

Taking (and painting) the street: a demonstration outside the Federal Congress in Buenos Aires.



The region has made great strides in a new frontier of social inclusion: protecting and advancing the rights of the LGBT community. How did it happen?

by Javier Corrales



JUAN MABROMATA/AFP/GETTY

A transformation, some would even say a revolution, is taking place in our understanding of democracy. Citizens and nations are increasingly recognizing that freedom and equality under the law requires protecting the rights, status and expression of lesbian, gay, bisexual, and transgender (LGBT) people. What was a taboo subject 20 years ago is today open to public discussion and debate. LGBT rights are central topics of concern, not just in academic circles, but even in televised presidential debates.

Remarkably, Latin America has emerged as a world leader in this democratic transformation. Some of the most advanced pro-LGBT legislation can be found in the region. But at the same time, in many areas Latin America is a world laggard; some of the worst forms of homophobia are routinely found in Latin America—placing the Americas in the awkward position of occupying both the lead and the back seat in the historic global movement to expand our conception of democracy. What explains this dichotomy?

LATIN AMERICA LEADS

It is important to look first at the positive. Some spectacular achievements in LGBT rights have occurred just in the past two years.

Everybody who follows Latin American affairs is probably familiar with the pathbreaking 2010 law in Argentina legalizing gay marriage and adoption. But many people may not realize that, while only Argentina, Canada, Mexico City, and a few states in the United States have approved gay marriage laws, LGBT rights are expanding almost everywhere.

For instance, in 2008, Brazil's then-President Luiz Inácio Lula da Silva inaugurated an international LGBT congress. The same year, Ecuador approved the second constitution in the world that bans discrimination on the basis of "gender identity," "sexual orientation" and "HIV status" (although it still defines marriage as the "union between man and woman," Art. 68).

In 2009, Uruguay approved civil unions. In 2010, El Salvador's president, Mauricio Funes, issued a decree banning discrimination in the public service based on sexual orientation and gender identity. Costa Rica's Constitutional Court ordered the Supreme Elections Tribunal to discontinue preparations for a referendum petitioned by *Observatorio de la Familia*, a conservative group seeking to block gay rights. The same year, Brazil's Federal Supreme Tribunal voted 10-0 in favor of gay partnerships.

In 2011, Lima Mayor Susana Villarán led the city's small gay pride parade. In Colombia, the Supreme Court unanimously ruled that homosexual couples have the right to "form a family" and gave the legislature two years to legislate in favor of recognizing same-sex unions. Even Fidel Castro, a person not known for admitting errors, apologized publicly for his mistreatment of homosexuals in the 1960s.

The transformation of Latin America is not just an internal affair.

As this process has unfolded, the region has emerged as a global champion of LGBT rights. In 2007, for instance, Argentina, Brazil and Uruguay promoted the United Nations launch of the Yogyakarta Principles, which specify how states must treat issues of sexual orientation and gender identity.

In March 2011, on behalf of 85 signatory countries, Colombia delivered a joint statement during the UN General Debate that called on states to end violence and establish criminal sanctions for human rights violations linked to sexual orientation and gender identity,

and urged the Human Rights Council to address these important human rights issues.

Also that month, President Dilma Rousseff of Brazil discussed with President Barack Obama of the United States the appointment of a special rapporteur on LGBT rights within the Inter-American Commission for Human Rights (IACHR) at the Organization of American States (OAS). Last November, partially in response, the IACHR created a Unit on the Rights of Lesbian, Gay, Bisexual, Trans, and Intersex (LGBTI) Persons.

And yet, despite these advances, Latin America is still home to some of the worst forms of discrimination and mistreatment of LGBT folks.

The notion of hate crime does not exist in many countries. Surveys show that the majorities tend to have little political tolerance for LGBT rights everywhere except in Argentina and Uruguay. Churches, schools, neighbors, and households routinely demonize LGBT people, forcing them to leave their places of residence or to stay in the closet. Politicians still express apprehension. The governor of Jalisco state in Mexico was typical in his remark that gay marriage "still disgusts me."

