTQ+ rights in places where the public is unsupportive.

In some countries, judges are accountable to the public through formalized mechanisms that make them less likely to rule in favor of individual rights that are unpopular with the majority of the electorate. Sometimes, especially in the U.S., some judges face retention

elections that force them to campaign like politicians, rendering their behavior more conservative during election years (Berry, 2015). More commonly, however, judges may face term or age limits that require them to keep an eye on their personal futures, thereby reducing the likelihood that they will act in ways that far exceed the bounds of public opinion. These checks on the power of the judiciary diminish the prospects for pro-LGBTQ+ rights rulings in places where public views remain hostile.

Across many contexts, judiciaries can act as counter-majoritarian guarantors of individual rights and freedoms. In places where publics and political actors are unsympathetic to claims of discrimination, lack of freedom, or inequality on the part of LGBTQ+ people, courts can often remedy those injustices.

The Interaction of Activists and Judges

Equal rights advocates and courts can act as bulwarks defending LGBTQ+ citizens in contexts where the public and/or the elected officials are not on their side. Activist networks do so through both the direct provision of social services, including housing and healthcare, as well as through impassioned advocacy. Even if government officials remain ardently homophobic or transphobic, the presence of some level of organized advocacy can help stem the tide of repression by increasing the perceived costs, both direct and indirect, for politicians to take punitive actions. Not only would they face potential protests, but they may also see conclusively that their position is not the only one in the community, and that others think and perceive differently than they do.

Judges also play a critical role in defending the rights of LGBTQ+ people in countries where the community lacks political support. LGBTQ+ rights appeals are essentially demands for equality and freedom, which are critical values in the constitutions and founding documents

of most modern states. As judges' and justices' principal obligations center on the defense of these essential documents, anti-LGBTQ+ laws do not find the same safe harbor before the judicial branch that they do before the legislative and executive branches, where politicians seek to employ wedge and/or valence issues to do the maximum benefit of their re-election campaigns.

The nexus between these two groups, activists and judges, is where the real opportunity for policy reform lies. Lawsuits are filed and court cases are advanced primarily not by aggrieved individuals, who are often lacking in financial resources or legal expertise, but by activist networks that seek to advance the broader reform cause through the vessel of a particular case. When they are well-organized, well-financed, historically long-lived, and well-connected with their overseas counterparts, these organizations and their lawyers stand well-positioned to make persuasive and cogent legal arguments before the courts. Conversely, judges and justices rely on the testimonies and court briefs of these social reformers, as they educate the court regarding the key facts of the particular case and—most crucially—how the specific appeal for a legal change fits within the pre-existing framing of key constitutional provisions. For example, the Botswana High Court, in its 2019 ruling invalidating a law criminalizing consensual same-sex sexual conduct, relied on briefs from the LGBTQ+ rights organization LEGABIBO in making its decision. Much of the evidence the judgment cites, including information on other countries' sodomy laws and the status of LGBTQ+ people in Botswana, comes from these legal briefs.

As a result, countries in which both of these elements—strong activist networks and assertive judiciaries—are present enjoy the highest likelihood of advances in LGBTQ+ legal freedoms, even in contexts where public opinion runs contrary to such reforms and/or where the society is largely conservative or religiously devout. Countries with only one of these elements

present are unlikely to see progression; nevertheless, they will most likely not regress either due to the individual and independent strength of each of these two groups. Finally, those places where neither factor is present may see the unencumbered enactment of the popular will, unmediated by activists or judges, as well as a high chance of harsh repression, including a crackdown on the freedoms of association and assembly of LGBTQ+ people and an enforcement of sodomy laws in places where such issues become politically salient.

Are courts independent, assertive, and willing to apply judicial review?	***Are activists well-organized, historically institutionalized, and well-financed?***	
	Yes and *yes* (1/1): Rights advancement	*No* and *yes* (0/1): No change
	No and *yes* (0/1): No change	*No* and *no* (0/0): Rights repression

Table 1: Theoretical Foundations

Case Selection Strategy

Qualitative evidence for these theoretical foundations can be gleaned from case studies of any number of states, as every country has experienced its own unique version of the LGBTQ+ freedom struggle. However, Sub-Saharan Africa is a particularly ideal region to situate the present study for a few reasons. First, there is a tremendous level of variation in national policy on LGBTQ+ rights: a significant number of countries still have sodomy laws on the books (although some do and some do not enforce them; see the countries in red in Figure 1), many have legalized homosexuality, and one country—South Africa—legalized same-sex marriage in 2006 (ILGA, 2020; Rouget, 2021).

Figure 1: Map of Sodomy Laws in Africa

Secondly, public opinion towards LGBTQ+ rights remains negative across most of the continent. Even though Afrobarometer surveys have found widespread acceptance of people of different ethnicities, different religions, and immigrants, the same cannot be said for LGBTQ+ people: as shown in Figure 2,[8] the vast majority of Africans across all five major regions indicate

[8] **Respondents were asked:** *For each of the following types of people, please tell me whether you would like having people from this group as neighbours, dislike it, or not care: People of a different religion? People from other ethnic groups? Homosexuals? Immigrants or foreign workers?* (The percentage includes those who say "strongly like," "somewhat like," and "not care.")

strong distaste with having homosexuals as neighbors (Howard, 2020). While some greater support can be found in Southern Africa, as well as in the Lusophone countries, even those areas still maintain only tepid levels of tolerance and lack full acceptance of LGBTQ+ people and identities (da Costa Santos and Waites, 2021).

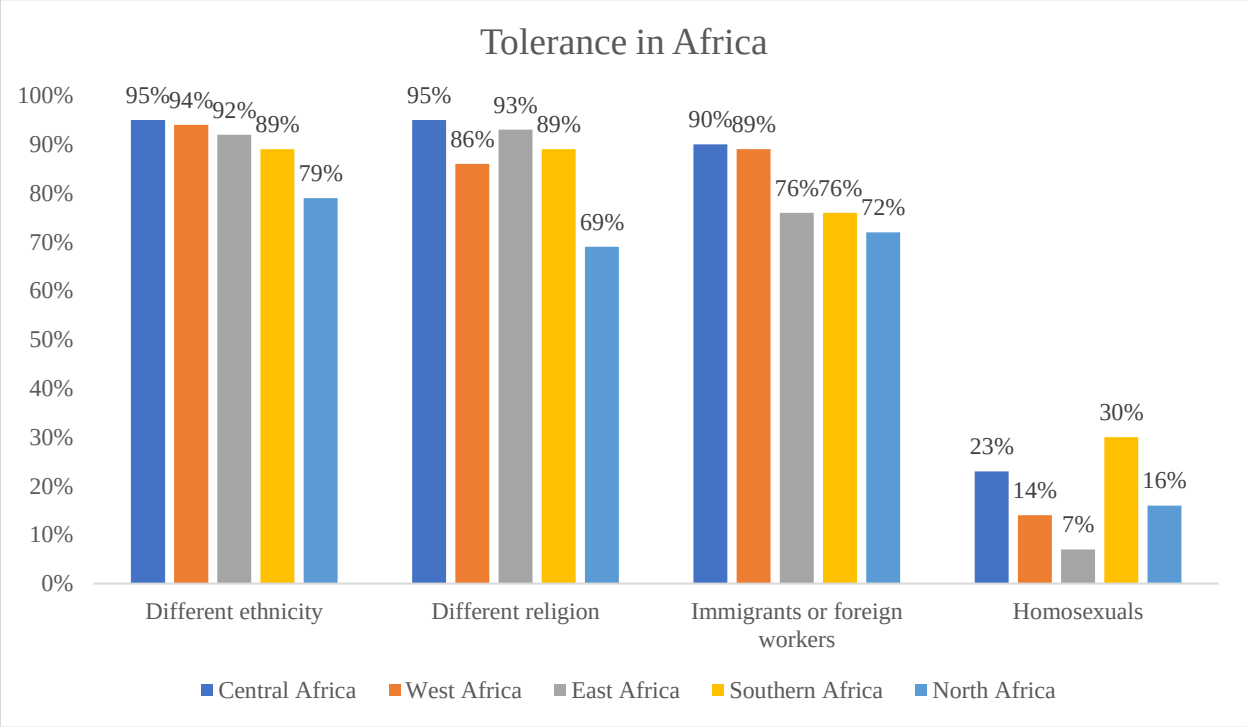


Figure 2: Public Opinion in Africa

Third, most countries on the African continent share common histories of European colonization, including the codification of colonial-era sodomy laws (Buckle, 2020). In addition, many African countries share histories of apartheid or other periods of intensive racial discrimination, dispossession, and violence. These factors allow for the comparison of cases and the elucidation of causal mechanisms.

Fourth, and perhaps most crucially, Sub-Saharan Africa currently comprises the global nexus in which these issues are most actively debated by both pro- and anti-LGBTQ+ equality forces. As such, different states on the continent are striking divergent paths on this issue, with

some strengthening penalties for same-sex sexual relations, while others are decriminalizing homosexuality or even taking broader steps to protect the rights of sexual and gender minorities. Traditional theories fall short in explaining these divergences, as levels of democracy or development, public opinion toward homosexuality, or degree of religiosity do not appear to exert the level of causal influence the literature ascribes to these variables.

For the purposes of this research project, I employ a most-similar case study design. This is a case selection strategy that entails finding countries that are as similar as possible on all measured independent variables except the independent variable(s) of interest, where they should vary, as well as the outcome variables, where they should also differ (Seawright and Gerring, 2008). By holding other elements constant, researchers can tease out the causal mechanisms driving various social phenomena. In the context of the presently discussed research study, the independent variables of interest are the strength and assertiveness of activists and judges, and the outcome variable is the status of LGBTQ+ legal equality in a certain country. Other independent variables, which should be held as constant as possible within real-world constraints, include level of democracy, level of human development, key historical experiences, demographics, and of course, public opinion toward homosexuality.

Against this backdrop, South Africa and Namibia emerge as strong cases, as they share striking similarities on most control variables, while also taking divergent paths in terms of outcomes. Naturally, the commonalities that they share are not at all surprising, as Namibia was a South African territory[9] until 1990. Polity deems both countries democracies, and Freedom House also marks them each as "free." Indeed, the two countries share remarkably similar Freedom House scores (Table 2). The UN Human Development Index, a composite measure of

[9] Namibia was known as South West Africa prior to independence in 1990.

health, education, and income, lists Namibia at 0.62[10] and South Africa at 0.71, as of 2021. Both countries also have a common history of racial apartheid, a system in which the white populations of each country violently dispossessed Black Africans and members of other racial identities of their land and property and forced them into wholly sub-par living arrangements and segregated public facilities and accommodations (Dugard, 2018). In both countries, whites comprise a substantial portion of the population: about 8% in South Africa and 6% in Namibia, although these have both declined in recent years.

Finally, public opinion toward LGBTQ+ rights is also remarkably similar in South Africa and Namibia. An interview with a historian of LGBTQ+ rights in Johannesburg in 2022 indicated that fewer than 10% of South Africans and Namibians supported same-sex marriage at the time it was legalized in South Africa in 2006 (personal interview with author, 2022). This finding is corroborated with other sources of information. A 2005 poll of South Africans conducted by the Human Sciences Research Council found that 80% opposed the legalization of same-sex marriage[11] in light of the *Fourie* decision, and in a 2003 South African Social Attitudes Survey, 84% of respondents indicated that same-sex sexual relations are "always" or "almost always wrong" (Rule et al., 2006; Thoreson, 2008). At the same time, a 2005 poll commissioned by the University of Namibia Department of Political Science found that only 8% of respondents wanted to repeal Namibia's sodomy ban, according to a Windhoek-based academic and sociologist (personal interview with author, 2022). In addition, a 2023 poll found that only 38% of South Africans supported same-sex marriage, seventeen years after legalization.[12]

[10] On a scale from 0 to 1, with 0 being least developed and 1 being most developed.
[11] See https://mg.co.za/article/2005-12-02-muslim-council-condemns-gaymarriage-judgement/.
[12] See https://www.pewresearch.org/short-reads/2023/06/13/how-people-in-24-countries-view-same-sex-marriage/.

Country	Total Score[13] and Status	Political Rights	Civil Liberties
South Africa	79—Free	33	46
Namibia	77—Free	31	46

Table 2: South Africa and Namibia Compared

While they share myriad key similarities, these two countries differ in terms of their outcomes. Whereas South Africa is one of the most progressive countries in the world where it comes to LGBTQ+ rights, Namibia continues to criminalize consensual same-sex conduct and offers no legal protections to LGBTQ+ citizens. While South Africa was the fifth country on the planet to legalize same-sex marriage in 2006 and is one of only three states that score a perfect 100 on Equaldex's index of LGBTQ+ legal equality,[14] rainbow Namibians continue to fight for basic freedoms. This divergence in terms of outcomes, coupled with strong similarities on the control variables, renders very powerful a case study analysis of these two countries.

While South Africa and Namibia offer an excellent opportunity for deep case study analysis and close comparison in order to shine a light on the independent variables of interest, a third case is needed to solve the existing degree of freedom issue (Yu, 2009). Since there are two key independent variables—activists and judges—at least one additional case is needed in order to offer sufficient statistical power.

Zimbabwe is the most ideal third case because, while it lacks the democratic governance of South Africa and Namibia and has lower public support for LGBTQ+ rights, it shares a similar history of apartheid and white settler-colonialism (Mlambo, 2014). In addition, it differs

[13] On a scale from 0 to 100, with 0 being least free and 100 being most free.
[14] Not even progressive Nordic countries achieve this level of legal equality.

from the other two countries in outcome: whereas South Africa experienced an early and bold transition to LGBTQ+ legal equality, and Namibia has experienced a stagnant legal environment where neither progress nor regression have occurred, Zimbabwe has seen active repression and ongoing efforts to enforce the country's sodomy law.

Table 3 provides a summary of this information. South Africa, exhibiting high performance across all metrics, is a case of strong rights progression. Zimbabwe exhibits low or very low performance on the activism and judicial metrics, and therefore sees rights repression. Namibia is an intermediary case with no major change to the legal environment in either direction.

	Activism	Judiciary	Activism + Judiciary	**OUTCOME**
South Africa	High	High	High	**Rights progression**
Namibia	Medium	Low to Medium	Low to Medium	**No major change**
Zimbabwe	Low	Low	Very Low	**Rights regression**

Table 3: Outcomes in South Africa, Namibia, and Zimbabwe

An Alternative Explanation

This dissertation advances the argument that a nexus of activists and judiciaries working in concert with one another are responsible for advancing LGBTQ+ equality reforms in contexts where public opinion is unsupportive of such changes. However, at least one major alternative explanation exists that should be appropriately considered.

The present research focuses primarily on the pro-equality or rights advancement side of the equation. However, in any situation where reformers present ideas for transformational change, they are certain to be met with opposition that can blunt the success of their cause. This is particularly true in cases of strong electoral competition where predominant public opposition

toward homosexuality can rise to the level of a valence issue, as two or more parties vie for an electoral advantage. As a result, perhaps it is the case that some countries haven't progressed toward LGBTQ+ equality because of such electoral competition and the ways in which it can foment and energize opposition to rights advancements.

However, empirical evidence contests this notion. First, anti-LGBTQ+ laws passed with large majorities in the legislature and overwhelming public support are still nevertheless routinely invalidated by courts.[15] Second, while leaders may focus on whipping up opposition to LGBTQ+ rights as a way of heading off an ascendant opposition, they may also do so as a result of their personal preference or due to the perception of the public's views on the issue. For example, Zimbabwe is a country with persistently high levels of electoral competition, and yet the focus on homosexuality as a valence issue significantly differed in degree between the administrations of Robert Mugabe and Emerson Mnangagwa, according to an academic based in Harare (personal interview with author, 2022). While Mugabe was making explicit anti-gay appeals in Zimbabwe,[16] Namibian President Sam Nujoma was doing the same in his country[17] despite a lack of major electoral contestation.

As a result of these factors, it is unlikely that electoral competition would be able to supplant progress towards LGBTQ+ equality in contexts with strong activist networks and powerful judiciaries.

[15] See https://www.bbc.com/news/world-africa-28605400.
[16] See https://www.universityworldnews.com/post.php?story=20210418135955423.
[17] See https://feminist.org/news/namibia-makes-homophobia-national-policy/.

CHAPTER 2: INTERVIEW AND ARCHIVAL RESEARCH METHODS

The three qualitative case studies in this dissertation analyze interview and archival data that were collected during field research in South Africa and Namibia in the summer of 2022. With the approval of the Michigan State University Institutional Review Board,[18] I conducted a mix of in-person and remote interviews with 35 South African, Namibian, and Zimbabwean activists, academics, journalists, lawyers, and others; these were each one to four hours in length. I supplemented this data with the collection of 513 documents from the GALA Queer Archives in Johannesburg and 74 documents from the National Archives of Namibia in Windhoek.

COVID-19 and In-Person Research

The fieldwork for this dissertation was conducted against the backdrop of the ever-evolving COVID-19 pandemic. The uncertainty of the period from March 2020 to early 2022 made it necessary for researchers to maintain a high degree of flexibility. Trade-offs regarding travel, in-person interviewing, and delaying completion of the degree for yet another year rendered doctoral research a particularly fluid affair during this time.

It was important for me to wait to do in-person fieldwork for several reasons, as fully remote qualitative research would have had significant deleterious impacts on the quality of my study. First, the adoption of teleconferencing software such as Zoom is not as widespread in Southern Africa as in North America or Europe. Second, it is challenging to establish trust with any marginalized community while sitting in a home office thousands of miles away. To be able to identify potential interlocutors and to obtain their consent for an interview, I typically already had to know one of their contacts. Without a physical presence on the ground in Southern Africa, I would be restricting my sample to only the people most adept at using virtual tools and most

[18] MSU Study ID: STUDY00007200. Exempt determination date: March 2, 2022. See appendix.

comfortable talking to an American. Both of these realities would have created an exceptionally white and racially homogenous sample, a sample that would have been further skewed with regards to education, financial means, age, and other factors. In addition, conducting my research entirely remotely would have allowed me access to only a tiny portion of the GALA Queer Archives—the few files that had already been digitized.[19]

In preparing to enter the field, I took Covid precautions seriously and fully complied with Michigan State University's pandemic-era travel authorization process. Upon departing for Windhoek in May, I was already fully vaccinated, boosted, and recovered from the virus. In addition, I tested regularly with at-home rapid test kits and wore a KN95 mask in indoor public areas. I often met with my interviewees in outdoor or well-ventilated areas. I am eternally grateful to the people who agreed to be interviewed for my study, and as such I considered it important to take their health and safety very seriously.

Snowball Sampling in Interview Research

The interview subjects who participated in this study were identified using a snowball sampling methodology. As interviewees are identified by the researcher, those same individuals are in turn asked to provide contact details for other potential interlocutors (Kirchherr and Charles, 2018). As I was aiming to find causal explanations regarding my key questions about LGBTQ+ rights and *not* seeking a representative sample, this type of non-random sampling was most suitable to finding individuals who could answer these questions (Mosley, 2013). Snowball sampling is in many ways more about selecting and finding rather than sampling, as sampling requires a researcher to make determinations ahead of time regarding who should and should not be in the study (Fujii, 2018). By remaining flexible toward undertaking an iterative process, the

[19] At the time of writing, fewer than 20% of GALA's archive has been digitized, a process that did not begin in earnest until the onset of the COVID-19 pandemic.

researcher remains open to the possibility that key theoretical understandings will shift as the research progresses, and that this in turn might require additional flexibility regarding future interviewees and methodological approaches.

While I did not seek to draw a representative sample in my interview research, I remained highly cognizant of the fact that Southern Africa remains the most racially divided and stratified place on earth, and that I needed to ensure that the views and experiences of Black, Coloured, and Asian populations be well-represented. In order to find people whose marginalized status may place them outside of others' main social networks, I found that persistence was highly important. First, I often had to follow up multiple times with previous interviewees to ask them to survey their networks for contact details that they themselves may not have had, or I had to email or WhatsApp a potential interviewee multiple times if a response was not received the first time. Furthermore, I quickly learned that maintaining a high degree of flexibility when it came to meeting location, time, and modality (in-person or remote) was very helpful in convincing others to agree to be interviewed.

Practical Considerations for Interviews

Prior to undertaking interview-based field research, researchers have a few concrete decisions to make regarding their interview practices. Where should the interviews take place? Should they be recorded? And how will they be transcribed? While these are just a handful of the questions that scholars may face in the field, there is often no singular "right" answer. Instead, researchers should feel open to being guided by the nature of their topic, the positionality of their interviewees, and other unique contextual factors in order to make decisions that are best suited for their research.

In the course of my fieldwork in Southern Africa, I tried to accommodate my

interviewees as best as I could, and I typically left it up to them to decide upon a meeting date and time. Oftentimes, they would select a restaurant or a coffee shop for the meeting; on other occasions, it may have been a park or an office. In my experience, more informal settings like restaurants have a clear advantage over formal settings such as offices and university spaces, as they allowed me to frame the interview as a chat or a discussion and granted the subject a greater chance to feel comfortable and relaxed. In addition, I could offer to pay for their meal or coffee in exchange for their gift of time and knowledge. Not only was this simply the right thing to do, but it also made the interviewees more likely to follow up with more helpful information or potential contacts after the interview. There are two disadvantages of a restaurant or café, however: 1) these locales often have a significant level of background noise, which may affect the quality of the recordings and the ease of mutual understanding, and 2) the lack of privacy may make the interviewee unwilling to divulge certain kinds of information.

In certain cases, it was not practical or advisable to conduct an in-person interview, and I had to use Zoom or WhatsApp instead. Sometimes, particularly in South Africa, the interviewee was too physically distant to warrant travel, and sometimes they had limited time available during the day. Other times there were physical safety or Covid concerns, and sometimes simply offering the remote option made a potential interviewee more likely to accept the offer to be interviewed. Logistical advantages aside, virtual interviews do make it more challenging to build rapport with the subject, as introductions are typically shorter and back-and-forth banter or personal discussions are often non-existent (Fujii, 2018). This may in turn make the subject's responses less authentic and reduce the likelihood that they divulge their own personal opinions or unique understandings. Even by simply being aware of this dynamic, the interviewer can at the minimum attempt to inject an extra degree of friendliness to the virtual conversation to put

the interviewee at ease.

All interview subjects provided their expressed written consent to be interviewed. I also opted to record the interviews in cases in which I had the consent to do so; recording ensures accuracy and lowers the burden on memory and recollection. Furthermore, it allows the researcher to pay deeper attention to what the interviewee is saying without the added stressor of constantly having to write down what is being said. This was helpful in allowing me to pay closer attention to the discussion than to jotting notes in my journal. Nevertheless, recording involves several trade-offs that should be carefully balanced and considered (Fujii, 2018). Some interview subjects may feel "monitored" or "surveilled" if they are being recorded, and as such they may subconsciously change their responses. The researcher may also be less fully engaged in the interview if they know that they will have the responses recorded. Despite these drawbacks, it is possible that notetaking may engender the same disadvantages on both counts—there is simply no singular "perfect" method.

In terms of recording technology, I opted for a free cell phone application ("Voice Recorder") in lieu of a recorder. I found that this had two primary advantages. First, I was simply much more familiar with the use of my phone and could handle it with greater facility, thereby avoiding any slip-ups or mishaps during interviews; the files were also easily transferable to my computer. Second, and much more importantly, a recorder is a visible reminder for a subject that they are being listened to and recorded, whereas a phone is a considerably more innocuous sight.

I sought to transcribe each interview as soon as possible—that evening or the following day, in most cases. Recordings are imperfect, and especially if there is background noise, scholars are forced to rely on memory and context to render a faithful transcription. Initially, I had planned to utilize transcription software, such as otter.ai, in my work. Unfortunately, the

combination of background noise with rapid and sometimes soft speech made this impossible. Over the course of the transcription process, I did not prioritize the inclusion of every word and vocal fill, as a sociologist or anthropologist might. Since I was interviewing elites about events in their societies and not about their own personal lives and social relations, I considered interviewees' linguistic and lexical selections to be secondary to the specific empirical information that they provided.

The Process of Interviewing, Positionality, and Interpretation

In my fieldwork, I opted for a semi-structured, open-ended interviewing style. I came to the interview with a mental list of guiding questions that were informed by both my theory and by my empirical findings up to that point. One example list is included in the appendix. These questions were designed to probe the causal nature of the mechanisms at play and to further investigate cause-and-effect relationships (Mosley, 2013).

Unless operating under strict time constraints, I sought to first build rapport with the interviewee by asking questions about their lives and interests, as well as sharing a bit about myself. In some of the interviews that stretched as long as four hours, we sometimes did not even get to the questions themselves until half an hour into the meeting. Once we did get to that point, I typically started with the easiest and least controversial question as a way of continuing to build trust and rapport (Fujii, 2018). I saved more challenging questions for the end of the interview. Once a particular question had been posed, I then followed up with more spontaneous, open-ended discussion that depended on the subject's response. This flexible and recursive approach suited my research the best because it allowed the subjects to guide the discussion, and as such they often revealed valuable knowledge that I otherwise may not have even considered inquiring about.

Interview research faces an important challenge in that the identities and positionality of the interviewer affect the responses of the interviewee. Previous research has found strong evidence for gender and ethnic interviewer effects (Zoch, 2021; Adida et al., 2016). As a result, it is impossible for positivist researchers to devise an interview method that is free of "bias," as interviewer-interviewee relations are dyadic relationships that exist within the global context of power dynamics and hierarchies (Fujii, 2018). Addressing my own positionality as a white, gay man from the United States in my interviews allowed my interviewees to see that I was not blind to key power differentials. By letting them know that I am a member of the LGBTQ+ community, I gave my subjects both a sense of understanding regarding the study and a sense of ease in discussing complex, and often controversial, issues. I also discussed my status as a white man and addressed how these identities have been used to marginalize and disempower others in the past and present. While I will never fully understand what it means to experience life as a woman or a person of color, I can at the very least listen to those communities with a goal of ever-improving allyship. In addition to making a commitment to active listening and anti-racist scholarship, learning from one's missteps and treating each respondent with dignity and respect are cornerstones of effective interview engagement (Fujii, 2018).

In interpreting my data, the methodologies I employ revolve around the search for themes and patterns. I use NVivo software to first code portions of each interview into identifiable categories. These can be determined either by a specific subject matter or by a particular aspect of theory. Afterwards, the functions of the software are used to analyze repeated words or phrases that may indicate a pattern. More difficult to spot are deviations from established patterns; this requires the researcher to make notes wherever one is spotted. Once this process is complete, I assemble a Word document of key quotes under major thematic headings that best

illustrate the causal processes at play.

Ethics in Interview Research

I am eternally grateful to the subjects who agreed to be part of my study, and I take their protection and well-being very seriously. Beyond the use of IRB-approved consent forms (which are included in the appendix) and the aforementioned Covid protocols, I took additional steps to protect the interlocutors. First, in the course of each interview, I endeavored to remain cognizant of the reality that certain subjects may be triggering for the interviewees. In the racially stratified and highly unequal societies of Southern Africa, some of the respondents had direct experience with poverty, violence, and psychological harms. I only brought up topics adjacent to these toward the end of each interview, once I had developed a better sense of the other person's comfort level and openness to engage with such topics. I also intentionally engaged with and discussed my positionality in each interview, ensuring that I convey to each respondent my self-awareness of the place of privilege from which I originate and the ways in which I grapple with that privilege.

I also spent time considering ways to better protect each subject's identity and privacy. First, in order to fully comply with South Africa's Protection of Personal Information Act (POPIA) and Zimbabwe's Access to Information and Protection of Privacy Act (AIPPA), I do not identify either South African or Zimbabwean respondents by name in this dissertation. Most Namibian interviewees issued their full consent to be named and quoted in print; however, given the intersectional systems of oppression that work in concert to make being a Black LGBTQ+ person a discriminated and disempowered class, I took additional precautions. I only directly name Namibians who have strong pre-existing media profiles in their home country or who engage regularly with the international press. These are individuals who are already very

publicly visible and who would likely not be harmed by appearing in a U.S.-published dissertation. Furthermore, I followed up with subjects a day or two after the interview if I felt that their consent was equivocal or not fully decisive. I recognize that sometimes it is challenging to say "no" to someone in an in-person setting, and I did not want that to dissuade anyone from being able to fully protect themselves or their privacy. Lastly, many respondents made statements to me in confidence, and I pledged to not include that material in my dissertation.

Archival Research

In addition to the interviews, I also conducted archival research at the GALA Queer Archives in Johannesburg and the National Archives of Namibia in Windhoek. According to their website, GALA is dedicated to preserving and disseminating information and material regarding the history and culture of LGBTQ+ people in Southern Africa. I found it to be a valuable source of information; not only were the archives exceptionally well-indexed and organized, but they also included material from a variety of differing sources and were easy to search. The archivist, Linda Chernis, was of immense help and personally offered her knowledge of the files in order to help me with my research. I accessed the National Archives of Namibia considerably less, and most of that material is not included in my dissertation.

Lee (2015) identifies several sources of bias that political scientists may be confronted with when undertaking archival work. These include: confirmation bias, where researchers select only the materials that confirm their theory, primarily due to time constraints; survival bias, where the material that survives long stretches of time to make it into the archives is systematically unrepresentative; transfer bias, where institutional gaps in the material obfuscate key information; and source bias, where governments and academic institutions collect only the documents that they deem worthy. Lee proposes various solutions for the social scientist who,

unlike the historian, does not enjoy extensive amounts of time dedicated to archival work. These include better understanding how the data was created, generating a pre-specified sampling frame, and providing additional context for the reader.

The atypical nature of the GALA Queer Archives mitigates these sources of archival bias. The targeted nature of these archives, along with the high-quality indexing, meant that I was able to review all the files that were related to my research during the two weeks I was there. Most of the material in these archives came from the late 20th and early 21st century and was directly transferred to GALA in 1997 or later, mitigating the survival and transfer biases. Finally, source bias is limited by the fact that this archive is explicitly oriented around LGBTQ+ rights and takes a social justice perspective; a government archive may have balked at much of the material. The existence of the Internet during the time periods under study also led to the inclusion in the archive of many voices who otherwise would not have had a platform. Letters and other informal documents serve this same purpose.

Nevertheless, it is still important to acknowledge that these archives provide an incomplete portrayal of LGBTQ+ life and organizing in Southern Africa. Many aspects of social activism comprise elements that are not written down on paper, and this is undoubtedly only more true for those working on LGBTQ+ issues in Southern Africa in the last decades of the 20th century and the first decades of the 21st. Fortunately, the interviews that I conducted for this project can help mitigate this source of bias by filling in the gaps and clarifying aspects that did not find their way into print. In addition, I was initially worried that the material contained in each organization's collection would paint an overly rosy picture of that organization and their respective cause. However, this was not so; I regularly found material that illustrated internal disagreements (usually in the form of meeting minutes) as well as external criticism (usually

contained in one of the other collections housed in the GALA archives).

On a practical note, I took pictures with my smartphone of all the documents that contained information relevant for my study. I took care to ensure these were high-quality and readable, particularly if the documents had any handwriting on them. When uploading these to my computer, I categorized them thematically and by subject in a way that would facilitate their use in the future. In each folder I also included a document containing my notes related to those particular documents.

Methodological Flexibility

A major thread that encompasses my research for this dissertation is the importance of remaining flexible and adaptable. At several points during the course of my field research, it became necessary to adjust course and deviate from pre-established plans. Sometimes this involved changing interview questions in light of major new information; other times it meant changing an interview to a virtual format because of an interlocutor's Covid exposure. The most important way this impacted my work involved the methods themselves. During my time in Namibia, I found the interview data I was collecting to be exactly what I needed to answer my research questions because the legal activism surrounding LGBTQ+ rights is very active as of the summer of 2022. However, in South Africa, this was not so. Due to the fact that the major legal reforms surrounding LGBTQ+ rights had already occurred in South Africa a generation ago, many of the subjects I found who are working in this area now did not have direct knowledge that could answer my major questions. At the same time, prior to arriving in South Africa, I did not fully appreciate how well-organized and rich the GALA Queer Archives were. It was not until I had already spent a couple days in Johannesburg that I realized that pivoting my primary research focus there from interviews to archival work would most benefit my research

and bring me closer to answering my key questions.

Other scholars too can benefit from this approach. Oftentimes we have received so much training in one particular method, or we adore it so much, that we become wedded to it. Nevertheless, it is important to remember that the first priority should be the questions, the theory, and the empirics, and that the methods are secondary. They are a means to an end, and they should never "swallow" the empirics or get in the way of asking questions we are legitimately interested in.

CHAPTER 3: A CROSS-NATIONAL LOOK AT LGBTQ+ POLICIES

The previous chapters have laid out a theory of LGBTQ+ policy advancements primarily undergirded by the characteristics and actions of activists and judges. Working in concert, these two groups can achieve legal reform even against the backdrop of overwhelming public disapproval. Chapters 4, 5, and 6 of this dissertation provide qualitative evidence for this theory—as well as an exploration of the mechanisms at play—from the Southern African cases of South Africa, Namibia, and Zimbabwe. This chapter, however, introduces an original quantitative dataset of global LGBTQ+ legal rights from 1990 to 2022 and employs it to provide external generalization and to demonstrate statistical, cross-national substantiation for these theoretical underpinnings.

The Dataset

The original LGBTQ+ rights dataset is inspired by the work of Equaldex,[20] a collaborative platform that chronicles and quantifies the status and progression of these rights across all countries and territories. While this website is useful for some research purposes—particularly considering the dearth of quantified information on laws related to the rights of the LGBTQ+ community—it has significant shortcomings. First, the Equality Index that they have created is purely cross-sectional and based solely on current legal realities, thereby rendering impossible the exploration of variation over time. Second, and perhaps most importantly, the Equaldex platform allows nearly anyone to make contributions and changes to the variable codings, even if they have not been verified as an expert on this topic. As a result of these limitations, it quickly became apparent that I would have to collect my own data and create an original panel dataset to be able to provide evidence for the theory laid out in chapter 1.

[20] See https://www.equaldex.com/.

The original dataset I created consists of all 193 UN member states, in addition to Taiwan and the Vatican City, and I include data for all years between 1990 and 2022,[21] with one observation per calendar year for each factor. My primary variable, the Legal Score, is an aggregate indicator, scored from 0 to 100, that combines six factors and weighs them as follows:

1. the legality of homosexuality and same-sex sexual relations: 30%
2. the legality of same-sex marriage or civil unions: 25%
3. anti-discrimination protections in employment, housing, and public accommodations on the basis of sexual orientation and gender identity: 25%
4. the legality of adoption by same-sex couples or LGBTQ+ individuals: 5%
5. the right of LGBTQ+ people to serve openly in the military: 5%
6. the right of transgender people to change their legal gender: 10%

These weightings were influenced by Equaldex's methodology. According to an email exchange with Equaldex coder and contributor Benjamin Applegate, the Equaldex Equality Index was constructed in concert with academic researchers at the Williams Institute at UCLA.[22] Determinations regarding the exact weight of each item or category were made in consultation with expert assessments, and further informed by factor and principal component analyses. Items with a greater material impact on LGBTQ+ people—such a relationship recognition—should enjoy a heavier weight than items with a more transitory impact, such as the right to donate blood. In addition, while many LGBTQ+ policy items are strongly correlated with one another, not all are. For instance, many African countries with conservative LGBTQ+ legal environments lack sodomy laws; this is not because the laws were repealed, but rather because they were never

[21] I selected 1990 as the starting point because that year saw a significant wave of democratization that resulted in widespread changes on the global stage, including the births of several new countries.
[22] See https://williamsinstitute.law.ucla.edu/.

instituted in the first place.[23] Furthermore, a few countries—most notably Pakistan—provide protections for transgender people while simultaneously repressing lesbian, gay, and bisexual people.

While the Equaldex Equality Index includes additional and more granular data, including on such issues as blood donation bans, conversion therapy, and intersex bodily integrity, it was not possible to find information on these for all countries stretching all the way back to 1990. As a result, I adjusted each factor's percentage to remain as faithful as possible to the expert weights of the Equaldex Equality Index. In addition, the six broad categories above provide great coverage; once I finalized my original dataset, I compared the Legal Scores for 2022 for each country with the Equaldex Equality Index scores and found them to be nearly identical in most cases, and within 10 points in 93% of cases.

I gleaned the information necessary to code each variable from online sources; these were mostly news reports, as well as countries' national and governmental websites. The Equaldex project website and contributors were helpful in pointing the way many times when it seemed nearly impossible to find a certain piece of data. Each variable was coded as follows:

1. Legality of same-sex sexual relations: 1 if fully legal, 0.5 if male illegal/female legal (there are no cases of female illegal/male legal), 0 if fully illegal.
2. Same-sex marriage: 1 if equal marriage, 0.5 if civil unions or domestic partnerships, 0 if no recognition.
3. Nondiscrimination protections: 1 if both sexual orientation and gender identity are covered, 0.5 if only one category protected, 0 if no protections.

[23] Most of the former French colonies do not criminalize same-sex sexual relations because France had already repealed its own sodomy ban at the time of colonization. This was not the case with the UK.

4. Adoption: 1 if full joint adoption legal, 0.5 if only step-child or single LGBTQ+ adoption legal, 0 if fully illegal.
5. Military service: 1 if all LGBTQ+ people can serve openly, 0.5 if only LGB may serve openly, 0 if LGBTQ+ people are banned or "Don't Ask, Don't Tell"-style policy in force.
6. Right to change legal gender: 1 if allowed without surgery requirement, 0.5 if allowed but with surgery requirement, 0 if not allowed at all.

Nearly every country either made progress over the observed time period or experienced no change; almost no country regressed. Particularly strong advances were seen across Europe and the Americas, including in such surprising locations as Eastern Europe and South America.[24] Figure 3 below depicts the progress undertaken cross-nationally in each category, while Figures 4 and 5 explore the evolution in the Legal Score by continent. Note that there has been ample progress made over time, while at the same time a tremendous degree of variation exists. Some places that criminalized consensual same-sex sexual relations in 1990, including South Africa, Ireland, and many U.S. states,[25] today sanction same-sex marriages and have robust anti-discrimination protections on their books.

[24] Same-sex marriage is now legal in most of South America and in a couple post-Communist countries in Europe, including Slovenia and Estonia.
[25] Among others.

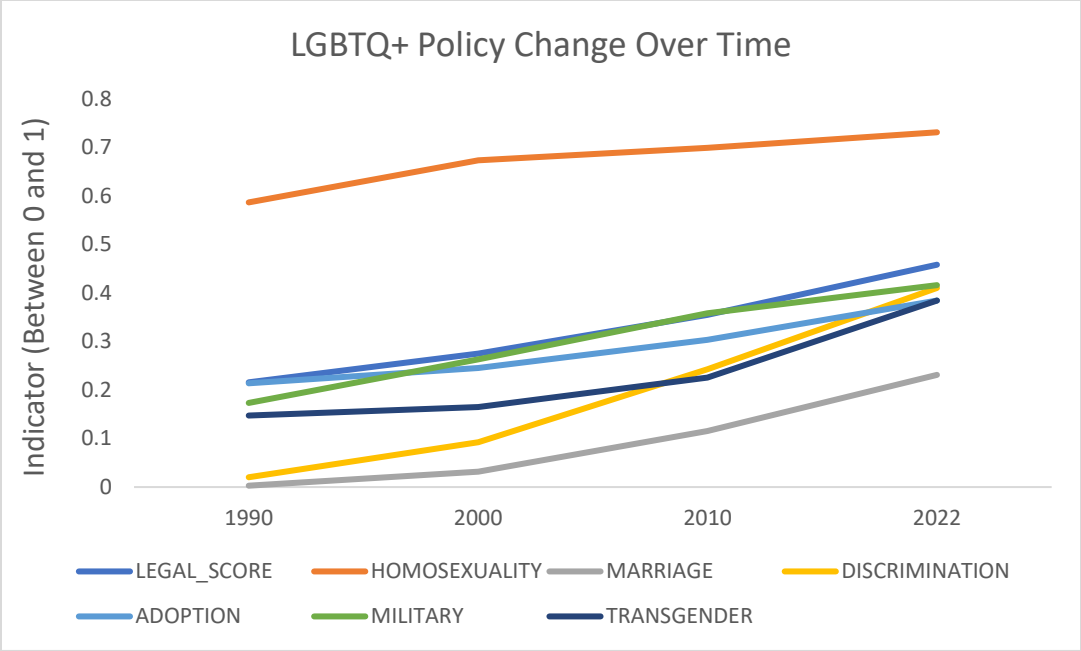


Figure 3: LGBTQ+ Policy Change Over Time

Since 1990, gains have occurred across all surveilled categories. However, they differ in degree. Whereas homosexual conduct was legal across much of the world in 1990 (and hence had less room to liberalize further), same-sex marriage was not legal in any country at that time; in fact, only Denmark recognized civil unions for same-sex couples. As a result, that variable has seen more growth. A particularly rapid increase can be seen in the adoption of anti-discrimination laws, especially after the year 2000. Relatively few countries had these at the turn of the century, whereas today they have been widely adopted—including in many parts of the world that lack any form of relationship recognition, such as most of Eastern Europe.

CONTINENT:

North America, Oceania, South America, Africa, Asia, Europe

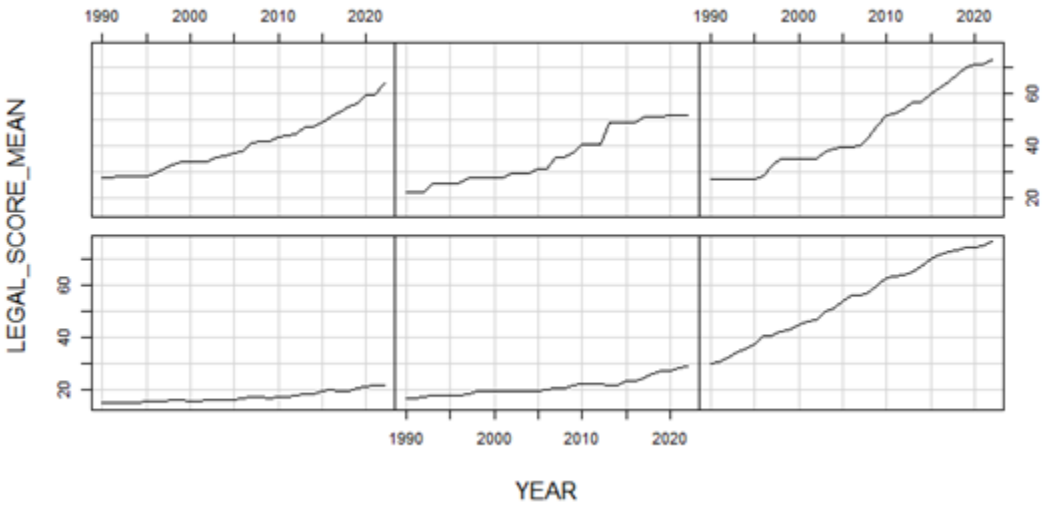


Figure 4: Legal Score by Continent (1)

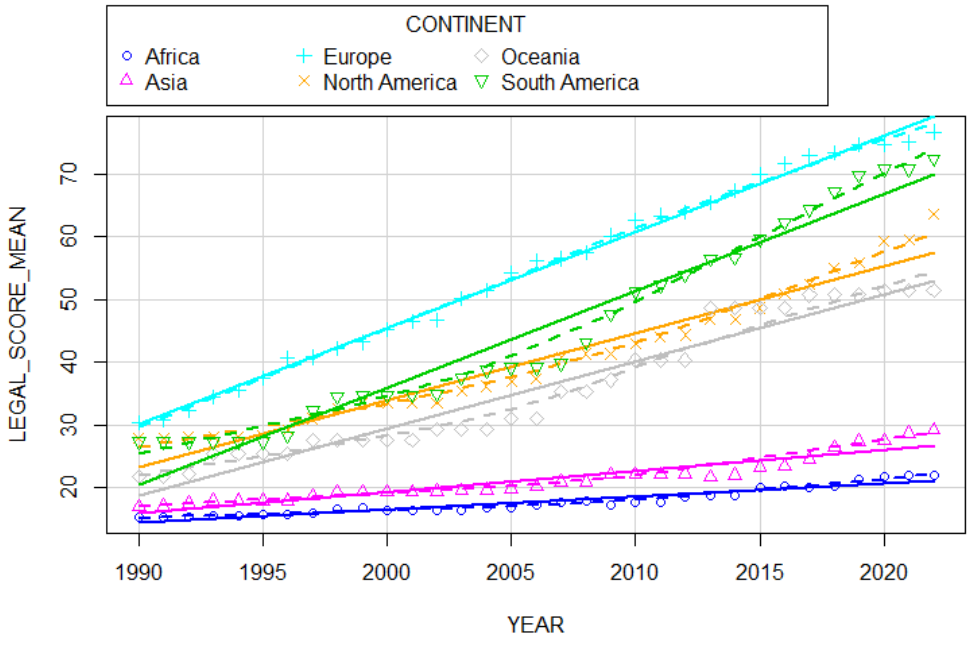


Figure 5: Legal Score by Continent (2)

Since 1990, there has been tremendous progress made on LGBTQ+ legal rights across much of the world, although Africa and Asia have clearly seen fewer advancements. South America was initially behind North America in this regard but has since leapfrogged ahead and now only narrowly trails Europe as the most equal and inclusive continent. It is also worth noting that the sheer sizes of Africa and Asia mask the widescale progress made by countries such as South Africa, Israel, Taiwan, Thailand, Mongolia, Nepal, and others, some of which rival top performers in Europe on the Legal Score.