The Catholic and Protestant Churches play a complicated role. On the one hand, Catholic charities tend to offer assistance to AIDS patients and victims of domestic abuse—groups that often include members of the LGBT community. On the other hand, factions within the clergy are today the most unabashed exponents of anti-LGBT speech. Chile's Cardinal Jorge Medina is a good example, openly proclaiming that "if a person has a homosexual tendency it is a defect, like missing an eye, a hand, a foot [...] but when it enters the practice of sexual life between people it's still not acceptable."

Few prodemocracy movements in the past 30 years have had to face such a complicated dilemma: fighting a moral authority in order to make a democratic point. With certain religious leaders deciding to become unabashedly outspoken against homosexuality, the LGBT movement finds itself battling a widely esteemed institution in its campaign to win rights.

Even when homophobia is quiet, it is still potent. Few Latin American employers have proactive diversity policies, and LGBT employees are often encouraged not to flaunt their sexuality. Marriage continues to be defined, constitutionally in some cases, as unions reserved for straight couples (or fake straight couples).

Neither the police nor school teachers receive training on how best to respond to LGBT issues. Transsexuals, many of whom rely on sex work to make a living,

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face the worst forms of physical and mental abuse, and sometimes lethal violence, by the very same people who purchase their services. In several English-speaking Caribbean nations, homosexuality remains illegal.

Consequently, there is an air of inhospitality even when the legal environment is hospitable.

Mexico City is a good example. A year after the city approved in late 2006 a cohabitation law granting same-sex couples marital rights identical to those established for common-law relationships between men and women, only 302 couples applied for this right. In contrast, in Massachusetts, with a smaller population (of 6.5 million versus 8.9 million in Mexico City), eight months after gay marriage was approved, 6,000 couples filed for this right.

Violence remains a problem. In Honduras, Mexico, Colombia, and Brazil, prominent gay leaders have been murdered. Latin American LGBT groups are finding that, as Omar Encarnación has argued, gay rights in the books “will mean nothing” as long as discrimination and violence remain rampant.

MEASURING PROGRESS

The dichotomy of status of LGBT rights can also be gauged quantitatively. Mario Pecheny and I have been working on two possible measures of LGBT rights and status. One looks at the legal environment, the other at LGBT-friendly organizations in a given country.

The Legal Environment

Drawing from various sources, we have identified seven legislative categories that affect LGBT rights: legality of same-sex sexual activity, legality of same-sex relationships, legality of same-sex marriage, legality of same-sex adoption, legality of LGBT military service, existence of anti-discrimination laws, and laws protecting expression of gender identity.

Each country was given a score from -1 to 2 for each of the categories, depending on whether there is full, partial, or no pro-LGBT legislation in the country for that particular category. The scores from each category

were summed up, with a country’s overall scores ranging from -1 to 14. If a country provided no information, it received a 0 score for that category, based on the assumption that if no information was listed, it was highly unlikely that legislation existed.

The Organizational Environment

Since we know that laws are not always enforced, it is important to find ways to measure the quality of life for LGBT people. This is difficult, almost impossible, to achieve for all countries and regions. Some surveys of degrees of discrimination have been conducted, but they are sporadic and unavailable everywhere.