More specifically, same-sex marriage has been widely legalized across North and South America, Europe, and Oceania, but is almost non-existent in Africa and Asia, where most recent progress has been in the form of the decriminalization of homosexuality. In addition, non-discrimination laws and laws that recognize the legal change of gender also tend to be clustered in the Americas and Europe, as do progressive adoption and military service laws.

Testing the Hypotheses

This dissertation advances two key hypotheses regarding LGBTQ+ policy gains in contexts where public opposition to such rights predominates: 1) that well-organized and strongly institutionalized activist networks are associated with rights advancements, and 2) that strong, independent judiciaries vested with judicial review powers are also associated with rights gains. Notably, the prospect for reform is highest at the nexus of these two hypotheses: namely, in situations where both activist organizations and judiciaries enjoy high levels of organization and power, respectively.

In order to test these hypotheses, it is necessary to locate appropriate proxies for these two metrics. The V-Dem (Varieties of Democracy) Dataset[26] provides researchers with a large

[26] See https://www.v-dem.net/.

number of variables measuring myriad facets of democratic health across states. This includes various candidate variables that can be utilized in comparative studies of judiciaries and activism.

These activism and judicial indicators constitute the main independent variables (or proxies for robustness checks), while the Legal Score from my original dataset is the dependent variable. As discussed in chapter 1, control variables should include level of democracy, level of development, and public opinion toward homosexuality.

Independent Variables

The following four variables from the V-Dem dataset measure key aspects of my theory related to judicial strength and assertiveness:

1. Judicial constraints on the executive index (v2x_jucon)
    a. Question: "To what extent does the executive respect the constitution and comply with court rulings, and to what extent is the judiciary able to act in an independent fashion?"
2. High court independence (v2juhcind)
    a. Question: "When the high court in the judicial system is ruling in cases that are salient to the government, how often would you say that it makes decisions that merely reflect government wishes regardless of its sincere view of the legal record?"
3. Compliance with high court (v2juhccomp)
    a. Question: "How often would you say the government complies with important decisions of the high court with which it disagrees?"
4. Judicial review (v2jureview)

a. Question: “Does any court in the judiciary have the legal authority to invalidate governmental policies (e.g. statutes, regulations, decrees, administrative actions) on the grounds that they violate a constitutional provision?”

The judicial review measure most closely encapsulates the core of my theory, and as such is the best way to operationalize and test the judiciary hypothesis. High court independence is a close second, although it does not measure judicial power. As such, this variable can be used for a robustness check. Future studies can also employ the judicial constraints and/or compliance with high court measures as further robustness checks.

LGBTQ+ activism is in turn more challenging to measure directly. While there are not any variables that do so specifically, the following two variables from the V-Dem Dataset measure key aspects of mobilization and organizing:

1. Mass mobilization (v2cagenmob)
    a. Question: “In this year, how frequent and large have events of mass mobilization been?”
    b. Clarification: “This question concerns the mobilization of citizens for mass events such as demonstrations, strikes and sit-ins. These events are typically organized by non-state actors, but the question also concerns state-orchestrated rallies (e.g. to show support of an autocratic government).”
2. Civil society participation index (v2x_cspart)
    a. Question: “Are major CSOs routinely consulted by policymakers; how large is the involvement of people in CSOs; are women prevented from participating; and is legislative candidate nomination within party organization highly decentralized or made through party primaries?”

b. Clarification: “The sphere of civil society lies in the public space between the private sphere and the state. Here, citizens organize in groups to pursue their collective interests and ideals. We call these groups civil society organizations CSOs. CSOs include, but are by no means limited to, interest groups, labor unions, spiritual organizations if they are engaged in civic or political activities, social movements, professional associations, charities, and other non-governmental organizations. The core civil society index CCSI is designed to provide a measure of a robust civil society, understood as one that enjoys autonomy from the state and in which citizens freely and actively pursue their political and civic goals, however conceived.”

This second indicator constitutes the stronger avenue of operationalizing activist strength, as measuring participation in civil society groups is more similar to activist organization strength than mass mobilization, which is mostly a measure of protest activity. Nevertheless, mass mobilization can and should be used in subsequent robustness checks.

Control Variables

In a study such as this one, the researcher must work to control for various potential confounding variables. As discussed previously, for the purposes of this study these include level of democracy, level of development, and public opinion toward homosexuality. These are the variables that the behavioralist literature treats as the primary determinants of legal progress on LGBTQ+ rights.

I import data on level of democracy from V-Dem. The V-Dem Institute measures several types of democracy, including electoral, liberal, participatory, deliberative, and egalitarian. For the purposes of this study, the most useful are electoral and liberal democracy:

1. Electoral democracy index (v2x_polyarchy)
    a. Question: “To what extent is the ideal of electoral democracy in its fullest sense achieved?”
    b. Clarification: “The electoral principle of democracy seeks to embody the core value of making rulers responsive to citizens, achieved through electoral competition for the electorate’s approval under circumstances when suffrage is extensive; political and civil society organizations can operate freely; elections are clean and not marred by fraud or systematic irregularities; and elections affect the composition of the chief executive of the country. In between elections, there is freedom of expression and an independent media capable of presenting alternative views on matters of political relevance. In the V-Dem conceptual scheme, electoral democracy is understood as an essential element of any other conception of representative democracy—liberal, participatory, deliberative, egalitarian, or some other.”
2. Liberal democracy index (v2x_libdem)
    a. Question: “To what extent is the ideal of liberal democracy achieved?”
    b. Clarification: The liberal principle of democracy emphasizes the importance of protecting individual and minority rights against the tyranny of the state and the tyranny of the majority. The liberal model takes a "negative" view of political power insofar as it judges the quality of democracy by the limits placed on government. This is achieved by constitutionally protected civil liberties, strong rule of law, an independent judiciary, and effective checks and balances that,

together, limit the exercise of executive power. To make this a measure of liberal democracy, the index also takes the level of electoral democracy into account.

For the main model, I employ electoral democracy, as the presence of minority rights protections in national law is an important part of what makes a country a liberal democracy, and this may overlap with the Legal Score measure in complex ways. However, liberal democracy can be used in robustness checks.

Data on level of economic development comes from the United Nation's Human Development Index, which is an aggregate indicator that combines data on health (life expectancy), education (mean years of schooling and expected years of schooling), and gross national income per capita. According to the UN website, the HDI itself is "the geometric mean of normalized indices for each of the three dimensions." This is a much more powerful indicator of human development than other traditional indicators, such as GDP per capita, which gives an incomplete picture of how the members of a society are faring and progressing.

Unfortunately, comprehensive, cross-national public opinion data on LGBTQ+ rights are not currently available. In addition, different indices ask very divergent questions: some inquire about support for same-sex marriage rights, while others only ask if the respondent is comfortable with having a gay neighbor. Potential proxies that can be used to measure this include level of religiosity or degree of political repression. However, both of these also present myriad problems. Regularity of religious attendance correlates surprisingly poorly with attitudes toward LGBTQ+ rights in many contexts.[27] For instance, in the Russian Federation—a perennial low scorer in both LGBTQ+ policy and public opinion toward LGBTQ+ rights—only 16% say that religion is very important to them, according to the Pew Research Center. Conversely, most

[27] See https://www.pewresearch.org/religion/2018/06/13/how-religious-commitment-varies-by-country-among-people-of-all-ages/.

South Americans are religious and yet tend to support same-sex marriage rights at much higher levels. In addition, political repression or human rights data are also inadequate proxies. The citizens of many politically repressive regimes, including Cuba, Thailand, and Vietnam, are supportive of LGBTQ+ rights, while the reverse is true in many free societies, including South Korea, Croatia, and Panama.

As a result of these challenges and lack of appropriate data, it was not possible to control for public opinion toward homosexuality in this study, and this certainly constitutes a limitation of this research. In the very least, level of democracy and level of development are known to be highly correlated with public opinion toward homosexuality, and this should provide some partial coverage; this is even more true with liberal democracy specifically, which I employ as part of the robustness checks. Future studies should certainly attempt to correct for this shortcoming. Nevertheless, a central argument of this dissertation is that the overall contribution of public opinion to social change is less than some research presupposes, and therefore a lack of a control for public opinion in the present study is less concerning than it appears *prima facie*.

The Model and Regression Results

After conducting a Hausman test,[28] it became clear that a one-way fixed effects panel data model, with country-year fixed effects, would be most appropriate[29] for this study:

$$Yit=\alpha+\beta 1Xit+ui+eit$$

In this model, an outcome Y (the Legal Score) and the independent variables (judicial review and civil society participation) X are observed for each country over multiple years from

[28] A Hausman test is used to decide between a random effects and a fixed effects model. It tests whether the unique errors are correlated with the regressors, and if they are, a fixed effects model should be used. See https://libguides.princeton.edu/R-Panel#:~:text=To%20decide%20between%20fixed%20or,hypothesis%20is%20they%20are%20not.

[29] Note that Pooled OLS would not have worked here because that model is used when different samples are taken at different points in time.

1990 to 2022, and a "mutually exclusive intercept shift, α, is estimated for each unit i to capture the distinctive, time-invariant features of each unit. This results in an estimate of β that is purged of the influence of between-unit time-invariant confounders" (Mummolo and Peterson, 2018).

In the first model, the dependent variable—the Legal Score—is regressed on these two key independent variables listed above (judicial review and civil society participation) as well as the two control variables (electoral democracy and human development index).

In the second model, which constitutes the key test of my theory, I include an interaction term: judicial review x civil society participation. According to my theory, a vital component of the advancement of LGBTQ+ rights in conservative societies is the nexus of strong judiciaries and healthy activist organizations. In other words, one factor should enhance the effect of the other.

In the third model, I include a lag of the dependent variable as a control. Since a main determinant of a country's current LGBTQ+ policy is that country's policies last year, including a lagged indicator is a useful way of reducing autocorrelation in the model (Wilkins, 2018). However, since lagged dependent variables are such good predictors of outcomes, their inclusion in models can improve the fit dramatically and cause the other coefficients to fall to insignificant levels (Achen, 2000). As a result, I opt to show my regression results both with and without the lagged variable.

In the fourth model, I replicate the second model, but only for African countries. Since this dissertation primarily centers the experiences of Africans and of African states, I believe it to be important to also present separate regression results for that continent here also. Finally, the fifth model also adds a lagged variable to the Africa-only model.

Next, I present a graph of the interaction term from Model 2. Parallel lines would indicate

that no interaction occurs, while nonparallel lines indicate that the respective variables enhance the other's effects, and that an interaction exists. The more nonparallel the lines are, the greater the strength of the interaction.[30]

Finally, I conduct several robustness checks to test structural validity, and I substitute other V-Dem variables. The first three checks replicate Models 1-3, but instead of utilizing judicial review and civil society participation, they employ judicial independence and mass mobilization as the operationalizations for judicial and activist strength. Checks 4 and 5 substitute liberal democracy for electoral democracy as the main democracy control.

[30] See https://medium.com/analytics-vidhya/the-significance-of-interaction-plots-in-statistics-6f2d3a6f77a3.

Regression Results (Country-Year Fixed Effects)

Dep. Variable: Legal Score (0-100)	**Model 1**	**Model 2 (with interaction term)**	**Model 3 (with lagged dep. var.)**	**Model 4 (Africa only)**	**Model 5 (Africa only, with lag)**
Independent Variables					
Judicial Review	**2.881*** (0.423)**	**3.856*** (0.433)**	0.265* (0.157)	**4.536*** (0.552)**	0.513* (0.205)
Civil Society Participation	**1.887*** (0.407)**	-0.401 (0.437)	-0.054 (0.154)	0.994* (0.531)	-0.063 (0.195)
Jud. Review x Civ. Soc. Part		**2.153*** (0.241)**	**0.195** (0.087)**	**1.727*** (0.269)**	**0.193** (0.1)**
Control Variables					
Lagged Legal Score			**0.946*** (0.005)**		**0.944*** (0.009)**
Electoral Democracy	**9.535*** (2.295)**	**12.63*** (2.303)**	-0.594 (0.816)	**10.337*** (3.202)**	0.225 (1.181)
Human Development Index	**123.723*** (3.221)**	**123.418*** (3.196)**	**9.181*** (1.27)**	**13.945*** (4.239)**	2.912* (1.522)
R-Squared	0.25606	0.26773	0.9128	0.1181	0.88801
Adj. R Squared	0.23059	0.2425	0.9097	0.084797	0.8836
Observations	5196	5196	5196	1540	1540

* significant at 10% level; ** 5% level, * 1% level

Table 4: Regression Results

Interaction Effect

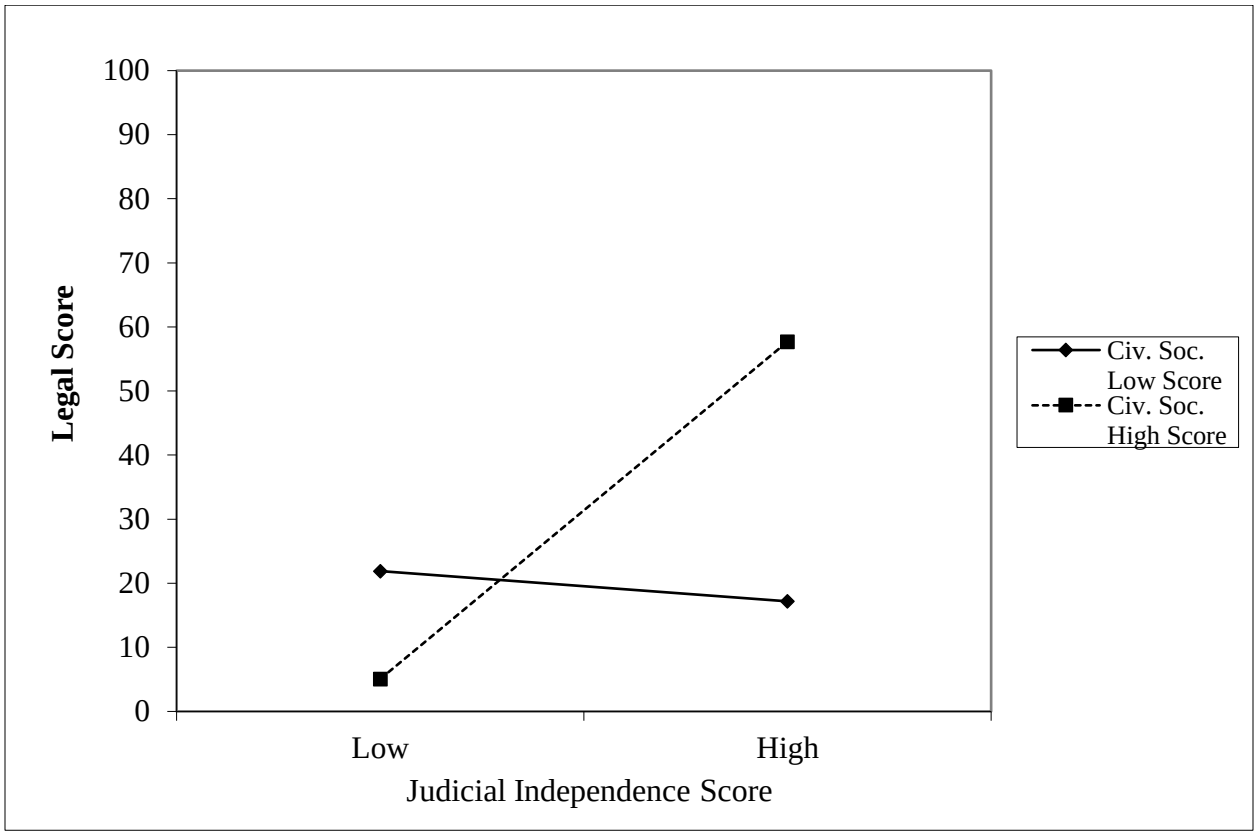


Figure 6: The Interaction Effect

Robustness Checks

Dep. Variable: Legal Score (0-100)	**(1)**	**(2) (with interaction term)**	**(3) (with lagged dep. var.)**	**(4) (with liberal democracy)**	**(5) (liberal democracy, with lag)**
Independent Variables					
Judicial Independence	**2.218*** (0.392)**	**2.309*** (0.39)**	0.379* (0.157)	**2.475*** (0.426)**	0.387* (0.147)
Mass Mobilization	**0.079** (0.217)**	0.04 (0.216)	-0.007 (0.075)	0.031 (0.216)	-0.007 (0.075)
Jud. Indep. x Mass Mobil.		**1.618*** (0.212)**	**0.169** (0.077)**	**1.727*** (0.211)**	**0.182** (0.076)**
Control Variables					
Lagged Legal Score			**0.947*** (0.005)**		**0.947*** (0.005)**
Electoral Democracy	**15.782*** (2.38)**	**13.87*** (2.38)**	1.577* (0.839)		
Liberal Democracy				**14.772*** (2.829)**	-1.576 (0.992)
Human Development Index	**127.217*** (3.18)**	**129.493*** (3.175)**	**9.729*** (1.267)**	**129.16*** (3.177)**	**9.669*** (1.267)**
R-Squared	0.25178	0.26045	0.91345	0.91333	0.91343
Adj. R Squared	0.22593	0.23475	0.91034	0.91024	0.91032
Observations	5196	5196	5196	5196	5196

* significant at 10% level; ** 5% level, * 1% level

Table 5: Robustness Checks

Discussion

The first model results indicate that judicial review and civil society participation are significant, with both coefficients presenting in the expected (positive) direction. Both activists and judges play important and independent roles in protecting and advancing LGBTQ+ rights. However, my theory proposes that the interaction of these two variables mutually strengthens each factor.

In Model 2, the main test of my theory, the interaction term is itself significant, providing substantiation to the notion that the nexus of judges and activists matters in a way that is separate from their respective individual actions. Interestingly, the significance of civil society participation drops away here but that of judicial review does not, indicating perhaps that activists need judges in a way that judges do not need activists. If members of a judiciary firmly believe a certain policy to be constitutionally unsound, they can invalidate it without consulting activists or organizers. However, activists themselves cannot change the law without convincing someone in a position of authority of the merits of their claims. In Fig. 6 above, I plot the interaction effect in Model 2. The strongly nonparallel nature of the lines indicates that the strength of this interaction is high.

In Model 3, I add a lag of the Legal Score as a control variable in order to address autocorrelation concerns. As warned by Christopher Achen in a 2000 paper, the fit of the model becomes abnormally good, and the coefficients of the other variables fall in significance. Indeed, the R-squared value increases to above 0.9, indicating that nearly *all* of the observed variance is explained by the model. Nevertheless, the interaction term remains significant at the 5% level, further substantiating the strength of this relationship.

Model 4 demonstrates that the story in Africa is much the same as that of the rest of the

world, with higher levels of judicial review and civil society participation being positively associated with improvements in the LGBTQ+ Legal Score across time. However, it should be noted that R^2 drops quite significantly from the other models to this one, indicating that less of the variation is explained by the model. The main reason for this is that colonial legacy plays an outsized role with regards to African LGBTQ+ policy. Many African countries are differentiated on the Legal Score only by the legality or illegality of same-sex sexual conduct, and former British colonies tend to have sodomy bans on the books, while former French and Portuguese colonies tend not to. The fifth and final model introduces a lag to the Africa-only model, and the results are similar to those of Model 3.

The robustness checks in Table 5 show that substituting judicial independence and mass mobilization in place of judicial review and civil society participation as the key independent variables does little to change the overall results. The same holds true when liberal democracy is used instead of electoral democracy. Utilizing these alternate specifications helps to provide additional support for the model findings by showing that substituting the regressors with alternative measures did not result in radical shifts in the overall results.

These findings provide evidence that, taken in concert with the qualitative data presented in the following three chapters, provides substantiation for the theory advanced in chapter 1. The strength of judiciaries and activist networks, and their work in concert, is key to advancing LGBTQ+ legal equality. Indeed, over the past several decades, they have successfully done so in numerous places deemed unlikely by prevailing explanations and existing literature, including in South Africa and throughout Latin America. This study extends prior research on LGBTQ+ rights by introducing both a) a time-series dimension, and b) a novel approach to studying this issue that highlights the roles played by actors outside the elected political sphere.

These quantitative findings serve the purpose of providing external generalizability to the present study. This is important in allowing for inferences to be made about broad populations and in providing evidence demonstrating that the mechanisms discussed in the following chapters apply to contexts beyond Africa. The qualitative case studies that follow focus more, in turn, on elucidating the causal mechanisms that underpin the theory in chapter 1.

This quantitative study has some limitations, however, that should be addressed by future research. First and foremost, I was unable to control for public opinion toward homosexuality, and future studies should tackle this shortcoming forthwith. Second, better measures could certainly be devised with which to operationalize the key indicators. In particular, indices should be constructed compiling data from multiple sources beyond V-Dem. In addition, collecting more granular data on LGBTQ+ rights would certainly be helpful. This could include data on the other Equaldex measures not studied here, or it could perhaps be regional-level data. In the latter case, models should be run using clustered standard errors (Beck and Katz, 1995; Beck, 2001). Additional studies are also needed looking exclusively at transgender rights.