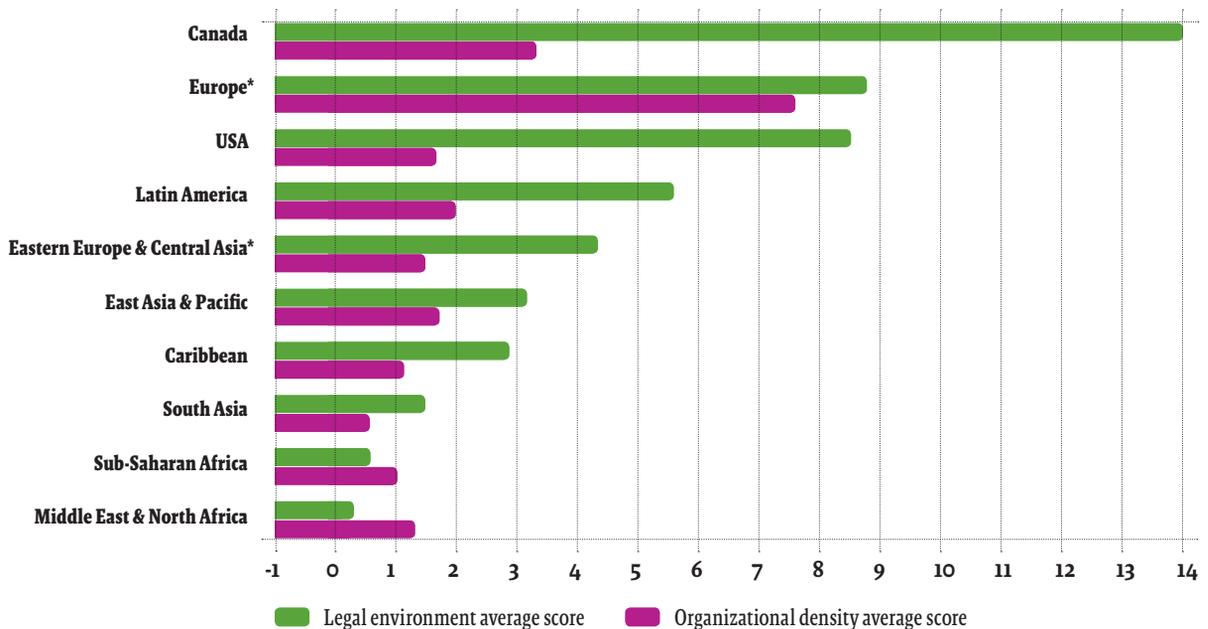
As a less-than-perfect solution, Pecheny, Mari Crook and I came up with what we call an index of gay-friendliness of cities. This index measures the number of gay-owned or gay-friendly organizations and businesses in the top three most populated cities in 117 countries. The information was gathered from the 2007 issue of *Spartacus*, a directory of gay services worldwide.

Three preliminary organization scores were given: average number of businesses across the three most populated cities, the number of businesses in the most populated city and the number of businesses per capita in the most populated city. While this index has a number of methodological problems, it offers the only measure of urban life from the point of view of the LGBT community. The index provides an estimate of the number of gay-owned and gay-friendly businesses per 100,000 inhabitants, in each country’s three largest urban centers.

Both indices confirm the same story. Latin America has become a leader in LGBT rights and urban living conditions. In terms of the legal environment, the average score for Latin America is 5.53. In terms of organizational density, the average for Latin America is 2.01 (meaning that there are 2.01 gay-friendly organizations per 100,000 inhabitants). Both scores are the highest for any region of the world outside the North Atlantic.

But the darker side of the story is also evident from the data. First, the score for Latin America in Figure 1

FIGURE 1. Pro-LGBT Laws and Businesses by Region (on a -1 to 14 scale)



*Countries author includes in Europe and Eastern Europe/Central Asia are:

Europe: Andorra, Austria, Belgium, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Faroe Islands, Finland, France, Germany, Gibraltar, Greece, Greenland, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, San Marino, Slovakia, Slovenia, South Georgia, Spain, Sweden, Switzerland, United Kingdom.

Eastern Europe and Central Asia: Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Macedonia, Moldova, Montenegro, Romania, Russia, Serbia, Tajikistan, Turkey, Turkmenistan, Ukraine, Uzbekistan.

excludes the islands of the Caribbean. When examined separately, the score for the Caribbean is dismal, one of the lowest in the world: 2.85 for the legal index; 1.11 for the organizational index.

Second, there is significant variation even across the rest of Latin America. Argentina, Brazil, Peru, and Colombia score very favorably in our indices, but Bolivia, Mexico, Venezuela, and most Central American countries score poorly (below 4 points of 14 in our legal index).

HOW DID ARGENTINA DO IT?

How might we explain this divergence? Most people are familiar with the obstacles to LGBT rights, ranging from well-entrenched cultural norms of machismo, sexism and secrecy, to the prominent role of religion in preaching anti-LGBT positions. So perhaps the best approach to the question is to focus on the reasons for high scores rather than on the reasons for low scores.

And there is no question that, in terms of legal issues, Argentina is perhaps the most important achiever.

Why Argentina, of All Places?

When one examines the literature on the factors that often relate to LGBT rights, one finds that many of these factors can be found in Argentina. Democratic rights are widespread and leading parties are mostly leftist. Furthermore, there is plenty of evidence that cultural attitudes are secular, at least in the cities. One of the strongest correlations is between secularism (measured in terms of the percentage of people in a given country who believe that “marriage is an outdated institution”) and a very pro-LGBT legal and organizational environment. This finding fits the Argentine case well, and helps explain why the Caribbean and Central America don’t do so well.

But Argentina also contradicts some of the important predictions of the literature. For instance, economic globalization is associated with LGBT rights. Yet

Argentina has, at best, medium rather than high levels of globalization.

Furthermore, on a number of measures, Argentina is not more secular than its peers in Latin America. While the differences between Argentina and Brazil are significant, they are not as large between Argentina and Chile, Mexico, Colombia, and Peru.

To explain why Argentina is so far ahead of the curve, we need to go beyond conventional explanations.

Here are six factors that explain Argentina's success.

First, it's not just secular values but also the role of the church in Argentina. Argentine Catholics don't go to church as much as people elsewhere in Latin America, and there are a small number of evangelicals. Much has been said about the fact that a Catholic country such as Argentina has approved gay marriage. This is a point worth making, because the Catholic Church, since 2007, especially under the present pope, has become more obsessed with blocking same-sex marriage.

In Argentina, even though the church actually launched a crusade against the marriage bill, church attendance is low—approximately 22 percent of the population attends church services weekly. The Evangelical population is tiny (only 9 percent, including Protestants, Lutherans and Methodists).

Low church attendance and the low numbers of Evangelicals help predict pro-LGBT legislation because it reveals the extent of societal secularism, as well as the mobilizational weakness of the churches. Argentina is distinctive on both counts.

Second, separation of church and party matters more than the separation of church and state. Argentina has not had a strong confessional party for the past 100 years. There is no strong Christian Democratic party, as in Chile and Venezuela. No party has the kind of strong connections with Opus Dei that characterizes the ruling parties in Colombia and Mexico. There is no party with strong connections with evangelical groups, similar to the ties of the contemporary Republicans in the U.S. (and arguably, the Labor Party in Brazil and most parties in Central America and the Anglo-Caribbean). This is one reason why so many legislators in Argentina, from all parties, risked voting against the pulpit.

Third, transnational legalism is the most important form of globalization. Much has been written about

how globalization helps to promote LGBT rights. We saw that the Argentina case defies what the theory says about globalization, when measured in economic terms. But Argentina also illustrates a type of globalization that is especially helpful, and that, incidentally, is scarce in the U.S.: transnational legalism.

This term refers to the ease with which a country's legal system borrows from international cases to set legal precedents domestically. While most countries in Latin America have a strong tradition of transnational legalism, Argentina is a regional champion. It is both an avid importer of international norms (since 1994, most international human rights treaties have had constitutional status) and also a voluminous exporter of legal norms, playing active roles in helping international organizations and foreign countries bolster their human rights norms and helping countries establish truth commissions. Argentina's pro-LGBT forces were quite comfortable emulating norms from abroad, even borrowing verbatim wording and arguments from actors fighting elsewhere to approve LGBT rights.

Fourth, the domestic legal landscape is as important a factor as global influence. Argentina's pro-LGBT groups did not just draw from abroad. They also drew from domestic sources.