CHAPTER 4: EARLY WINS FOR LGBTQ+ EQUALITY IN SOUTH AFRICA

In today's Republic of South Africa, LGBTQ+ people enjoy significant legal rights and freedoms. These include legal same-sex marriage since 2006 and a constitutional ban on discrimination on the basis of sexual orientation since 1994 (Thoreson, 2008; Hoad, 2005). This is despite the fact that, according to a white, male-identified activist in Cape Town, "…probably fewer than 10% of South Africans wanted gay marriage to be legal in 2006" (personal interview with author, 2022). What explains this clear and stark incongruence between the law and the public attitudes writ large? South Africa is a prime example of a case where a well-organized and well-connected activist movement, in interaction with a strong, independent judiciary, enabled the country to proceed beyond what its statistical priors would presage.

LGBTQ+ Activism in South Africa: Historical Roots and Racial Divides

Organized LGBTQ+ activism in South Africa predates the 1969 Stonewall riots in New York City, an indication of the long-lived nature of this social, legal, and political struggle for equality. In the 1960s, South Africa was in the midst of an era of deeply entrenched state-promoted discrimination against, and disenfranchisement of, Black South Africans. The apartheid government, led by the right-wing National Party, was not only virulently racist, but also deeply homophobic and socially conservative.

In 1966, a party of predominantly white, gay men occurred in the affluent Johannesburg suburb of Forest Town. In attendance were roughly 350 people, many of whom were prominent members of the local LGBTQ+ community, including doctors, lawyers, and businessmen. A raid by the South African police led to multiple arrests and to a mass moral panic that swept through the highest levels of national government. According to a Coloured Johannesburg-based activist,

> Forest Town was the turning point. They came after us…invaded our personal spaces and private events…and decided to make the laws even more cruel and unjust and disgusting.

> It was when we were able to come together as a community and fight back! (personal interview with author, 2022).

Indeed, the raid brought about parliamentary proposals for sweeping new anti-gay laws. While same-sex sexual relations were already criminalized in South Africa, the new proposals went further, criminalizing homosexuality itself and, for the first time, targeting lesbians as well. A fact-finding report presented to the House of Assembly as part of the debate on the Immorality Amendment Bill (1968) makes the following declaration regarding the Forest Town raids: "The scene which took place on the evening described was such that it filled even hardened members of the Criminal Investigation Department with disgust and revulsion" ("Immorality Amendment Bill" files, GALA, accessed 2022). The report is replete with various other homophobic and transphobic pronouncements meant to foment support for the proposed legislation.

As a result of the raid and the subsequent legislative proposals, the Homosexual Law Reform Fund was founded in 1968 to challenge the draconian bill, a crucial early step. Referring to these early efforts to organize LGBTQ+ people in South Africa, the Johannesburg activist emphasizes:

> We were so divided as a community back then…Black fought against white…men against women. Most of those first organizations took no position against apartheid—can you imagine? They said we will fight for gay and lesbian rights—*white* gays and lesbians—but we're just not going to give a damn about the Black people in this country (personal interview with author, 2022).

The activist goes on to mention that Black LGBTQ+ people were doubly oppressed:

> Not only were [they] systematically excluded from the benefits of citizenship by apartheid, they were also disenfranchised by the anti-gay laws *and* by the unwillingness of white gay and lesbian organizations to fight for their rights.

In the 1970s, gay bars, clubs, and other meeting spaces began to proliferate in urban, white South Africa (Gevisser and Cameron, 1995). In part inspired by similar trends in Europe and North America, these new spaces reflected an increase in the economic wealth of white

South Africa. However, Black LGBTQ+ people were neither welcome in these bars, nor did they have the economic and monetary resources necessary to access them. In 1982, the Gay Association of South Africa (GASA) was founded with the goal of reducing prejudice against gay people in the country. Strikingly, this organization claimed to be "apolitical" and took no stance on apartheid or Black civil rights. Instead, it focused on serving as a safe space for white gays and lesbians, and even offered counseling services ("Edwin Cameron" files, GALA, accessed 2022). According to a white, female-identified historian in Johannesburg,

> The goal of GASA was to organize white gay men while excluding women and Black, Coloured, and Asian people. What exactly they were organizing them to do, I am not sure. They claimed to be apolitical. They even cracked down against Blacks and used racist rhetoric against them (personal interview with author, 2022).

The apex of this divide between white and Black LGBTQ+ people was reached in 1987 with the election of Leon de Beer to Parliament. This parliamentarian, a straight, while male, paradoxically supported gay rights *and* the apartheid system concurrently. As the historian described,

> Mr. de Beer was a National Party candidate in Hillbrow, which at that point was a gayborhood. He actually took a position in favor of gay rights while at the same time he continued supporting apartheid. He even wanted to go farther and make Hillbrow a whites-only area yet again (personal interview with author, 2022).

This event points to both the increasing political and electoral power of the gay community as well as the deep divides that systematically excluded and disenfranchised Black LGBTQ+ people. White gay men had been able to establish a degree of organizational and institutional influence that even the ultraconservative National Party felt obliged to respect, and yet they wielded that power in profoundly discriminatory ways during the apartheid years.

Transitions and New Organizations

By the mid-to-late 1980s, Black and white progressive LGBTQ+ activists had grown

increasingly frustrated with the inability of existing organizations to engage in intersectional activism, and many began to realize that new advocacy networks were needed that advanced the concerns of the community *and* took a strong anti-apartheid position. In this spirit, a group of activists founded Lesbians and Gays Against Oppression (LAGO) in Cape Town in 1986 (Gevisser and Cameron, 1995). According to a flier issued by the group, LAGO's stance was that the "fights against racism and homophobia are one struggle" ("LAGO-OLGA" files, GALA, accessed 2022). Shortly thereafter, in 1988, three Black activists founded the Gay and Lesbian Organization of Witwatersrand (GLOW). GLOW was a predominantly Black, working-class LGBTQ+ organization in the Johannesburg area that also took an unapologetically anti-apartheid and pro-liberation stance. Within its founding constitution, a statement of general principles declares unequivocally, "There are three non-negotiable principles; non-racism, non-sexism, and non-heterosexism" ("GLOW" files, GALA, accessed 2022). A newsletter in the same file states, "[GLOW] commits itself to fight for gay and lesbian rights in solidarity with the struggles of all oppressed peoples in South Africa."

Other documents further elaborate on GLOW's intersectional and anti-racist stance and activism, including plans for marches, sit-ins, letter writing campaigns, international conferences, support for those with HIV/AIDS, and much more. Throughout these files runs a clear line of intersectional awareness and intentionality. A document entitled, "How to Run a Workshop" centers anti-racism as a value and entreats activists to consider the racial impacts of their language and leadership styles. Given the white-centric nature of prior South African LGBTQ+ movements, the approach and inclusivity of GLOW was innovative and revolutionary. As an activist in Johannesburg explained,

> GLOW was a very significant and important organization. For the first time in South African history, you had a group of people who came together to fight for and uplift the

voices of our Black LGBT brothers and sisters (personal interview with author, 2022). This respondent went on to explain how the LGBTQ+ organizations that were appearing on the scene at the time—not just GLOW—took on increasingly complex tasks, including setting up pride parades, providing social services, organizing letter-writing campaigns, applying political pressure, providing safe spaces for people in the community, and making connections with the African National Congress (ANC). As early as 1990, four full years before Nelson Mandela took office as president, LAGO/OLGA was already sending letters to the liberationist ANC demanding the inclusion of sexual orientation in a non-discrimination clause in any new constitution ("LAGO-OLGA" files, GALA, accessed 2022).

Of great importance at this time was the activist Simon Nkoli, the founder of GLOW. A Black Sesotho speaker and anti-apartheid activist, Nkoli had joined the white-dominated GASA. Given this organization's staunch refusal to take a stance on "political" issues, including race and apartheid, the board had voted to refuse to recognize or aid Nkoli's activism (Gevisser and Cameron, 1995; Currier, 2012). According to a Black, male-identified activist based in Johannesburg,

> Simon was incensed. How could an organization for gay people refuse to recognize the rights of Black people? He created GLOW to remedy this burning injustice (personal interview with author, 2022).

At the same time, Nkoli was changing attitudes among Black anti-apartheid organizers and ANC members regarding the rights of LGBTQ+ people. He had been arrested for his anti-apartheid activities under a broad security law alongside twenty-one others in 1985 (Gevisser & Cameron, 1995; Thoreson, 2008). After he was sentenced to death in the Delmas Treason Trial,[31]

[31] The Delmas Treason trial was a lengthy trial held in South Africa in December 1988 that accused 22 individuals of treason and imposed harsh penalties as a result of anti-apartheid activism (South Africa Conspiracy Trial Decision Collection, 1984-1988).

he came out as gay. Since he was widely respected at that point, his coming out had a major effect on the attitudes and beliefs of other Black activists. As per the Johannesburg activist,

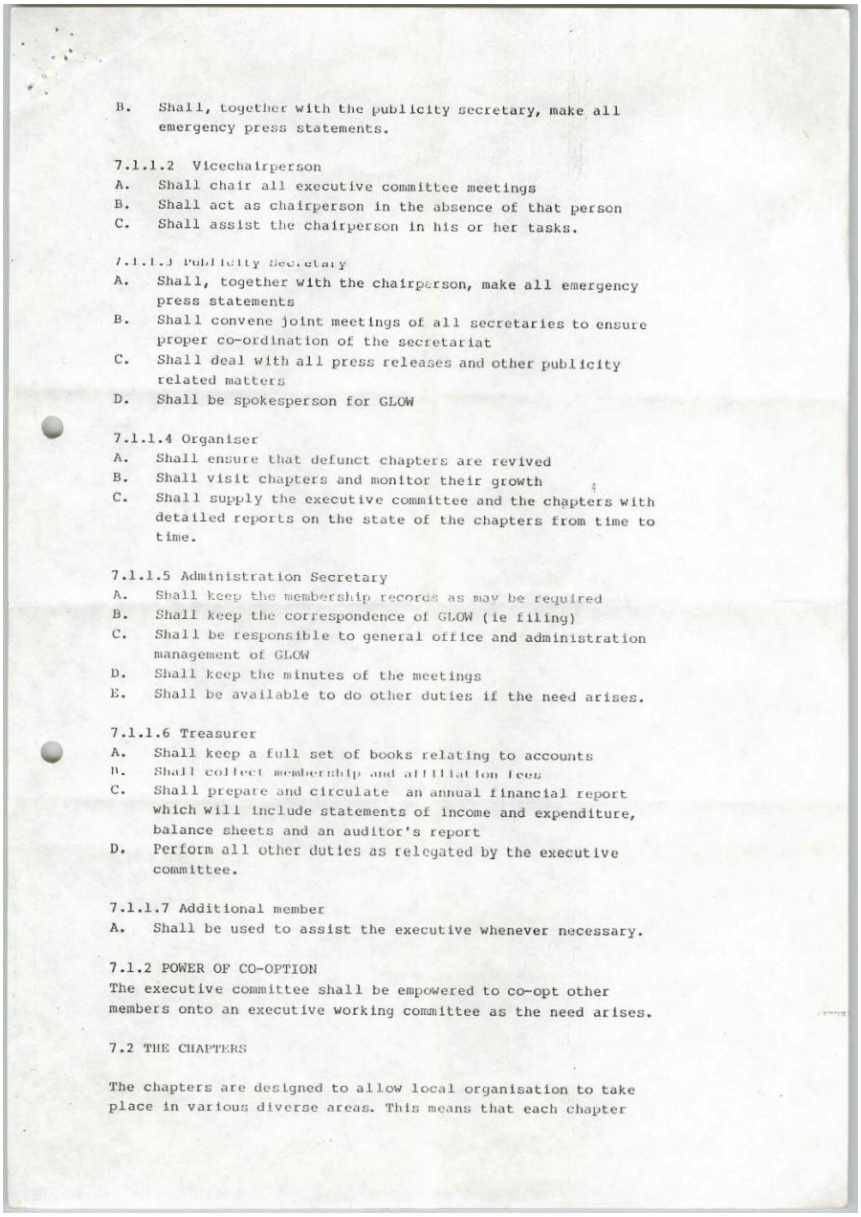
> Simon was a brave freedom fighter, and by coming out, he made a really transformative statement. It really changed how some people in the UDF and ANC saw gay people (personal interview with author, 2022).

Documents within the LAGO/OLGA files further support this finding (GALA, accessed 2022). An interview from 1989 with several Nkoli supporters indicates that some of them had their minds changed by his coming out: "I had always thought of them as depraved individuals. But I had a lot of respect for Simon, so maybe I had my mind a bit changed by that whole episode."

Nkoli was released from prison in 1988 and founded GLOW that same year.

Movement Organization, Resourcefulness, and Adaptability

Given how long LGBTQ+ organizations had existed in South Africa, it is perhaps not surprising that by the late 1980s and early 1990s, they were becoming reasonably sophisticated in their organizational capacities. These activist organizations typically had chairs, vice chairs, treasurers, organizers, and recruiters, as well as secretaries and other administrative personnel. Figure 7 depicts a page from the GLOW organizational files indicating some of these key roles ("GLOW" files, GALA, accessed 2022). Other organizations and associations of the era also typically had such by-laws that institutionalized clear roles and responsibilities.



B. Shall, together with the publicity secretary, make all emergency press statements.

7.1.1.2 Vicechairperson
A. Shall chair all executive committee meetings
B. Shall act as chairperson in the absence of that person
C. Shall assist the chairperson in his or her tasks.

7.1.1.3 Publicity Secretary
A. Shall, together with the chairperson, make all emergency press statements
B. Shall convene joint meetings of all secretaries to ensure proper co-ordination of the secretariat
C. Shall deal with all press releases and other publicity related matters
D. Shall be spokesperson for GLOW

7.1.1.4 Organiser
A. Shall ensure that defunct chapters are revived
B. Shall visit chapters and monitor their growth
C. Shall supply the executive committee and the chapters with detailed reports on the state of the chapters from time to time.

7.1.1.5 Administration Secretary
A. Shall keep the membership records as may be required
B. Shall keep the correspondence of GLOW (ie filing)
C. Shall be responsible to general office and administration management of GLOW
D. Shall keep the minutes of the meetings
E. Shall be available to do other duties if the need arises.

7.1.1.6 Treasurer
A. Shall keep a full set of books relating to accounts
B. Shall collect membership and affiliation fees
C. Shall prepare and circulate an annual financial report which will include statements of income and expenditure, balance sheets and an auditor's report
D. Perform all other duties as relegated by the executive committee.

7.1.1.7 Additional member
A. Shall be used to assist the executive whenever necessary.

7.1.2 POWER OF CO-OPTION
The executive committee shall be empowered to co-opt other members onto an executive working committee as the need arises.

7.2 THE CHAPTERS

The chapters are designed to allow local organisation to take place in various diverse areas. This means that each chapter

Figure 7: GLOW Organizational Roles

With regards to funding, the Johannesburg activist notes the importance of strong transnational ties with concurrent movements in Europe and North America:

> Many of the wealthy gays of Joburg and Cape Town were medical and legal professionals, and they had traveled to London and New York and all these cities (personal interview with author, 2022).

The interviewee goes on to discuss how wealthy and upper-middle-class LGBTQ+ South Africans not only provided financing for the movement at home but also informed the tactics of

the movement by incorporating similar approaches from Western countries. A set of letters between liberal South African Member of Parliament Helen Suzman[32] and an activist named "Peter" follows a 1986 exchange in which they discuss potential ways to repeal the country's discriminatory sodomy ban; Peter notes what he saw was taking place in the U.S. subsequent to the Supreme Court's refusal to invalidate the sodomy bans in *Bowers v. Hardwick* that same year ("Kevan Botha" files, GALA, accessed 2022). Other documents and newspaper clippings indicate that American and European LGBTQ+ rights groups were even holding some fundraisers for their South African counterparts.

In addition to a strong level of organization and resourcefulness borne out of the organizations' long experience in the fight for equality, they also remained remarkably nimble and adaptable. In particular, while the election of Leon de Beer in 1987 and the exchange of letters with Helen Suzman in 1986 indicate a desire to attempt to achieve LGBTQ+ law reform from within the elected political system, most activists learned quite quickly that this was emphatically *not* going to bear fruit, as the National Party largely maintained its socially conservative stances. Instead, an academic in Pretoria notes that LGBTQ+ organizations and activists pivoted towards two avenues that were more likely to bring success: 1) allying the movement with the broader anti-apartheid struggle and the African National Congress in particular in order to have a seat at the table in a post-apartheid South Africa, and 2) working through the courts rather than trying to persuade Parliament (personal interview with author, 2022). The focus on the ANC in particular blossomed in this era as it became clear that the apartheid regime was coming under severe strain and a new system of governance would have to be brought into fruition.

[32] Helen Suzman was a South African Member of Parliament who served between 1953 and 1989 in the whites-only House of Assembly. For many years, she was the only consistent voice against apartheid in the Parliament.

The ANC and the New Constitution

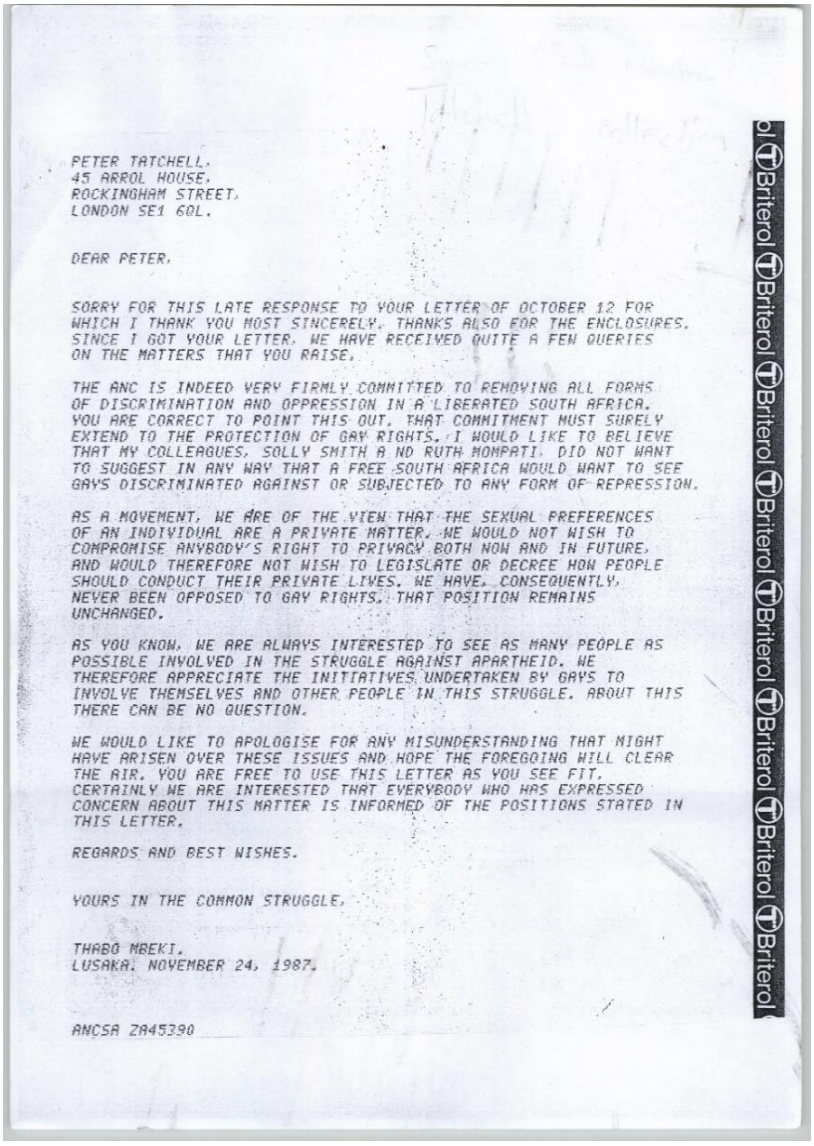
In the late 1980s, the position of the African National Congress on LGBTQ+ rights reflected public sentiment on the matter. While Nelson Mandela's party advanced a socialist, anti-racist political ethic, this liberationist sentiment did not extend to LGBTQ+ rights, according to a Cape Town academic (personal interview with author, 2022). Indeed, prominent ANC voices contributed to the dominant heterosexist and homophobic narratives of the time. Winnie Madikizela-Mandela, the former wife of Nelson Mandela, horrified many in the movement with her repeated homophobic statements (Currier, 2012). At a major trial taking place between 1991 and 1993, she repeatedly made virulently homophobic statements alleging that she had "saved" four Black men from homosexuality and that homosexuality itself was a colonial import. According to the Cape Town academic, Mandela's statements were not condemned by the ANC leadership. At the same time, other high-ranking members of the party continued to make statements indicating their opposition to LGBTQ+ rights (Hoad et al., 2005). Ruth Mompati, for instance, stated that she could not understand why people "wanted" lesbian and gay rights, declaring that gays were wealthy and privileged; other leaders ranged in their stances from announcing their belief that LGBTQ+ people are not "normal" to simply saying they had no comment at all on the matter ("LAGO-OLGA" files, GALA, accessed 2022).

And yet, if ANC leaders held homophobic views that reflected the dominant attitudes of members of the public, why is it that sexual orientation was added to the Equality Clause of the 1996 Constitution as grounds for non-discrimination? After all, the country had elected an ANC government led by Nelson Mandela in 1994 subsequent to the repeal of the apartheid laws in the preceding years. The answer lies primarily in a well-organized and sustained activist movement that changed attitudes among a small handful of key ANC players.

Prominent ANC leaders such as Thabo Mbeki and Cyril Ramaphosa spent much of the later apartheid period in exile in London and in Lusaka, Zambia. According to a U.S.-based white female academic,

> ANC leaders interacted with a milieu of "cosmopolitan" leftists and progressives in London, which socialized them into a pro-LGBTQ+ rights worldview (personal interview with author, 2022).

Some had already begun to modify their views as a result of Simon Nkoli's coming out after being charged with treason in the Delmas Treason Trial. British gay rights activists, most notably Peter Tatchell, were active both in the international anti-apartheid struggle *and* in a much more covert campaign to convince the leadership of the African National Congress to enshrine LGBTQ+ rights into law once they came to power in a new South Africa. An exchange of letters between Tatchell and future president Thabo Mbeki underscores this approach, as Mbeki came to state that the ANC saw gay rights as part of the broader freedom struggle that it had been engaging in ("Peter Tatchell" files, GALA, accessed 2022). Nevertheless, at the time of this 1987 letter (see Figure 8), Mbeki emphasized that "sexual preferences…are a private matter," perhaps couching his language in caution in order to not upset the more conservative ANC base.



PETER TATCHELL,
45 ARROL HOUSE,
ROCKINGHAM STREET,
LONDON SE1 6QL.

DEAR PETER,

SORRY FOR THIS LATE RESPONSE TO YOUR LETTER OF OCTOBER 12 FOR WHICH I THANK YOU MOST SINCERELY. THANKS ALSO FOR THE ENCLOSURES. SINCE I GOT YOUR LETTER, WE HAVE RECEIVED QUITE A FEW QUERIES ON THE MATTERS THAT YOU RAISE.

THE ANC IS INDEED VERY FIRMLY COMMITTED TO REMOVING ALL FORMS OF DISCRIMINATION AND OPPRESSION IN A LIBERATED SOUTH AFRICA. YOU ARE CORRECT TO POINT THIS OUT, THAT COMMITMENT MUST SURELY EXTEND TO THE PROTECTION OF GAY RIGHTS. I WOULD LIKE TO BELIEVE THAT MY COLLEAGUES, SOLLY SMITH A ND RUTH MOMPATI, DID NOT WANT TO SUGGEST IN ANY WAY THAT A FREE SOUTH AFRICA WOULD WANT TO SEE GAYS DISCRIMINATED AGAINST OR SUBJECTED TO ANY FORM OF REPRESSION.

AS A MOVEMENT, WE ARE OF THE VIEW THAT THE SEXUAL PREFERENCES OF AN INDIVIDUAL ARE A PRIVATE MATTER. WE WOULD NOT WISH TO COMPROMISE ANYBODY'S RIGHT TO PRIVACY BOTH NOW AND IN FUTURE, AND WOULD THEREFORE NOT WISH TO LEGISLATE OR DECREE HOW PEOPLE SHOULD CONDUCT THEIR PRIVATE LIVES. WE HAVE, CONSEQUENTLY, NEVER BEEN OPPOSED TO GAY RIGHTS. THAT POSITION REMAINS UNCHANGED.

AS YOU KNOW, WE ARE ALWAYS INTERESTED TO SEE AS MANY PEOPLE AS POSSIBLE INVOLVED IN THE STRUGGLE AGAINST APARTHEID. WE THEREFORE APPRECIATE THE INITIATIVES UNDERTAKEN BY GAYS TO INVOLVE THEMSELVES AND OTHER PEOPLE IN THIS STRUGGLE. ABOUT THIS THERE CAN BE NO QUESTION.

WE WOULD LIKE TO APOLOGISE FOR ANY MISUNDERSTANDING THAT MIGHT HAVE ARISEN OVER THESE ISSUES AND HOPE THE FOREGOING WILL CLEAR THE AIR. YOU ARE FREE TO USE THIS LETTER AS YOU SEE FIT. CERTAINLY WE ARE INTERESTED THAT EVERYBODY WHO HAS EXPRESSED CONCERN ABOUT THIS MATTER IS INFORMED OF THE POSITIONS STATED IN THIS LETTER.

REGARDS AND BEST WISHES.

YOURS IN THE COMMON STRUGGLE,

THABO MBEKI,
LUSAKA, NOVEMBER 24, 1987.

ANCSA ZA45390

Figure 8: Letter from Mbeki to Tatchell

At the same time, LGBTQ+ activist networks within South Africa organized for an inclusive equality clause within the constitution. The OLGA files indicate that by 1990, a concerted effort to convince the ANC to add sexual orientation to the constitution was underway ("LAGO-OLGA" files, GALA, accessed 2022). Reflecting the strategy of British gay rights campaigners to mainly target higher-level ANC officials who were more progressive on the issue, letters from OLGA to the ANC were mainly directed at the executive leadership. By 1994, the National Coalition for Gay and Lesbian Equality (NCGLE) was formed by a broad coalition

of mostly white, male, moderate LGBTQ+ rights activists to both a) enshrine non-discrimination protections within the constitution, and b) advance LGBTQ+ rights generally, including repealing the still-active sodomy ban (Currier, 2012; Gevisser and Cameron, 1995; Hoad et al., 2005).

Reflecting the longstanding strategic adaptability of South Africa's LGBTQ+ rights organizations, NCGLE sought to frame its rhetoric through language preferred by the ANC, emphasizing equality rather than freedom ("NCGLE" files, GALA, accessed 2022). In addition, a Johannesburg academic—a white man—noted that NCGLE had learned the value of incrementalism by observing the trajectory of similar movements in the U.S.:

> The people in NCGLE were closely tapped into what was happening in the U.S., both with gay rights but also with legal reform strategies more broadly. They were certainly familiar with the strategies of Thurgood Marshall and Ruth Bader Ginsburg of building legal victories, one on top of the other, and not trying to go too fast (personal interview with author, 2022).

Reflecting this approach, many of the NCGLE files implore members to not bring up issues such as marriage and adoption "at this time" because it would "confuse our campaign/strategy" ("NCGLE" files, GALA, accessed 2022). By not attempting to achieve every legal goal simultaneously and instead adopting a strategy of quietly building victories behind the scene, the LGBTQ+ rights movement would be more likely to avoid a public backlash. Given the longstanding and clear opposition of the majority of the public to issues like same-sex marriage and adoption, legal scholars within the movement saw a clear need to strike a careful balancing act.

The Judiciary in Post-Apartheid South Africa

As the apartheid system began to be dismantled in the early 1990s, LGBTQ+ activists were able to begin considering their second avenue of pursuing progress: the courts. The liberal

constitutional framework crafted in the transitional period sought to guarantee strong judicial review and individual rights protections as a balm against the worst abuses of apartheid, and so that what transpired during the twentieth century would never happen again (Cornell et al., 2014; Gevisser and Cameron, 1995; Judge et al., 2008).

Existing research on present-day South African courts has determined that while some threats to judicial independence exist in South Africa, the country's judiciary is generally free of improper influence (Siyo and Mubangizi, 2015). The scope and power of the country's courts are also quite broad as a result of the post-apartheid constitutional design. Unlike the apartheid-era South African judiciary, which focused narrowly on determining the "intention of Parliament" with regards to statutes, the modern Constitutional Court is a powerful, independent body charged with ensuring that all enacted laws comply with the Constitution of the republic (Nyane, 2020; Mathebe, 2021). Since 1994, the Court has handed down highly consequential judgments vis-à-vis myriad issues, including several major decisions on individual rights and freedoms. In many of these, the judges indicated plainly their awareness of the political unpopularity of their decision, but they nevertheless highlight the supremacy of the post-apartheid Constitution and of the courts, and they bluntly proclaim the necessity that the law of the land complies with the nation's charter.

One such early example came in the landmark 1995 case *S v Makwanyane and Another*, in which the court ruled that capital punishment violates the Constitution's guarantee of fundamental rights, and permanently enjoined the execution of the remaining death row inmates (Mathebe, 2021). In so doing, the judgment notes the broader society's approval of the death penalty before proceeding to outline the reasons for why it should not continue to stand. At the same time that the courts began to issue forceful defenses of human rights, they also started to

rely quite heavily on foreign jurisprudence; since judges could not rely on the racist decisions of the apartheid era, they had to look elsewhere for guidance and precedent. According to a Cape Town academic (a white man),

> [The judges] had to look to the U.S. and other Western liberal democracies for precedent. Many of these judgments that they had begun to cite were quite progressive statements of rights and autonomy (personal interview with author, 2022).

A multitude of factors therefore made the South African judiciary highly amenable and sympathetic to LGBTQ+ rights: 1) its readiness to stand up for the Constitution and individual rights, 2) its willingness to apply judicial review and directly challenge politically popular laws, and 3) its acceptance of foreign precedent from liberal democracies.

It was against this favorable backdrop that NCGLE began its legal push for LGBTQ+ rights. Having already secured the inclusion of sexual orientation in the Constitution through targeted appeals to ANC leaders, the NCGLE strategists were ready to proceed with their strategy of incremental gains through piece-by-piece litigation. In the 1997 case *National Coalition of Gay and Lesbian Equality and the South African Human Rights Commission v Minister of Justice and Others*, the Constitutional Court agreed that the legal ban on same-sex sexual relations should be invalidated (Judge et al., 2008). Over the following decade, the NCGLE and other LGBTQ+ legal organizations brought additional cases that addressed LGBTQ+ immigration equality and greatly expanded the rights of same-sex domestic partners.

As precedent slowly continued to build, it became clear that two main factors were resulting in resoundingly favorable rulings for the LGBTQ+ community. One is that the inclusion of sexual orientation in the Equality Clause of the Constitution bound the hands of some conservative jurists. According to a Johannesburg academic, the activists of the era perceived many judges to match the political conservatism of the public and of the majority of

elected officials (personal interview with author, 2022). Nevertheless, they sided with the LGBTQ+ activists almost unanimously against the arguments of the state due to the unambiguous wording of the country's charter.

A second major factor accounting for this phenomenon is the presence on the bench of numerous anti-racist jurists, many of whom had been elevated to the bench by the ANC as a result of their own anti-apartheid activism. While initially the struggles against racism and homophobia occupied two very separate lanes in South Africa, by the 1990s their convergence was nearly complete. The ANC was placing anti-racist jurists on the courts, and the legal thinking of many of these judges was influenced by the partnerships that had formed between anti-apartheid and pro-LGBTQ+ rights campaigners.

In addition, the openly gay and HIV-positive Justice Edwin Cameron was highly influential in shaping the perspectives of many within the South African legal profession, according to a Cape Town academic (personal interview with author, 2022). Even those jurists who initially did not see the wisdom of striking down anti-LGBTQ+ legislation were regularly persuaded to do so by the well-reasoned and insightful personal appeals of Justice Cameron. Furthermore, the decisions of Justice Albie Sachs also reflected a deep-seated desire not just to respect the Constitution and its requirements, but also to advance freedom and even celebrate LGBTQ+ people and diversity, something that other South African judges have cited as influential to their own legal thinking given the high degree of respect they held for Justice Sachs (Cornell et al., 2014; Judge et al., 2008).

Same-Sex Marriage

In the years that preceded the 2005 case *Minister of Home Affairs v Fourie*, which legalized same-sex marriage in South Africa, the NCGLE and its allies were in close

communication with their counterparts overseas, particularly in the United States ("NCGLE" files, GALA, accessed 2022). In particular, the South African activists expressed an interest in learning more about the *Baehr v. Miike* case that almost brought legal same-sex marriage to Hawaii in the 1990s. They also communicated regularly regarding successful efforts to achieve the same in the Netherlands and Canada in the early 2000s.

In the context of a) an inclusive Constitution with the words "sexual orientation" explicitly spelled out; b) a judiciary that was interested in expanding rights and freedoms and doing away with the oppressive legacy of apartheid; and c) a well-organized LGBTQ+ legal movement with a long history of political organization and deep transnational connections, it is perhaps not surprising that on December 1, 2005, the nine justices sitting on the Constitutional Court of South Africa issued a unanimous ruling ordering the Parliament to include same-sex couples within the marriage laws of South Africa within a one-year timeframe. The case was the culmination of a long legal battle—ongoing since 2002—concerning the right of Marie Fourie and Cecelia Bonthuys to get married legally in South Africa.[33] The *Fourie* decision had an enormous social and legal impact on LGBTQ+ South Africans and their partners, children, and families (Judge et al., 2008).

The following year, when Parliament voted to pass the Civil Union Act, the African National Congress leadership whipped the membership to vote in favor out of respect for their constitutional obligations to the judiciary. Privately, however, many of the backbench ANC members expressed fury at being forced to vote for such legislation, according to a Johannesburg academic (personal interview with author, 2022). Many saw homosexuality as un-African and knew for certain that this vote contravened the wishes of their constituents. Nevertheless, their

[33] See https://www.sahistory.org.za/dated-event/court-approves-same-sex-couples-right-marry.

careers would certainly have been more seriously threatened had they disobeyed the whip, since being expelled from the ANC—the country's overwhelming political majority—would have meant certain political ruin for most.

The Failure of the Opposition to LGBTQ+ Equality

This ANC episode well exemplifies the failure of the opposition to LGBTQ+ equality in South Africa, and it aligns with the conclusions of Ryan Richard Thoreson (2008), who argues that a lack of organizational cohesion and poor issue framing, among other factors, doomed the countermovement to LGBTQ+ rights in South Africa. The ANC leadership's strong support for LGBTQ+ equality, despite being a politically unpopular position, did not change the fact that most South African voters did not have a major political alternative to vote for. Nevertheless, this does not appear to have been a determinative factor. Parties that opposed these rights did exist and South Africans could have engaged in mass mobilization expressing their outrage—why didn't they?

Since no major well-funded anti-LGBTQ+ equality group existed in South Africa, the countermovement to LGBTQ+ rights faced the arduous task of having to mobilize the whole population to action if they wanted to stop the country's course. The well-organized pro-LGBTQ+ side, on the other hand, only had to keep winning court cases (Thoreson, 2008). Getting South Africans to care about and organize around their distaste for the rights of sexual and gender minorities was challenging in a country where far and away the most salient issues were poverty, crime, and unemployment, and where voters typically cast their ballots based on those issues (Rule et al., 2006; Thoreson, 2008). As a Johannesburg lawyer—a white woman—explained,

> We South Africans don't have time to protest at every abortion clinic and pride parade like you Americans…South Africans are worried about where their next meals is coming

from and whether they can get around safely (personal interview with author, 2022). South African LGBTQ+ activists were well-resourced and organized and only had to convince a relatively small group of people of the righteousness of their cause. The countermovement, on the other hand, lacked organizational cohesion and was faced with the laborious task of mobilizing a population of people for whom economic concerns were top of mind.

Conclusion

LGBTQ+ activism emerged relatively early in South Africa as a result of the greater levels of freedom and wealth experienced by members of the white community. While early organizations lacked an intersectional approach and were Black-exclusionary, their long history contributed to the strong level of organization that LGBTQ+ organizations enjoyed at the time apartheid came to an end.

Through a targeted campaign of pressuring select ANC leaders, LGBTQ+ activists were able to secure inclusion of sexual orientation as a protected class in the Constitution of the Republic of South Africa. Coupled with strong transnational ties and the use of effective strategies and tactics, these activists began a methodical approach of bringing court cases on behalf of aggrieved parties.

Post-apartheid South African courts were designed to enjoy strong powers of judicial review as a way of safeguarding individual rights and ensuring that the horrors of apartheid would never again come to pass. The courts were also increasingly reliant on foreign precedent and becoming more and more willing to challenge and check the powers of the South African presidency and parliament.

As a result of this confluence of activist and judicial strength, South Africa became one of the first countries in the world to legalize same-sex marriage, and continues to be a world

leader on the legal rights[34] of LGBTQ+ people.

[34] While the legal rights of the community are excellent, it cannot be reiterated enough that many LGBTQ+ people, particularly those in the Black and Coloured communities, experience violence and discrimination at very high levels.

CHAPTER 5: THE LONG ROAD TO LGBTQ+ EQUALITY IN NAMIBIA

The Republic of Namibia, a former German colony in Southern Africa, shares ample key factors in common with South Africa. They share a common history of apartheid and brutal racial oppression because of Namibia's status as a South African territory prior to 1990. These two Southern African countries are the most unequal on Earth, as per their Gini coefficients. They also share a similar level of economic development, marked by stark contrasts of enduring poverty with some of the highest concentrations of wealth on the African continent. According to Afrobarometer and interview data, the citizens of both Namibia and South Africa share similar viewpoints on matters of LGBTQ+ equality; majorities of both countries' populations generally hold conservative views, and they especially did so at the time South Africa legalized same-sex marriage in the mid-2000s.

These similar background characteristics might perhaps lead an external observer to guess that these two countries enjoy similar, if not identical, legal dynamics when it comes to the rights of their LGBTQ+ citizens. Surprisingly, this is not at all the case. While South Africa, for the myriad reasons outlined in the previous chapter, has made strong progress on securing legal equality for its rainbow populations in nearly all aspects of relationship and nondiscrimination law, Namibian law on these same topics has barely budged. An unenforced sodomy ban remains on the books, married couples returning from the altar in Cape Town face state-sanctioned discrimination, and homophobia erupts from the parliamentary benches in much the same way that it does from the public square.

Why have Namibia and South Africa taken such a different direction on matters of LGBTQ+ equality despite the presence of so many similar or identical underlying factors? Whereas South Africa exhibits high performance on both the activism and judicial assertiveness

scales, Namibia constitutes an intermediary case. This includes a low performance on activist activity and strength, including organizational resourcefulness, historical institutionalization, and transnational ties, and a medium-level score on judicial assertiveness, comprising such aspects as use of judicial review, reliance on foreign law, a prior willingness to challenge the government, and a constitutional framework that includes an equality clause. As a result, Namibia did not experience the swift legal progress on LGBTQ+ rights issues that South Africa saw in the 1990s and 2000s despite widespread public opposition. Nevertheless, the country does not remain frozen in time, and since 2020, signs have emerged that Namibia will eventually converge with its larger neighbor in its policy on issues of LGBTQ+ equality. The following chapter will examine the experience of Zimbabwe, a case with low-performing activism and judicial metrics that has seen widespread repression of its LGBTQ+ citizens.

Activism in Namibia: Historical Roots and Population Density

Namibia's LGBTQ+ activist community developed at least two decades after that of South Africa, and until recently demonstrated less organizational efficacy. A considerable portion of this crucial difference is rooted in Namibia's unique historical trajectory. Deeply influenced by myriad factors, including its legacy of German colonization, South African territorial status, and very low population density, Namibia can be understood to share much in common with its southern neighbor while nevertheless maintaining certain key historical differences, each of which played a part in producing the identified variation.

Of all the world's nations, only Mongolia has a lower population density than Namibia. The capital Windhoek, located in the central part of the country, is a mid-sized city that is complemented by a robust rural population in the northern borderlands, neighboring Angola. Much of the rest of the country, spanning an area roughly twice that of the State of California, is

comprised of desert and sand dunes. A small number of two-lane roads connect the few towns that dot the hostile landscape. The country's northern coast is so desolate, and its environment so harsh and inhospitable, that it has been dubbed the "Skeleton Coast," aptly named for the graveyard of ships that it has become.

A substantial body of research has found that political activity and social organizing are strongly associated with high population density and urbanization, both of which were in very low supply in pre-independence Namibia (Lin et al., 2017; Knudsen and Clark, 2013; Glaeser, 1994). Consequently, it is not at all surprising then that recognizable LGBTQ+ activist groups, including the Rainbow Project and Sister Namibia, did not form in the country until after independence in 1990. Whereas South Africa's LGBTQ+ community enjoyed solid footholds in major urban centers, including Johannesburg and Cape Town, as well deep connections with counterparts in the United States and Western Europe, Namibia (then known as South West Africa) scarcely had within its borders much more than 1.4 million people (today there are about 2.5 million). Windhoek was still a sleepy town, the tourism industry had yet to take off, and there were no universities in the country; one of the strongest predictors of protest activity in a particular community is the presence of university students (Van Dyke, 1998). The population of openly LGBTQ+ people in the capital had simply not reached the critical mass necessary for the construction of a viable social reform movement.

Lastly, Namibia's status as a South African territory further de-incentivized local activism. When asked about LGBTQ+ activism in Namibia prior to 1990, Patrick Reissner—a gay-identifying white man—was emphatic:

> There wouldn't have been any… I mean, we were South African. Gay, white people would have just gone to Cape Town. They wouldn't have had a barrier to going. They were headed to [university] there anyway (personal interview with author, 2022).

The lack of a separate Namibian nationality, and in particular the dearth of universities, stunted the growth of LGBTQ+ organizing, which was already in full swing in South Africa by 1969.

Key Contrasts with the South African Experience

While the earlier discussion on case selection establishes that Namibia and South Africa exhibit strong commonalities on key independent variables, including public opinion toward homosexuality and level of democracy, relatively small, exogenous historical divergences led to important differences in the areas of activism and legal jurisprudence. These deviations, while often triggered by innocuous individual decisions or even random chance, have led to clear and noticeable divides in the primary areas of theoretical inquiry: activist groups and the judicial system.

As mentioned above, Namibia's low population density, lack of universities, and status as a South African territory all delayed the onset of LGBTQ+ activism relative to its larger neighbor. There was, however, an additional factor. The South West Africa People's Organisation, also known as SWAPO, which was and is the country's liberationist counterpart to South Africa's ANC, took a solidly homophobic path. Whereas a few key individuals were able to dislodge anti-LGBTQ+ policies from the ANC's platform and instead convince it to adopt a fight for the liberation of *all* humans, the leadership of SWAPO pushed their party in the opposing direction.

As explained by Windhoek LGBTQ+ activist Hildegard Titus—a Black queer-identifying woman—SWAPO politicians have long taken anti-LGBTQ+ stances that set them apart from their ANC counterparts:

> They're very conservative, they're very hard-core Christian, and they always have been (personal interview with author, 2022).

The reason for this is not puzzling—the long-time SWAPO leader and first president of Namibia,

Sam Nujoma, was personally against the rights of LGBTQ+ people. A 2003 newspaper article that appeared in *The Namibian* explicates: "Nujoma renews attacks on whites, gays, media" ("The Namibian" files, National Archives of Namibia, accessed 2022). According to the article, Nujoma saw homosexuality as "un-African" and likened it to bestiality, while at the same time decrying the LGBTQ+ community for "undermining" the Namibian nation.

Another Windhoek-based activist—a Black male—explained the potential reasons for this perspective:

> SWAPO and Nujoma and their clan were not rubbing shoulders with the leftist elite of the world. Definitely not like the ANC was. They spent time exiled in [Tanganyika],[35] not really a place known as a bastion of liberal democracy and understanding of diversity (personal interview with author, 2022).

This statement can be corroborated by online sources that confirm SWAPO's presence in present-day Tanzania (Britannica.com, accessed 2023). If the leaders of the African National Congress were socialized in a "cosmopolitan" milieu in metropolitan London, a socialization that included regular correspondence with LGBTQ+ rights activist Peter Tatchell, that sort of engagement did not appear to be taking place on the Namibian side.