The agenda of the LGBT movement was cast as part of the country's broader agenda on women's reproductive rights, gender equality, health, and sexuality. These issues have been part of Argentina's legislative agenda for several decades. Furthermore, a strategy was developed by different LGBT organizations, particularly the *Federación Argentina de Lesbianas, Gays, Bisexuales y Trans* (Argentine Federation of Lesbians, Gays, Bisexuals, and Trans), to encourage gay couples to request marriage licenses, get an official refusal and then challenge the decision on constitutional grounds.

This strategy proved effective. Several judges responded by authorizing marriages, also on constitutional grounds. In less than a year, a dozen gay couples were married that way, even before the new law came into being. The issue was framed as a question of equality before the law—the domestic law.

In contrast, the Catholic Church almost took pride in presenting itself as outside the law. Its discourse against LGBT folks became so aggressive and discriminatory that even those who were unsure about the morality of the bill were appalled by the church's position.

Whereas the traditional left in Latin America has



A banner day: President Cristina Fernández de Kirchner (center) with LGBT activists after the approval of the same-sex marriage law.

never quite come to terms with globalization, always responding to it with various forms of negativity ranging from suspicion to extreme repulsion—LGBT movements have adopted a more relaxed response: leverage globalization. LGBT groups systematically use resources provided by globalization and markets to enhance their bargaining leverage. For instance, they use traditional and new media such as the Internet to actively monitor and adapt to local circumstances the strategies adopted by LGBT movements elsewhere on the planet.

The key lesson, therefore, is that in addition to transnational legalism, a country needs to have a well-grounded legal tradition of equality, liberty and human rights, as well as a set of social movements with expertise in how to use that tradition to its advantage.

Fifth, democracy, yes; referendum democracy, no. Perhaps the most important victory by pro-LGBT groups in Argentina was to avoid the referenda trap. Enemies of Argentina’s gay marriage legislation, including the Catholic Church, offered a populist compromise: submit the issue to a popular vote.

In Latin America at the moment, the concept of participatory democracy is in vogue. But LGBT groups in Argentina and their allies were smart to recognize the problems with this form of populism. Submitting questions of minority rights to a majority vote is inherently a biased process—against the minority group, naturally—and this makes it undemocratic despite its reliance on the popular vote. Deciding the rights of minorities by consulting majorities is not democracy; rather, it is tyranny of the majority, or perhaps more aptly, “the violence of faction” (Federalist No. 10, 1787).

Argentina thus replicated the path taken by Massachusetts, where gay marriage was approved first through a court ruling, and then by legislative vote against the wishes of Governor Mitt Romney, who wanted a referendum, and avoided the California and Florida models, which relied on popular vote to disastrous results.

Sixth, the president presides. Ultimately, what made the law possible in Argentina was the president’s decision to take the risk of backing the bill. This courageous act is the one factor that is more ad hoc and specific to the case,

and yet perhaps it was the most indispensable. Analysts debate why President Cristina Fernández de Kirchner risked a public fight with the church and a possible split within the ruling party.

Perhaps she did this because of the Peronist tradition of confronting the church openly (while secretly negotiating other agreements). Perhaps it was another example of the administration’s penchant for open confrontation. Perhaps she did it because the opposition was fragmented and likely to split even more severely than the ruling party. Perhaps she did it because the government needed to recover lost ground among the young and the urbanites, who had abandoned her. Perhaps she did it out of principle.

Who knows? What matters is that the president took the risk.

A few days after the law was approved, Fernández welcomed, for the first time ever, a host of LGBT organizations to the Pink House. That, too, was historic and gutsy.

Overcoming homophobia is not easy and, perhaps, never fully attainable. But Argentina offers some important lessons on what it takes to move forward.

It is important to live in a democracy, of course. But it is more important to avoid referenda democracy. It is important to have separation of church and state, but it is also vital to have secular citizens and secular parties.

Ultimately, legislatively approved gay marriage is transforming the way we have thought of democracy for the past three centuries, and it would be disingenuous to believe that this effort can occur without courage.

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