Rights advocate Hildegard Titus also emphasized the importance of coming out in shaping attitudes. Whereas many ANC members had their perspectives uprooted when Simon Nkoli, an activist held in great esteem, came out as gay during the Delmas Treason Trial, there would be no similar opportunity among the SWAPO membership. As Titus explains,

> Even if there were queer members of SWAPO, they weren't open or visible. The ANC definitely had some (personal interview with author, 2022).

The location of the exiled party members is likely exogenous in this situation, as the existence of the ANC's London office reflected the large South African community present in the UK (Ellis,

[35] Present-day Tanzania.

2013). Namibians lacked a similar presence there, and indeed many preferred Germany. On the other hand, the lack of openly LGBTQ+ figures within SWAPO's ranks is potentially endogenous, as a more hostile climate could have potentially deterred one from disclosing their true identity. Nevertheless, Nkoli is well-regarded for his courage and bravery in coming out, and many recognize that he certainly risked hostility in doing so (Gevisser and Cameron, 1995).

The application of the apartheid system in South West Africa also differed from that of South Africa proper. The territory's white population was smaller and heavily concentrated in Windhoek and parts of the very rural south, whereas its Black population was primarily located in the north, near the border with Angola. As a result, the practical application of apartheid was less stringent in South West Africa, as forced relocation was far less common than in South Africa (Dugard, 2018; Gordon, 2021). Furthermore, not all apartheid laws were extended to South West Africa. As lawyer Carli Schickerling, a white woman, explained in a meeting in her Windhoek office,

> I don't think the implementation [of apartheid] in Namibia was ever as stringent or as severe as it was in South Africa… it just didn't radicalize the movement in the same way (personal interview with author, 2022).

Perhaps as a result of this "less stringent" application of apartheid in South West Africa, the country's main liberationist forces—most notably SWAPO—did not see the drafting of a new constitution through the lens of ending discrimination on *all* bases and ensuring legal equality for *all* citizens, as was the case with the ANC in South Africa. Whereas the Namibian Constitution does contain fundamental rights provisions similar to the South African Constitution, they are not nearly as broad in scope. First, they certainly do not contain any mention of banning discrimination on the basis of sexual orientation. Second, the constitution

explicitly enumerates[36] potential limitations on the fundamental rights provisions. And third, the Namibian Constitution specifically identifies[37] its main rights-related focus as ending apartheid and banning racial discrimination—language that is significantly more targeted and narrowly focused than the South African Constitution's sweeping rights guarantees. This narrower constitutional language rendered it much more difficult for activists and reformers to petition the courts for the redress of grievances than in South Africa, where the basic law provided for a much more firmly rooted understanding of freedoms, rights, and legal equality.

Early Activism in Namibia: 1990s-2010s

The early seeds of a visible queer rights movement began to sprout in Namibia in the years following independence in 1990. In particular, two organizations took up the mantle of advocacy for a community beleaguered by the HIV/AIDS epidemic—The Rainbow Project and Sister Namibia (Lorway, 2015; Currier, 2012). According to a Windhoek-based academic and sociologist—a gay-identified Coloured male—the immediate post-independence period was marked by a sense of possibility and euphoria:

> People had a sense for once that change was possible. They really felt that they could do things that would achieve big results (personal interview with author, 2022).

In that spirit, Sister Namibia—a women's rights collective—expanded its focus to include lesbian rights in 1993, and the LGBTQ+ rights-focused Rainbow Project was founded soon thereafter in 1996.

Out lesbians and partners Liz Frank and Elizabeth Khaxas[38] had founded Sister Namibia as a feminist collective in 1989 on the eve of Namibian independence (Currier, 2012). Bayron

[36] Article 22.
[37] Article 23.
[38] Khaxas and Frank are Namibian and German nationals, respectively. Many same-sex couples in Namibia who challenge the state for recognition of their relationships are comprised of one Namibian and one foreign citizen (typically South African or German).

von Wyk, a gay-identified Coloured Namibian LGBTQ+ rights activist and academic, highlighted the importance of this event:

> Frank and Khaxas were an important part of the queer rights struggle in Namibia in the '90s and early 2000s. Their work with Sister Namibia was extremely important, and they helped The Rainbow Project get going. One of the first court cases on behalf of queer people in Namibia also happened thanks to them (personal interview with author, 2022).

Indeed, *Frank and Khaxas v Chairperson of the Immigration Selection Board* was an early, albeit failed attempt at achieving some recognition for same-sex relationships in the Southern African nation (University of Pretoria, 2007). In this decision, the Supreme Court upheld the Immigration Selection Board's decision to deny Liz Frank a Namibian residence permit.

Another major component of early LGBTQ+ organizing was the formation of social groups, including the Social Committee of Gays and Lesbians (SCOG), the Gay and Lesbian Organization of Namibia (GLON), and others (Currier, 2012). This development mirrors the early appearance of social groups in South Africa in the 1970s—groups that were explicitly apolitical—two decades prior. Like those organizations, SCOG and GLON suffered a relatively quick demographic demise: they were overwhelmingly white, and a Black male-identified Windhoek academic noted that they seemed exclusionary and unwelcoming to others (personal interview with author, 2022). They also did not give voice to the issues of violence and unemployment that so greatly afflicted the lives of Black and Coloured Namibians. The 1997 Sister Namibia Collective meeting minutes from *The Rainbow Project* files in the GALA Queer Archives confirms this: "Role of GLON: -formed in the early '90s, but over the years the support dwindled," (accessed 2022).

The downfall of GLON led to a perceptible need for a new approach to LGBTQ+ organizing. At a Sister Namibia meeting in the mid-1990s, Elizabeth Khaxas reported the findings of a cultural working group: "The group discussed issues regarding structure and

membership. Members felt that they didn't want to form part of GLON, but that they wanted to form a new organization," ("The Rainbow Project" files, GALA, accessed 2022). Her report goes on to say that members of the community wanted to be part of something that was inclusive, and it notes strategies for achieving that, such as not charging fixed prices at parties and admitting individuals based on a sliding scale.

An additional factor led to the rise of both The Rainbow Project (TRP) as an organization and to Sister Namibia's increased focus on queer rights issues in the mid-1990s. According to a Black lesbian-identifying journalist and historian based in Swakopmund,[39] Namibia, the inflammatory rhetoric of Robert Mugabe in neighboring Zimbabwe had made plain the need for a rainbow organization that more effectively argued for the political equality of LGBTQ+ Namibians:

> In 1995, Mugabe had gone on a tirade against gays, saying that homosexuals were like 'dogs and pigs' and that they were disgusting, offensive, unworthy of Zimbabwean nationality (personal interview with author, 2022).

Increasingly, over the coming years, Namibian President Sam Nujoma also echoed Mugabe's vicious, violent remarks against the community, and encouraged the public to help the police identify and arrest homosexuals (Currier, 2012). According to activist Hildegard Titus,

> The first president was extremely conservative, anti-gay. He's a major part of why we're still in this fight today (personal interview with author, 2022).

While it initially appeared that The Rainbow Project would model itself on the winning political legal strategy of South Africa's NCGLE, a growing confluence of factors conspired to hamper the success and longevity of this and other early reform efforts (Lorway, 2015; Currier, 2012). Activist and scholar Bayron von Wyk identified a surprising moment in 1992 when sexual orientation had been quietly slipped into the Labour Code by an unknown parliamentarian

[39] Swakopmund is a city located on the Atlantic coast of Namibia.

as grounds for non-discrimination in public and private employment:

> With this action, it seemed that we were on the same track as South Africa… in the next few years it became clear that we would go in a very different direction (personal interview with author, 2022; Lorway, 2015).

Due to internal divisions and fears of being too publicly visible, TRP and Sister Namibia failed to defend this policy advance, and subsequent versions of the Namibian Labour Code would not include protections for LGBTQ+ people (Currier, 2012).

At the same time, these organizations struggled to make a cogent public argument for decriminalizing same-sex sexual relations or for ensuring immigration equality for same-sex couples in the Frank and Khaxas case. A Windhoek sociologist (gay-identified Coloured male) explains:

> Unfortunately these organizations just sort of disappeared into the background. They were internally very strongly divided, they couldn't agree on a singular strategy, and they were afraid of sparking backlash from the public or from SWAPO. Sister Namibia went back to focusing more on women's rights issues, I mean now they're practically just a magazine. The Rainbow Project found that it could continue existing through a targeted focus on HIV/AIDS. They also found they could secure some international funding that way, which before they weren't too successful with (personal interview with author, 2022).

Archival material also shows the prominence that The Rainbow Project placed on counseling and providing safe spaces for its members ("The Rainbow Project" files, GALA, accessed 2022). According to the files, HIV/AIDS was indeed the issue that was top of mind for members, and it presented a major source of personal challenge to the well-being of many. However, this shift to internal member services further underlines the retreat from public campaigns that had been required in order to achieve legal reform.

An additional problem was that the reform efforts of the '90s and early 2000s continued to be dominated by whites, and to a lesser extent, members of the Coloured population. Rather than moving on from GLON era, as the founders of TRP had tried to do, they actually prolonged

some of its deficiencies. According to Hildegard Titus,

> Those early groups were still very white and Coloured. Today there are a lot more Blacks, especially in the street movement (personal interview with author, 2022).

These challenges, internal divisions, and exclusionary realities contrast with the strong level of organization, resourcefulness, and adaptability demonstrated by South African LGBTQ+ organizations during this same time period. A major reason for this difference is certainly the fact that rainbow activism in South Africa had a more than two-decade head start on Namibia's organizers, and as a result they had learned more over time. In addition, whereas South African activist networks maintained deep transnational ties with their counterparts in Europe, North America, and Australia, Namibian activists interfaced almost exclusively with South Africans. A single attempt at corresponding with U.S. activists is noted in The Rainbow Project's meeting minutes from 1998: an inquiry as to whether the Namibian Constitution provided the legal basis for a judicial ruling in favor of "homosexual rights" ("The Rainbow Project" files, GALA, accessed 2022). While the answer was in the affirmative, subsequent attempts at communication with that American activist failed.

The Namibian Judiciary

Besides strong activist networks, an additional key element present in societies that expand LGBTQ+ rights despite the presence of disapproving public opinion is judicial assertiveness. In countries where courts are both independent *and* willing to exert their power to counter the influence of the elected branches of government, issues of LGBTQ+ equality are more likely to find legal refuge, and this is most true in countries that also exhibit high performance on the activism metric.

In some respects, Namibia's courts are analogous to South Africa's, and in others they differ. According to V-Dem and Freedom House, the former's judiciary is just as independent as

the latter's, and this is corroborated through an interview with lawyer Uno Katjipuka, a Black woman (personal interview with author, 2022). Despite the fact that SWAPO's dominant-party status in the post-independence period may have presaged judicial meddling, this did not turn out to be the case (VonDoepp, 2009; Horn and Bösl, 2008). Rather, members of the executive and legislative branches were generally seen as respectful of the authority of the courts. Indeed, in the fifteen years immediately following independence, the Supreme Court ruled against the government's side in more than half of criminal cases (VonDoepp, 2009). Nevertheless, according to Pater VonDoepp, it is likely that this had less to do with a true commitment to liberal democracy and judicial independence and more with the fact that Namibia's system had experienced the least amount of "judicialization" in Southern Africa. In other words, relatively few cases had come before the Supreme or High Courts that directly challenged the extent of the governing powers of the executive, and indeed relatively few cases of great public controversy had made their way up to these courts. This stands in contrast with the situation in South Africa, where politics was becoming increasingly judicialized and where many contentious social issues were ascending before the Constitutional Court, such as capital punishment and topics related to the powers of the administration (Mathebe, 2021).

In Namibia, no cases on LGBTQ+ rights made it to the Supreme or High Courts prior to the Frank and Khaxas immigration case in 2001—nor did any cases on politically adjacent issues, such as abortion.[40] This reflects the relatively fragile state of activism in the country at the time, which was much more nascent than its well-established South African counterpart. According to a Windhoek sociologist, a gay Coloured man, this was a major problem:

> The South Africans had perfected the strategy of incrementalism. They knew what to push for and when to go for it. Without any precedents, of course the judges said in the 2001 case that same-sex couples aren't protected by the Constitution. It's not surprising,

[40] Abortion continues to be criminalized in Namibia, whereas South Africa legalized the practice in 1996.

(personal interview with author, 2022).

As the queer rights organizations in Namibia were newly formed and experiencing some internal division, they were not ready in 2001 to mount an effective case before the Court. The case came before the justices out of the personal necessity of the couple to secure a residence permit for Liz Frank,[41] not out of activists' readiness to use the case to advance LGBTQ+ equality throughout Namibia by pursuing a carefully constructed legal strategy.

There is also a sense that Namibian judges were less interested in foreign or international law than their counterparts in South Africa. A Cape Town academic—a white male—explained that while international law was the only form of jurisprudence available to South African jurists due to the reality that all precedent at the time was by definition apartheid-era precedent, Namibians judges had more wiggle room:

> Namibia went back to the old Roman-Dutch law. They didn't throw the baby out with the bath water, so to speak (personal interview with author, 2022).

This utilization of Roman-Dutch law,[42] rather than international law, as a basis for precedent greatly impacted the judiciary's focus, likely in a direction away from individual rights and freedoms. As Hildegard Titus put it,

> South Africa tried to completely reinvent their laws, whereas here we really didn't do that (personal interview with author, 2022).

This divergence ended up proving critical to determining the direction of each country's equality movement.

[41] While the Supreme Court did not extend any broader protections to same-sex couples, they did grant Frank the residence permit.

[42] The uncodified form of civil law used in the Netherlands and by Dutch colonists in pre-1910 South Africa (Britannica.com, accessed 2023). Roman-Dutch law consisted of anti-LGBTQ+ legal frameworks, including a sodomy law.

Contemporary Activism: 2020—Present

The theoretical underpinnings of this dissertation do not proscribe the possibility of legal progress in contexts like Namibia in perpetuity. Rather, Namibia's status as an intermediary case, with a low performance on the activism metric and a mid-level score on the judicial strength indicator, is but a snapshot in time. As a result of the reasons previously discussed, the country did not join its neighbor to the south in legalizing same-sex marriage in 2006; however, more recent developments have indicated the possible beginning of a period of legal convergence.

After The Rainbow Project had refocused its public efforts on HIV/AIDS and Sister Namibia returned to a primary focus on women's rights, the movement lay dormant for a number of years. A vibrant and energetic LGBTQ+ rights movement did not reemerge in the Southern African nation until 2020, according to a Coloured, gay-identifying Windhoek sociologist. He explained,

> In 2019, before the pandemic, there was like one meeting spot for people from the community. Now there are dozens in Windhoek alone (personal interview with author, 2022).

What had triggered this sudden renaissance? According to the sociologist, it was two primary elements, an ultimate and a proximal cause. First, an exogenous shock had occurred, as the pandemic lockdown that began in March 2020 was strict in Namibia: curfews were imposed, movements were heavily restricted, and alcohol was banned. This had the effect both of giving individuals in the community time to think deeply about their lives, and it also shined a light on episodes of police brutality, which were frequent during the lockdown and which were felt most harshly by Black and brown members of the trans and gender non-conforming communities. Second, the proximal cause for the heightened level of activist activity was the case of Phillip Lühl and Guillermo Delgado, a Namibian citizen and his Mexican spouse who were denied

residency rights for their three children, all of whom had been born through surrogacy in South Africa.

The contemporary period of queer organizing in Namibia has been marked by an increasing sense of intersectionality. According to Namibian actor Adriano Visagie, a Coloured man who starred in the first Namibian LGBTQ+ movie, *Kapana*, contemporary activists try to eschew divisions:

> There's no sense in splitting it all up into different movements, one for transgender people, one for abortion access, one for queer rights, one against racism. It's all one human rights movement for all people (personal interview with author, 2022).

Hildegard Titus confirmed that many of the LGBTQ+ rallies and gatherings today are very diverse, but offered a cautionary word that race and class continue to present themselves as major cleavages and hinderances to progress:

> I think on the ground it's fairly Black, but the couples fighting the legal battles are all essentially white. You need the money to be able to fight a legal battle and fight for these rights, and you need time. But a lot of Black people, they are in unsafe or precarious positions. A lot of these legal activists are wealthy or relatively comfortable… [they] have the resources to do it. But yeah, I think it's kind of sad in a way because the protests are majority Black people, and only now with surrogacy and same-sex marriage can you see white queer people or white allies coming to support. And then I guess like, with Pride, it tends to be more mixed, but I feel like a lot of the groundwork stuff tends to be Black and brown. And only the more high-profile rights attract whites (personal interview with author, 2022).

Patrick Reissner, a white gay male activist working with Equal Namibia, confirmed this reality:

> My experience as a white, privileged man with a second passport[43] is very different from the experience of someone growing up in Katutura[44] or someone who is trans-identifying, despite the fact that I still struggled quite a lot with my sexual identity growing up. But I could always leave if things ever got bad and I could become educated and find employment in the formal sector (personal interview with author, 2022).

[43] Patrick Reissner holds dual Namibian and German nationality, as do many other white Namibians.
[44] Katutura is a township of Windhoek where the majority of the poor Black population resides.

Nearly every interviewee of every race and gender lamented the reality that white Namibians are typically absent from protests that do not involve prominent legal issues like same-sex marriage. Hildegard Titus pointed out that when a transgender woman, Mercedez von Cloete, faced brutal violence at the hands of the police, few whites showed up to protest:

> We were all just texting each other like, wondering, where are all the white allies? Why aren't they coming? It's good when they come out (personal interview with author, 2022).

Despite the endurance of deep divisions within the movement, the presence of openly LGBTQ+ people in Namibian society has continued to grow rapidly. According to a Windhoek writer and journalist:

> You actually see queer people out in public holdings hands and kissing. You see trans people. And there's all these spaces—there's movie nights, there's drag nights every month now. This is a huge change from [before the pandemic] (personal interview with author, 2022).

The burgeoning number of spaces available for LGBTQ+ people to gather has offered the community a chance to connect with one another, to share their issues and concerns, and to plan their next steps forward. Bayron von Wyk also emphasized the visual and symbolic importance of Namibia's first queer monument—the rainbow crosswalk in Windhoek, depicted in Figure 9:

> This is something you would have never seen a few years ago—people would have attacked it. Now it even has a little sign by it explaining its meaning (personal interview with author, 2022).

The presence of such a visual representation of LGBTQ+ pride empowers members of the community, and various queer organizations gather regularly to maintain and repaint it.

Figure 9: Rainbow Crosswalk in Windhoek

The Role of the Courts in Contemporary Activism

Namibia's lack of legal recognition for same-sex relationships has spurred passionate activism around the courts and the judiciary. Explaining why organizers have targeted the judiciary and not the parliament in their quest for reform, Hildegard Titus explains,

> Basically, the courts are the only avenue, they're the only ones who can change… because even with the other parties that aren't SWAPO, they're still very much conservative, very homophobic, they don't care. If we had to do referendums on abortion on LGBTQ rights, it would fail as well. I mean, Namibia is one of the more tolerant countries in Africa, but we still have a long way to go on the legal front. If we had a referendum, it wouldn't go well. Unless it were portrayed from a human rights perspective, and even then I don't think people would listen (personal interview with author, 2022).

In this case, the majority of the elected officials do represent the views of most Namibians, and those views are generally conservative and skeptical of LGBTQ+ rights advancements. As a

result, the courts constitute Namibian activists' only viable hope for short-term legal change.

Legal LGBTQ+ activism in Namibia has generally been focused on three couples and two lawyers. The most visible are the aforementioned Phillip Lühl and Guillermo Delgado and their three children, represented by advocate Uno Katjipuka. I visited Lühl and Delgado at their home in Klein Windhoek in May of 2022 for a long-form interview. Phillip described the pain of being physically separated for long stretches of time solely due to the family's uncertain and ever-tenuous status under Namibian law:

> [Guillermo], the kids, and I were separated for eight months while this whole episode played out. I was with the twins in Durban[45] while [Guillermo and our son] were here in Windhoek. The hardest part was not knowing when this was going to end and when we would be able to see each other again and be together again. The most uplifting thing was all the activism that sprung up, seemingly out of nowhere, to support us. Like, everywhere, at the airport, everywhere, people were backing us up (personal interview with author, 2022).

The couple took turns explaining their legal saga, as it made its way through the courts: they had had to fight to secure the legal residency rights of both Guillermo, a Mexican national, and their oldest son prior to the 2021 birth of their twin daughters, which proved to be the most complex and heart-wrenching journey. As Guillermo explained,

> [Judge Thomas Masuku] ruled that Phillip had to show a paternity test to bring the twins into the country… we refused… there is no basis in international law for this (personal interview with author, 2022).

Eventually, a series of limited court rulings allowed the family to be reunited, provided Namibian citizenship by descent to their son Yona, and set the stage for further advances for LGBTQ+ rights in the country. In *Lühl v Minister of Home Affairs and Immigration*, the High Court even found that the 2001 Supreme Court precedent in the Frank and Khaxas case should be overruled, thereby providing some form of legal recognition to same-sex couples.

[45] Durban, South Africa.

Nevertheless, the High Court declined to take this step out of respect for the judicial supremacy of the Supreme Court.

An interview with the family's lawyer, Uno Katjipuka, yielded additional insights (personal interview with author, 2022). First, she agreed to take Lühl and Delgado's case not of a desire to advance a so-called "test case," a strategy favored by South African and American activists. Her involvement was resultant from both her identity as a Black lesbian woman, and out of a desire, as a progressive reformer, to right a specific wrong in Namibia. She expressed a desire to achieve radical, transformational, intersectional change through a system that is nevertheless foundationally establishmentarian.

Carli Schickerling, the lawyer for the other two couples,[46] reflects the corporate background from which she comes: a white Afrikaner woman, she seeks liberal advances and incremental change. While she hopes through her efforts to help legalize same-sex marriage and abortion in Namibia, she expressed skepticism about the more radical, redistributionist platforms of some LGBTQ+ activists (personal interview with author, 2022). She said that her main effort is focused on convincing the Supreme Court to adopt the High Court's logic:

> The High Court has said there are clear reasons to revisit [the 2001 Frank and Khaxas case], we just don't have the authority to do so… my work is to convince the next court up to reverse the prior judgment.

Whereas Schickerling concedes that the High Court does not have the authority to overrule the 2001 Supreme Court decision, Katjipuka argues that it does. This divide in legal strategy is reflective of earlier divisions within the Namibian LGBTQ+ equality movement and contrasts with the more unified and cogent strategy observed in South Africa.

[46] Daniel Digashu and Johann Potgieter; Anette Seiler and Anita Seiller-Lilles. These couples also consist of a Namibian citizen and a foreign national (South African and German, respectively) seeking residency rights in Namibia.

Just prior to the completion of this dissertation in July 2023, the Namibian Supreme Court ruled in *Digashu v Government of the Republic of Namibia*[47] that the government must recognize legally contracted foreign same-sex marriages, further underlining the progress currently underway in Namibia. However, there are also signs of a brewing backlash, as a law banning same-sex marriage was making its way through Parliament.[48]

Conclusion

While recent developments presage a possible convergence with the legal regime in South Africa, LGBTQ+ activism in Namibia exhibits low performance on the activism metric for a few reasons. First, LGBTQ+ organizing did not develop in Namibia until two decades after its southern neighbor. Second, this early organizing was also comparatively divided and unwilling to adopt a strategy of public visibility. Third, Namibian LGBTQ+ activists had comparatively weak transnational ties. As a result, activists' ability to pressure the judiciary for reform was limited.

While Namibia's judiciary, much like South Africa's, is fairly independent of state interference, some critical differences further hampered the likelihood of reform. The Namibian courts have been generally unwilling to take up major issues of societal concern or to directly challenge the government on key issues, and they rely principally on Roman-Dutch law for their legal precedents rather than on international law. As a result, Namibian is a mid-level performer on the judicial assertiveness metric.

Taken together, these two scores allow Namibia to be classified as an intermediary case. The lack of a high performance on these metrics meant that Namibia was not able to make the kind of progress seen in South Africa, a legal evolution that was able to counter and surmount

[47] See https://www.hrw.org/news/2023/05/26/namibian-court-recognizes-foreign-same-sex-marriages.
[48] See https://www.africanews.com/2023/07/20/namibia-vote-on-a-law-against-same-sex-marriage//.

the low support among the public for LGBTQ+ equality. However, Namibia also escaped the fate of its very low-scoring neighbor, Zimbabwe, where active legal repression has endured until recent times.

Since 2020, however, Namibian LGBTQ+ organizing more closely follows the tactics of the South African activists of the 1990s and 2000s, and they are significantly more intersectional than their own predecessors from that era. This development was to be expected, as social relations do not remain frozen in time, but evolve and adapt with changing societies. As the exogenous shock of the pandemic helped to accelerate and strengthen activists' fervor, so too did it raise and broaden the prospects and possibilities for legal reform.

CHAPTER 6: REPRESSION AND HUMAN RIGHTS ABUSES IN ZIMBABWE

Zimbabwe is a Southern African state with a British colonial history and an apartheid past, similar to other countries in the region (Raftopoulos and Mlambo, 2009; Meredith, 2007). Zimbabweans also express a strong dislike toward homosexuals in public opinion surveys (Kokera and Ndoma, 2016).[49] Unlike the situation in South Africa, however, Zimbabwean LGBTQ+ activism has been characterized by internal divisions and afflicted by the death of an early, prominent leader. The Zimbabwean judiciary also lacks sufficient independence from the other branches of government and has been unwilling to apply the principles of judicial review when doing so would run contrary to the wishes of the executive. This mixture of weak activist organization and judicial strength has hampered the advancement of LGBTQ+ rights and empowered the state to pursue police raids and other repressive policies.

Historical Underpinnings

Known as Southern Rhodesia until 1979, Zimbabwe had been governed by the racist, whites-only government of Ian Smith. This brutal regime had deployed the country's rich mineral wealth for the benefit of the white population while systematically excluding Black Zimbabweans from economic and political power. From 1980 to 2017, the country was governed by Robert Mugabe, who pursued socialist policies of land distribution, leading to the rapid flight of white Zimbabweans from the country (Mlambo, 2014).

This history offers many parallels to that of neighboring South Africa and Namibia, while also illustrating key contrasts. Much like in these countries, early LGBTQ+ organizing was rooted primarily among members of the white community, who enjoyed far greater levels of

[49] See https://www.afrobarometer.org/publication/ad124-zimbabwe-tolerance-crosses-ethnic-religious-national-but-not-sexual-lines/#:~:text=The%20findings%20show%20that%20large,most%20are%20intolerant%20of%20homosexuals.

freedom and wealth. A Harare-based program officer for GALZ,[50] the primary LGBTQ+ activist organization in Zimbabwe, explains:

> GALZ was founded in 1990—it's actually the oldest LGBTI advocacy organization in all of Southern Africa. They were mostly white activists back then, like Keith Goddard…quite a lot were targeted as "un-African," and some were even arrested. Many others just left the county (personal interview with author, 2022).

The GALZ program officer describes a situation that is similar to that of neighboring countries in the region, where early LGBTQ+ activism did not reflect the demographics of the country at large. Another interviewee, a Bulawayo-based bisexual activist, explains that early activism was not intersectional:

> Back then they were more concerned with getting recognition and rights, rather than fighting for people who were literally getting raped and beaten in their homes. We needed counseling, health services (personal interview with author, 2022).

Indeed, archival material confirms that a majority of early activists were white ("GALZ" files, GALA, accessed 2022). These organizers focused their energies in two primary areas: combatting Mugabe's homophobic rhetoric and building transnational ties with mostly white activists from other countries.

The 1995 Book Incident

A major event[51] took place in 1995 that would affect the trajectory of LGBTQ+ organizing in Zimbabwe for some time to come, as well as expose key divides within the movement. GALZ had attempted to take part in the Zimbabwe International Book Fair (ZIBF), which had a human rights theme that year. The book fair denied GALZ's application, as the director was uneasy about straining the relationship with the government and President Mugabe, who was known for his anti-gay views. Eventually, pressure from South Africa led to the ban

[50] An Association of LGBTI People in Zimbabwe. Formerly Gays and Lesbians of Zimbabwe. See https://galz.org/.
[51] See https://galz.org/book-fair-saga/.

being lifted; however, according to an academic in Harare, divides over whether GALZ should still participate heavily divided the organization:

> All of a sudden they were allowed to [enter], but there were bitter arguments about this…they didn't want to bow their heads to a homophobic organization. Most of the executive committee resigned in the aftermath of this event (personal interview with author, 2022).

At the same time the book fair episode was engulfing GALZ, President Robert Mugabe had begun ramping up his attacks on the LGBTQ+ community. As the Harare academic noted, the executive's rhetoric became increasingly vitriolic:

> Mugabe kept switching between "homosexuals are like dogs" to "they *are* dogs" to "they don't exist in Zimbabwe." So which is it? (personal interview with author, 2022).

When asked whether this rhetoric was perhaps an attempt at electoral gamesmanship—since Mugabe's ZANU-PF was competing for votes with Morgan Tsvangirai's Movement for Democratic Change, the interviewee said no:

> It's much simpler than that. It's like what you asked about Nujoma in Namibia. [Anti-gay sentiment] was just his personal view. I think he thought he was doing the country a favor with his misguided declarations (Meredith, 2007; personal interview with author, 2022).

The GALZ archival files, including minutes from executive committee meetings, illustrate the fact that the organization's attention was increasingly focused on combatting this rhetoric. Very little attention was concentrated on providing services—including counseling and HIV/AIDS services—that Black members were demanding, according to the Bulawayo activist (GALA, accessed 2022; personal interview with author, 2022).

Keith Goddard and Transnational Ties

While early LGBTQ+ organizing in Zimbabwe experienced internal divisions and dissatisfaction from Black members, one individual emerged as a strong community leader. Keith Goddard, a white, gay man, provided cogent and competent leadership for the beleaguered

community as the programs manager and later as the director of the organization.[52] Nearly every document in the GALZ archival files bears his name or signature, and he was intimately involved in every aspect of visible LGBTQ+ community organizing in Zimbabwe. As described by the Harare-based academic,

> Goddard had a hands-on leadership style and was *the* gay man in Zimbabwe. Everyone knew who he was, and he knew everyone…I don't think [GALZ] would have survived without him (personal interview with author, 2022).

According to this interviewee, Keith Goddard played a major role in building connections between GALZ and their contemporaries in South Africa and Namibia. Evidence of growing transnational ties also comes from the GALZ archival files (GALA, accessed 2022). Press releases, handwritten notes, and other writings demonstrate such ties; for example, in 2000, GALZ issued a press release condemning Namibian President Sam Nujoma's attacks on LGBTQ+ people. Two years earlier, British gay rights activist Peter Tatchell had written to Robert Mugabe, urging him to de-escalate his attacks on sexual and gender minorities.

An exchange of letters between GALZ members—mainly Keith Goddard—with South Africa's NCGLE, Namibia's Rainbow Project, and Botswana's LEGABIBO[53] led to an increased understanding of which legal tactics and goals should be pursued to maximize the likelihood of policy reform. These included aims of decriminalizing sodomy and including an equal rights amendment—modeled after South Africa's—in the Constitution. The final recommendation was to pursue a two-track legal strategy based on both legal and socio-cultural change. See Figure 10 on page 107.

Organizational Decline

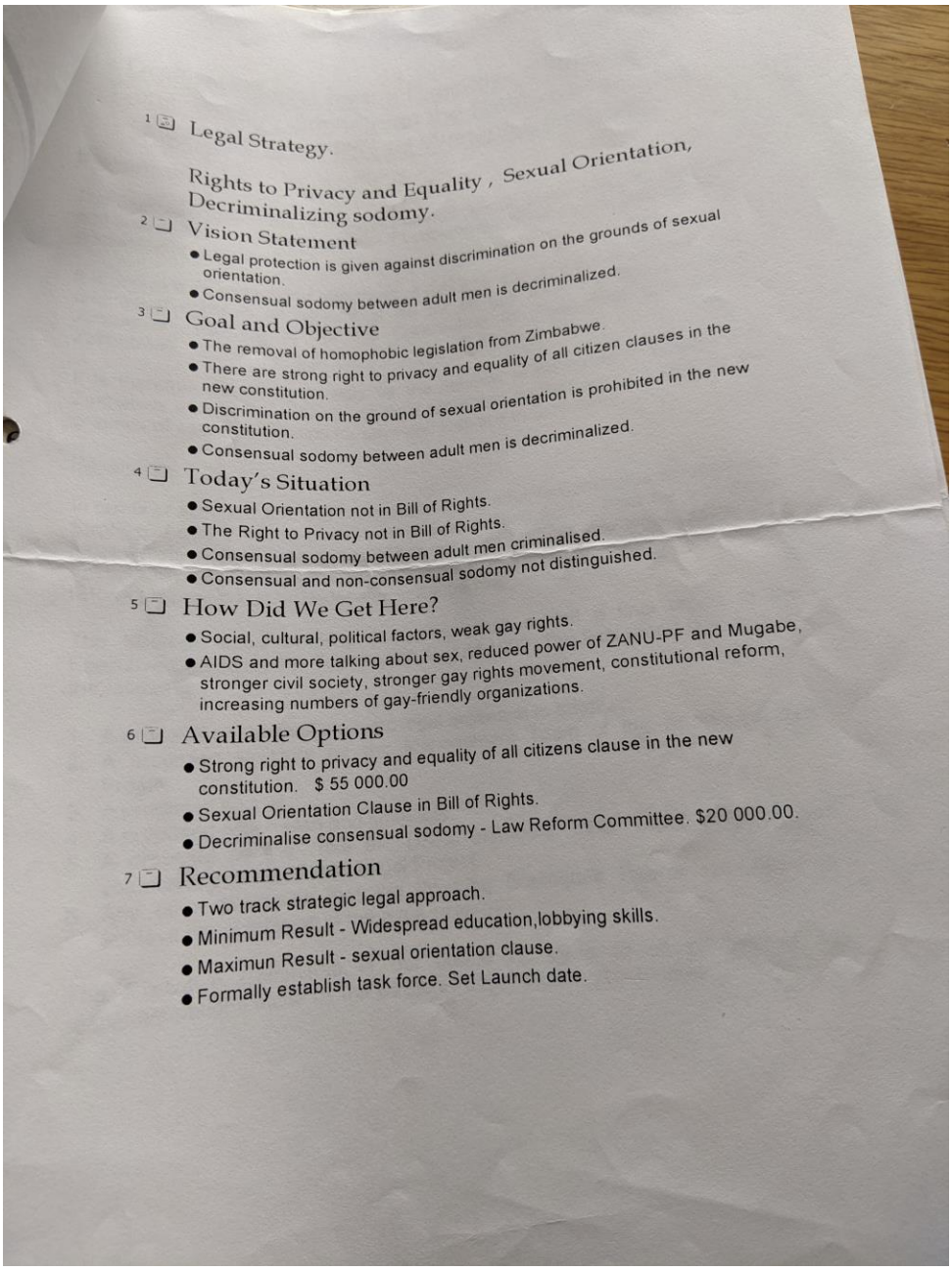
While some divides had clearly started to manifest within GALZ as a result of the 1995

[52] See https://wri-irg.org/en/story/2009/keith-goddard-13031960-09102009.
[53] See https://legabibo.org.bw/.

book fair incident, the organization was steadily developing under the stewardship of Keith Goddard in the late 1990s and early 2000s. However, this came to a screeching halt with the emigration of key executive board members and the health decline of Keith Goddard, who eventually succumbed to HIV/AIDS in 2009.[54] As explained by the Harare-based GALZ program officer,

> Yeah, a lot of things all sort of happened at once, which wasn't great for the health of the [organization]. Several [executive board members] left for the UK or [South Africa], and then Keith got really sick. There was no leadership left to get us through all stuff that was coming from Mugabe (personal interview with author, 2022).

[54] See https://www.globalgayz.com/death-of-important-gay-hero-keith-goddard-of-zimbawe/35/.



1 Legal Strategy.

Rights to Privacy and Equality , Sexual Orientation, Decriminalizing sodomy.

2 Vision Statement

- Legal protection is given against discrimination on the grounds of sexual orientation.
- Consensual sodomy between adult men is decriminalized.

3 Goal and Objective

- The removal of homophobic legislation from Zimbabwe.
- There are strong right to privacy and equality of all citizen clauses in the new constitution.
- Discrimination on the ground of sexual orientation is prohibited in the new constitution.
- Consensual sodomy between adult men is decriminalized.

4 Today's Situation

- Sexual Orientation not in Bill of Rights.
- The Right to Privacy not in Bill of Rights.
- Consensual sodomy between adult men criminalised.
- Consensual and non-consensual sodomy not distinguished.

5 How Did We Get Here?

- Social, cultural, political factors, weak gay rights.
- AIDS and more talking about sex, reduced power of ZANU-PF and Mugabe, stronger civil society, stronger gay rights movement, constitutional reform, increasing numbers of gay-friendly organizations.

6 Available Options

- Strong right to privacy and equality of all citizens clause in the new constitution. $ 55 000.00
- Sexual Orientation Clause in Bill of Rights.
- Decriminalise consensual sodomy - Law Reform Committee. $20 000.00.

7 Recommendation

- Two track strategic legal approach.
- Minimum Result - Widespread education,lobbying skills.
- Maximun Result - sexual orientation clause.
- Formally establish task force. Set Launch date.

Figure 10: GALZ Recommendations

The GALZ archival files do not contain any evidence of transnational communications after 2005, despite an earlier flurry of activity (GALA, accessed 2022). In fact, the number of documents overall dropped sharply around that time, and far fewer organizational meetings or activities were held.

The Zimbabwean Judiciary

Further complicating the LGBTQ+ community's path to progress was the fact that the Zimbabwean judiciary lacked full *de facto* independence from the executive. On one hand, Zimbabwe's constitutional framework is broadly similar to South Africa's, and the constitution constructs a judiciary that is theoretically independent (Tsabora, 2022). On the other hand, these constitutional underpinnings have not been translated into reality, and the country's courts have come under judicial capture during both the Mugabe and Mnangagwa administrations (Madhuku, 2002; Magaisa, 2020).[55] According to Magaisa, there has long been undue influence held over the courts by the Zimbabwean presidency and the governing ZANU-PF party. This influence is exerted in a multitude of ways, including through the power to appoint judges, to change their level of compensation, to remove them from office, or to suspend them without benefits. In 2011, Zimbabwe Chief Justice Godfrey Chidyausiku sounded the alarm publicly, arguing that judicial independence was at best weak in Zimbabwe due to the appointment of pro-ZANU-PF judges and the ready willingness of the executive branch to defy court orders.[56] When the judiciary did rule against the government, as in the 2001 decision declaring land seizures illegal, those judges were never again assigned to issues of high-profile political relevance.

As a result of this judicial capture, LGBTQ+ activists felt it was a losing battle to attempt to sway or appease the judiciary. In fact, judicial records indicate that the local magistrate courts were active participants in the arrests of LGBTQ+ activists for crimes of sodomy or "violating the peace" ("GALZ" files, GALA, accessed 2022). The GALZ program officer confirmed in an interview that her organization did not, either in the past or present, attempt to achieve progress through the judiciary:

[55] See https://bigsr.africa/bsr-understanding-judicial-capture-in-zimbabwe/.
[56] See https://www.voanews.com/a/zimbabwes-justice-system-again-under-scrutiny-113878139/157247.html.

> We have not tried to work with the courts…the chief justice is appointed by the president, so they're just going to do what the president wants them to do. There has been more engagement with the parliament (personal interview with author, 2022).

The program officer went on to say that there typically wasn't much to hope for with parliament either, but that there were at least more independent thinkers who were willing to hear out the activists' arguments. They did not feel that that was the case with the judiciary.

The Mugabe Years and Police Raids

Given the internal divisions within GALZ and the collapse of leadership following the departure and eventual demise of Keith Goddard, coupled with a captured judiciary, very little stood in the way between a disapproving public and the LGBTQ+ community. In this moment, President Mugabe was able to aim his fire at this minority group with relatively little effectual pushback or contestation from within Zimbabwe.

In an interview with Keith Goddard contained within the GALZ archival files, the former director of the organization explained the numerous ways in which the regime and the police targeted LGBTQ+ Zimbabweans (GALA, accessed 2022). In one case, "[a] young man was assaulted by the police and then driven to the outskirts of the city and abandoned there." GALZ had offered to take the case to court on the young man's behalf, but he refused, fearing the publicity such a trial would generate. Regarding a lesbian woman in Harare, Goddard said, "[The police] physically assaulted her and stole her money and shoes." Goddard himself had been charged with sodomy by a magistrate court for reporting a case of blackmail to the police, reflecting the poor relations between the community and the judiciary.

The Harare programs officer also confirmed that regular police raids occurred during the Mugabe years, and that on occasion members of the public would also engage in attacks on LGBTQ+ people (personal interview with author, 2022). A *Washington Blade* article describes a

brutal assault that occurred during an end-of-the-year LGBTQ+ party on December 19, 2014 (Lavers, 2014).[57] In this attack, a group of men forced their way into a club and began to beat the patrons with blunt objects.

Much like in earlier years, these human rights violations led to the emigration of prominent activists, generating a feedback loop that deteriorated the strength of activist networks. According to a Johannesburg-based lawyer, Zimbabwe's most prominent transgender rights activist now lives in the U.S. state of Maryland:

> Rikki Nathanson founded TREAT in 2015, which was a really important trans rights organization…she had been arrested for using a women's toilet and had to flee the country. She eventually won her case but never returned (personal interview with author, 2022).

Such challenges had unfortunately become commonplace for LGBTQ+ activists and community members.

The Mnangagwa Years and Reforms

As a result of these developments, the situation felt dire for LGBTQ+ Zimbabweans at the end of Mugabe's presidency in 2017. Nevertheless, two major changes over the coming years would positively impact the trajectory of the LGBTQ+ legal landscape in a way that parallels advances in neighboring Namibia. These include the ascension to the presidency of the more socially moderate Emmerson Mnangagwa in late 2017 and the onset of the COVID-19 pandemic in early 2020.

According to the GALZ program officer, the change in government was monumental in bringing new rights to LGBTQ+ Zimbabweans:

> There has been a great improvement as a result of the new leadership…there's still the same challenges—the sodomy ban, the marriage ban—but it was a shock when the government accepted two recommendations…a proposal on intersex rights and an LGBTQI-inclusive ban on violence against women and children (personal interview with

[57] See https://www.washingtonblade.com/2014/12/24/attack-zimbabwe-lgbt-party-leaves-dozens-injured/.

author, 2022).

While the government enacted only the two proposals deemed least controversial, the fact that they were able to engage in good faith with the LGBTQ+ community is a clear point of departure from the posture of the Mugabe administration.

Much like in neighboring Namibia, the onset of the pandemic acted as an exogenous shock that inspired people to act to secure their rights. According to the GALZ official,

> There has been a sense of togetherness amplified by the pandemic. Yes, there were movement restrictions and problems with coping, particularly in the rural areas, but there was more engagement than ever…People wanted to be with their community. We have more safe spaces now than ever, including fourteen LGBTQI sector organizations. Our focus on HIV/AIDS has increased, and we offer more counseling services now too…We have a Dutch and EU partnership through IDAHOT also (personal interview with author, 2022).

The program officer continued to explain further that there is a generally positive outlook for the future due to changing attitudes, increased funding, and changes in government. She explained that in addition to offering health services and safe spaces, GALZ is able to focus on four main pillars: community empowerment, acting as an information and resource hub, policy review, and governance.

Conclusion

Prior organizational challenges among Zimbabwean LGBTQ+ activists—exacerbated greatly by the departure of influential members and leaders—comingled with a judiciary that lacks independence to create a situation where not only did the legal state remain stagnant, but neither activists nor jurists could prevent an onslaught of police raids and local attacks. As a result, Zimbabwe constitutes the "low case" for the purposes of this study. Only in recent years has progress begun to occur as a result of changes in the country's leadership and the exogenous shock of the COVID-19 pandemic.

CONCLUSION

This dissertation advances scholars' understanding of LGBTQ+ political reforms by presenting qualitative evidence from a context where pro-LGBTQ+ legal changes were enacted despite the lack of public support for the same and contrasting it with two cases in which reforms stalled or repression ensued. In so doing, I highlight the key roles played by two sets of actors outside the partisan political system whose work counterbalances and often even overrides the desires of political actors: activists and judges. In particular, my theory emphasizes the historical institutionalization of activist organizations, their transnational ties, and their level of organization, resourcefulness, and adaptability. With regards to the judiciary, I highlight independence, power, and assertiveness; my argument also considers the importance of constitutions and of the acceptability of foreign and international law.

As evidence, I first consider quantitative data, which I collected in order to create an original, cross-national LGBTQ+ rights dataset, and which provides this study with external generalization. Statistical analysis provides evidence for the theory that LGBTQ+ rights advancements are associated with strong activist networks (measured via the V-Dem civil society participation indicator) and judicial review, as well as the interaction of the two.

I also present interview and archival data from South Africa, Namibia, and Zimbabwe for the purpose of elucidating key causal mechanisms. The Rainbow Nation[58] was a surprisingly early adopter of same-sex marriage and other LGBTQ+ rights despite having a largely conservative population that has, at least until recently, been quite unsupportive of LGBTQ+ equality. Early gay and lesbian rights organizations, which were dominated almost exclusively by whites and refused to take anti-apartheid stances, nevertheless gave the movement a crucial

[58] South Africa.

early foothold. As these organizations eventually grew into progressive and increasingly multiracial coalitions, they also became better organized. Deep transnational ties helped to strategize. These developments positioned the movement in a such a way that sexual orientation was added to the Constitution, and it also allowed them to take advantage of opportunities for new judicial advancements in the post-apartheid era, as emboldened progressive courts made bold rulings in favor of individual rights and freedoms. See Figure 11 ("Home Affairs/ To Have and to Hold" files, GALA, accessed 2022).

Figure 11: South Africa Same-Sex Marriage Cartoon

The experience of South Africa contrasts with those of Namibia and Zimbabwe, where LGBTQ+ activism did not begin in earnest until the 1990s. In the case of Namibia, early activism was hampered by internal divides and by fears of being too visible. In the case of Zimbabwe, divisions among activists, coupled with the emigration of key members and the death of the GALZ director, also stalled progress. Namibia's judiciary, while independent and willing to challenge the government, was nevertheless characterized by certain differences with the

South African courts that downgraded the outlook for reform. Zimbabwe's courts lacked independence from the political branches altogether, and this dissuaded activists from even bringing forth appeals.

Contributions

Whereas existing work devoted to the study of LGBTQ+ people and their rights continues to center the U.S., Canada, and Europe, this study instead centers the experiences of LGBTQ+ people in Southern Africa, and it seeks to expand our understanding of the ways in which equal rights advocates can advance their agenda in settings where legislative paths or referenda may not bear fruitful results. It highlights the importance of strong organizational capacity among activists, as well as the verdant gains that can be made by working through the judicial system. In addition to examining the key avenues social organizers pursue in advocating for change, this work also advances our understanding of comparative judicial politics and of African courts, particularly in a post-colonial context. It identifies the power of an activist-judicial nexus in achieving policy reforms in contexts where political support is lacking or where the opinion of the public is unsupportive. As such, this research is innovative because it brings together a focus on social institutions with a study of formal institutions.

More specifically, this dissertation explains why LGBTQ+ rights reforms succeed in some places but fail in others. While this study addresses these particular rights, its implications are not limited to these issues. As a result, this dissertation offers a key cautionary tale, as activists with agendas across the political spectrum can also pursue judicial pathways to enact extreme or reactionary agenda items—on matters ranging from abortion to guns and other issues. In addition, it can offer other activists, including those fighting for women's rights and rights of indigenous communities or racial minorities, a powerful toolkit as well. The present study

thereby challenges traditional behavioralist discourse by proposing a mechanism through which public opinion and political support (or non-support) can be overridden by various institutional factors.

Limitations

Throughout this dissertation, I have tried to be clear and forthcoming with regards to the limitations of my research, in the hopes that future scholars can improve upon it. One shortcoming of the quantitative study (Chapter 3) is that I was not able to control for public opinion toward homosexuality. Nevertheless, an important argument of this dissertation is that the overall contribution of public opinion to social change is less than many would assume, and therefore a lack of a control for public opinion in the cross-national study does not imperil the validity of the overall findings. In the qualitative studies (Chapters 4-6), I would have liked to have been able to interview a more diverse group of subjects, as more than 40% of the interviewees were white[59] and a slim majority were men. A broad perspective is important, as interviewees of different racial groups had widely divergent interpretations of events and history. I was also unable to interview many South Africans who had a firm grasp on the current status of LGBTQ+ rights activism in the country.

Future Studies

There is ample room for future inquiry in this line of work, and much of it is sorely needed. Most importantly, future studies should consider other countries where LGBTQ+ rights have advanced against the backdrop of an unsupportive public, including Mongolia, Nepal, and Colombia. This will help further elucidate causal mechanisms, and it will serve the dual purpose of telling the stories of LGBTQ+ people outside the U.S. and Europe. Additional studies should

[59] This means that whites were overrepresented by a factor of more than four.

consider other issues to which my theory would apply, including changes in abortion rights, and how activist-judicial linkages are implicated in these policy changes. More work is also needed throughout the comparative judicial politics field, particularly on democratic regimes in Africa.

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APPENDIX

The following pages contain the following: a list of interviewee demographics, a battery of sample guiding interview questions, the research participation consent form, the personal data use consent form (South Africa and Zimbabwe only), and the IRB exempt determination letter.

List of Interviewee Demographics

Namibia

#	Name	Race	Gender & LGBTQ+ ID[60]	Location & Role
1	Hildegard Titus	Black	Queer woman	Windhoek activist
2	Patrick Reissner	White	Gay man	Windhoek activist
3	Carli Schickerling	White	Woman	Windhoek lawyer
4	Bayron von Wyk	Coloured	Gay man	Windhoek academic
5	Adriano Visagie	Coloured	Man	Windhoek actor
6	Uno Katjipuka	Black	Woman	Windhoek lawyer
7	Phillip Lühl	White	Gay man	Windhoek activist
8	Guillermo Delgado	Hispanic	Gay man	Windhoek activist
9	Frowin Becker	White	Straight man	Swakopmund student
10	-	Black	Man	Windhoek activist
11	-	Black	Lesbian woman	Swakopmund journalist
12	-	Coloured	Gay man	Windhoek sociologist
13	-	Black	Woman	Windhoek activist
14	-	White	Man	Windhoek writer
15	-	White	Woman	Windhoek activist
16	-	Coloured	Woman	Windhoek student
17	-	Coloured	Genderqueer	Windhoek drag queen

Table 6: Namibia Interviewees

[60] Note: not available for most respondents.

South Africa[61]

#	Race	Gender & LGBTQ+ Identity	Location & Role
1	White	Woman	Joburg[62] historian
2	White	Gay Man	Cape Town activist
3	Coloured	Man	Joburg activist
4	Black	Man	Joburg activist
5	White	Man	Cape Town academic
6	White	Lesbian woman	U.S.-based academic
7	White	Gay man	Joburg academic
8	White	Woman	Joburg lawyer
9	Coloured	Transgender woman	Cape Town activist
10	Black	Bisexual woman	Pretoria academic
11	Black/Indian	Man	Durban activist
12	White	Woman	Cape Town journalist
13	White	Straight woman	Bloemfontein activist

Table 7: South Africa Interviewees

[61] Note: to fully comply with South Africa's Protection of Personal Information Act (POPIA) and Zimbabwe's Access to Information and Protection of Privacy Act (AIPPA), I do not identify either South African or Zimbabwean respondents by name in this dissertation.
[62] Johannesburg, South Africa.

Zimbabwe

#	**Race**	**Gender & LGBTQ+ Identity**	**Location & Role**
1	Black	Woman	Harare activist
2	Black	Bisexual man	Bulawayo activist
3	Black	Man	Harare academic
4	White	Gay man	Joburg-based writer
5	Black	Woman	Harare activist

Table 8: Zimbabwe Interviewees

Sample Interview Questions

- How do activists in [South Africa or Namibia] organize and advocate for LGBT rights?
- How would you describe the LGBT rights situation in your country and your community?
- What are the biggest challenges facing the [South African or Namibia] LGBT community? What reforms are needed?
- How do activists interact with the judicial system to reform laws or improve the lives of LGBT citizens?
- Do you believe that the judicial system in your country is on the side of LGBT people?
- Which branch of government do you trust more to advance freedoms for LGBT people: the political branches or the judiciary?
- Why do you believe South Africa has had a different trajectory than Namibia over the last thirty years with respect to LGBT rights?
- What do you believe is the future of the LGBT community in your country?
- What role have democratization movements and the transition from apartheid played in advancing LGBT rights?
- To what extent did ANC (African National Congress) leaders interact and befriend LGBT activists in the pre- and post-apartheid period? Did this have an impact on the writing of the constitution or on future legislation?

Somewhere Over the Rainbow: A New Look at LGBT Rights Advancements – Mircea Lazar

Purpose of study: To ascertain why LGBT rights advancements have occurred in certain places but not others despite the presence of similar underlying factors.

Consent to take part in research

- I…… voluntarily agree to participate in this research study.

- I understand that even if I agree to participate now, I can withdraw at any time or refuse to answer any question without any consequences of any kind.

- I understand that I can withdraw permission to use data from my interview within two weeks after the interview, in which case the material will be deleted.

- I have had the purpose and nature of the study explained to me in writing and I have had the opportunity to ask questions about the study.

- I understand that participation involves an interview with the researcher, Mircea Lazar.

- I understand that I will not benefit directly from participating in this research.

- I agree to my interview being audio-recorded.

- I understand that all information I provide for this study will be treated confidentially.

- I understand that extracts from my interview may be quoted in Mircea Lazar's PhD dissertation project, and that I may be mentioned by name in his study.

- I understand that if I inform the researcher that myself or someone else is at risk of harm they may have to report this to the relevant authorities - they will discuss this with me first but may be required to report with or without my permission.

- I understand that signed consent forms will be retained at the Michigan State University Political Science Department until June 1, 2023.

- I understand that under freedom of information legislation I am entitled to access the information I have provided at any time while it is in storage as specified above.

- I understand that I am free to contact the researcher, Mircea Lazar, to seek further clarification and information.

Mircea Lazar
PhD Candidate, Michigan State University Department of Political Science
lazarmi1@msu.edu
+1-330-554-4138

Signature of research participant

---------- ----------

Signature of participant Date

---------- ----------

Signature of researcher Date

I believe the participant is giving informed consent to participate in this study.

Consent for Use of Personal Data

1. The personal information to be collected from participants includes: name, gender, and race. Questions regarding one's personal sexual orientation or gender identity will not be directly asked, but that information may be inadvertently referred to by interview subjects.

2. The purposes for which the personal data will be used are: doctoral dissertation research.

3. The data will be collected from the participant through: qualitative, semi-structured interviews in either an in-person or remote format.

4. The personal data will be used based on your consent. Names, identifying information, and direct quotes may be utilized in the dissertation.

5. The controller of the personal data will be researcher Mircea Lazar, advised by Dr. Jeffrey K. Conroy-Krutz.

6. You have the right to withdraw your consent to use the personal data at any time. However, this does not affect the legality of the research conducted on the basis of your consent before the withdrawal.

7. The personal data will be stored at Michigan State University. All data will be stored on a password protected external hard drive kept by the controllers.

8. You are not obliged to provide the personal data.

9. The personal data will be transferred to the controller and their representative in the United States.

10. Data subject will be informed (in any form within a week) if there is any transfer of personal data.

11. You consent for the data to be collected, transferred and stored in the United States and used for the stated purpose. You understand that you can contact the controller listed to have your data deleted.

_____ _____

Signature Date

_____

Printed Name

MICHIGAN STATE
UNIVERSITY

Office of Regulatory Affairs
Human Research Protection Program
4000 Collins Road, Suite 136
Lansing, MI 48910
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Email: irb@msu.edu
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EXEMPT DETERMINATION
Revised Common Rule

March 2, 2022

To: Jeffrey K Conroy-Krutz

Re: **MSU Study ID:** STUDY00007200
Principal Investigator: Jeffrey K Conroy-Krutz
Category: Exempt 2ii
Exempt Determination Date: 3/2/2022
Limited IRB Review: Not Required.

Title: Somewhere Over the Rainbow: A New Look at LGBT Rights Advancements

This study has been determined to be exempt under 45 CFR 46.104(d) 2ii

Principal Investigator (PI) Responsibilities: The PI assumes the responsibilities for the protection of human subjects in this study as outlined in Human Research Protection Program (HRPP) Manual Section 8-1, Exemptions.

Continuing Review: Exempt studies do not need to be renewed.

Modifications: In general, investigators are not required to submit changes to the Michigan State University (MSU) Institutional Review Board (IRB) once a research study is designated as exempt as long as those changes do not affect the exempt category or criteria for exempt determination (changing from exempt status to expedited or full review, changing exempt category) or that may substantially change the focus of the research study such as a change in hypothesis or study design. See HRPP Manual Section 8-1, Exemptions, for examples. If the study is modified to add additional sites for the research, please note that you may not begin the research at those sites until you receive the appropriate approvals/permissions from the sites.

Please contact the HRPP office if you have any questions about whether a change must be submitted for IRB review and approval.

New Funding: If new external funding is obtained for an active study that had been determined exempt, a new initial IRB submission will be required, with limited exceptions. If you are unsure if a new initial IRB submission is required, contact the HRPP office. IRB review of the new

submission must be completed before new funds can be spent on human research activities, as the new funding source may have additional or different requirements.

Reportable Events: If issues should arise during the conduct of the research, such as unanticipated problems that may involve risks to subjects or others, or any problem that may increase the risk to the human subjects and change the category of review, notify the IRB office promptly. Any complaints from participants that may change the level of review from exempt to expedited or full review must be reported to the IRB. Please report new information through the study's workspace and contact the IRB office with any urgent events. Please visit the Human Research Protection Program (HRPP) website to obtain more information, including reporting timelines.

Personnel Changes: After determination of the exempt status, the PI is responsible for maintaining records of personnel changes and appropriate training. The PI is not required to notify the IRB of personnel changes on exempt research. However, he or she may wish to submit personnel changes to the IRB for recordkeeping purposes (e.g. communication with the Graduate School) and may submit such requests by submitting a Modification request. If there is a change in PI, the new PI must confirm acceptance of the PI Assurance form and the previous PI must submit the Supplemental Form to Change the Principal Investigator with the Modification request (available at hrpp.msu.edu).

Closure: Investigators are not required to notify the IRB when the research study can be closed. However, the PI can choose to notify the IRB when the study can be closed and is especially recommended when the PI leaves the university. Closure indicates that research activities with human subjects are no longer ongoing, have stopped, and are complete. Human research activities are complete when investigators are no longer obtaining information or biospecimens about a living person through interaction or intervention with the individual, obtaining identifiable private information or identifiable biospecimens about a living person, and/or using, studying, analyzing, or generating identifiable private information or identifiable biospecimens about a living person.

For More Information: See HRPP Manual, including Section 8-1, Exemptions (available at hrpp.msu.edu).

Contact Information: If we can be of further assistance or if you have questions, please contact us at 517-355-2180 or via email at IRB@msu.edu. Please visit hrpp.msu.edu to access the HRPP Manual, templates, etc.

Exemption Category. The full regulatory text from 45 CFR 46.104(d) for the exempt research categories is included below.[1234]

Exempt 1. Research, conducted in established or commonly accepted educational settings, that specifically involves normal educational practices that are not likely to adversely impact students' opportunity to learn required educational content or the assessment of educators who provide instruction. This includes most research on regular and special education instructional strategies, and research on the effectiveness of or the comparison among instructional techniques, curricula, or classroom management methods.

Exempt 2. Research that only includes interactions involving educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures, or observation of

public behavior (including visual or auditory recording) if at least one of the following criteria is met:

(i) The information obtained is recorded by the investigator in such a manner that the identity of the human subjects cannot readily be ascertained, directly or through identifiers linked to the subjects;

(ii) Any disclosure of the human subjects' responses outside the research would not reasonably place the subjects at risk of criminal or civil liability or be damaging to the subjects' financial standing, employability, educational advancement, or reputation; or

(iii) The information obtained is recorded by the investigator in such a manner that the identity of the human subjects can readily be ascertained, directly or through identifiers linked to the subjects, and an IRB conducts a limited IRB review to make the determination required by 45 CFR 46.111(a)(7).

Exempt 3. (i) Research involving benign behavioral interventions in conjunction with the collection of information from an adult subject through verbal or written responses (including data entry) or audiovisual recording if the subject prospectively agrees to the intervention and information collection and at least one of the following criteria is met:

(A) The information obtained is recorded by the investigator in such a manner that the identity of the human subjects cannot readily be ascertained, directly or through identifiers linked to the subjects;

(B) Any disclosure of the human subjects' responses outside the research would not reasonably place the subjects at risk of criminal or civil liability or be damaging to the subjects' financial standing, employability, educational advancement, or reputation; or

(C) The information obtained is recorded by the investigator in such a manner that the identity of the human subjects can readily be ascertained, directly or through identifiers linked to the subjects, and an IRB conducts a limited IRB review to make the determination required by 45 CFR 46.111(a)(7).

(ii) For the purpose of this provision, benign behavioral interventions are brief in duration, harmless, painless, not physically invasive, not likely to have a significant adverse lasting impact on the subjects, and the investigator has no reason to think the subjects will find the interventions offensive or embarrassing. Provided all such criteria are met, examples of such benign behavioral interventions would include having the subjects play an online game, having them solve puzzles under various noise conditions, or having them decide how to allocate a nominal amount of received cash between themselves and someone else.

(iii) If the research involves deceiving the subjects regarding the nature or purposes of the research, this exemption is not applicable unless the subject authorizes the deception through a prospective agreement to participate in research in circumstances in which the subject is informed that he or she will be unaware of or misled regarding the nature or purposes of the research.

Exempt 4. Secondary research for which consent is not required: Secondary research uses of identifiable private information or identifiable biospecimens, if at least one of the following criteria is met:

(i) The identifiable private information or identifiable biospecimens are publicly available;

(ii) Information, which may include information about biospecimens, is recorded by the investigator in such a manner that the identity of the human subjects cannot readily be ascertained directly or through identifiers linked to the subjects, the investigator does not contact the subjects, and the investigator will not re-identify subjects;

(iii) The research involves only information collection and analysis involving the investigator's use of identifiable health information when that use is regulated under 45 CFR parts 160 and 164, subparts A and E, for the purposes of ``health care operations'' or ``research'' as those terms are defined at 45 CFR 164.501 or for ``public health activities and purposes'' as described under 45 CFR 164.512(b); or

(iv) The research is conducted by, or on behalf of, a Federal department or agency using government-generated or government-collected information obtained for nonresearch activities, if the research generates identifiable private information that is or will be maintained on information technology that is subject to and in compliance with section 208(b) of the E-Government Act of 2002, 44 U.S.C. 3501 note, if all of the identifiable private information collected, used, or generated as part of the activity will be maintained in systems of records subject to the Privacy Act of 1974, 5 U.S.C. 552a, and, if applicable, the information used in the research was collected subject to the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq.

Exempt 5. Research and demonstration projects that are conducted or supported by a Federal department or agency, or otherwise subject to the approval of department or agency heads (or the approval of the heads of bureaus or other subordinate agencies that have been delegated authority to conduct the research and demonstration projects), and that are designed to study, evaluate, improve, or otherwise examine public benefit or service programs, including procedures for obtaining benefits or services under those programs, possible changes in or alternatives to those programs or procedures, or possible changes in methods or levels of payment for benefits or services under those programs. Such projects include, but are not limited to, internal studies by Federal employees, and studies under contracts or consulting arrangements, cooperative agreements, or grants. Exempt projects also include waivers of otherwise mandatory requirements using authorities such as sections 1115 and 1115A of the Social Security Act, as amended. (i) Each Federal department or agency conducting or supporting the research and demonstration projects must establish, on a publicly accessible Federal Web site or in such other manner as the department or agency head may determine, a list of the research and demonstration projects that the Federal department or agency conducts or supports under this provision. The research or demonstration project must be published on this list prior to commencing the research involving human subjects.

Exempt 6. Taste and food quality evaluation and consumer acceptance studies:

(i) If wholesome foods without additives are consumed, or (ii) If a food is consumed that contains a food ingredient at or below the level and for a use found to be safe, or agricultural chemical or environmental contaminant at or below the level found to be safe, by the Food and Drug Administration or approved by the Environmental Protection Agency or the Food Safety and Inspection Service of the U.S. Department of Agriculture.

Exempt 7. Storage or maintenance for secondary research for which broad consent is required: Storage or maintenance of identifiable private information or identifiable biospecimens for potential secondary research use if an IRB conducts a limited IRB review and makes the determinations required by 45 CFR 46.111(a)(8).

Exempt 8. Secondary research for which broad consent is required: Research involving the use of identifiable private information or identifiable biospecimens for secondary research use, if the following criteria are met:

(i) Broad consent for the storage, maintenance, and secondary research use of the identifiable private information or identifiable biospecimens was obtained in accordance with 45 CFR 46.116(a)(1) through (4), (a)(6), and (d);

(ii) Documentation of informed consent or waiver of documentation of consent was obtained in accordance with 45 CFR 46.117;

(iii) An IRB conducts a limited IRB review and makes the determination required by 45 CFR 46.111(a)(7) and makes the determination that the research to be conducted is within the scope of the broad consent referenced in paragraph (d)(8)(i) of this section; and

(iv) The investigator does not include returning individual research results to subjects as part of the study plan. This provision does not prevent an investigator from abiding by any legal requirements to return individual research results.

1 Exempt categories (1), (2), (3), (4), (5), (7), and (8) cannot be applied to activities that are FDA- regulated.

2 Each of the exemptions at this section may be applied to research subject to subpart B (Additional Protections for Pregnant Women, Human Fetuses and Neonates Involved in Research) if the conditions of the exemption are met.

3 The exemptions at this section do not apply to research subject to subpart C (Additional Protections for Research Involving Prisoners), except for research aimed at involving a broader subject population that only incidentally includes prisoners.

4 Exemptions (1), (4), (5), (6), (7), and (8) of this section may be applied to research subject to subpart D (Additional Protections for Children Involved as Subjects in Research) if the conditions of the exemption are met. Exempt (2)(i) and (ii) only may apply to research subject to subpart D involving educational tests or the observation of public behavior when the investigator(s) do not participate in the activities being observed. Exempt (2)(iii) may not be applied to research subject to subpart D.