
19. LGBTI rights: the international context

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The simplicity of the term ‘lesbian, gay, bisexual, transgender and intersex rights’ (LGBTI) belies the complexity of the ongoing struggle for justice and the double-edged sword of legal recognition and regulation. Legal restrictions on LGBTI individuals include: the ongoing criminalization and regulation of same-sex sexual practices and intimate relationships (in, for example, Nigeria or Iran); restrictions on the way LGBTI individuals form families via for example adoption or fertility or surrogacy practices (in, for example, Portugal, Italy or Australia); restrictions on access to employment or housing (in, for example, India or Chad); restrictions on the formation of activist networks and publicity of LGBTI solidarity and politics (in, for example, Russia or Belarus); restrictions on trans people’s ability to legally change their gender and the punitive consequences of expressing non-gender-normative identity (in, for example, Romania or Malaysia); and excessive medical intervention in the lives of intersex individuals (in, for example, Australia or the USA).

There is no singular avenue used to achieve LGBTI rights, nor definitive consensus on the type of rights that LGBTI individuals ought to be claiming. Legal restrictions on LGBTI rights are often challenged using legal arguments relying on broader rights to civil and political equality, including the right to privacy, freedom of speech or rights to marriage and family life via national law, drawing on international conventions (for example, the European Convention on Human Rights, the Universal Declaration of Human Rights).

Some activist organizations such as Stonewall (UK) argue that formal rights to civil and political equality must be in place as a matter of basic non-discrimination. This approach is not without criticism (see Douglas et al., 2011). Formal equality often relies on a conception of LGBTI as a singular identity. This can preclude more complex considerations of, and responses to, the web of discriminations that occur through intersections of race, class, gender, ability and so on (see Grabham et al., 2009). This flattens out public debate on how LGBTI identities intersect with broader political frameworks and power structures. The pursuit of formal equality for LGBTI people also tends to focus on a particular right. In the West,

the noisy clamour of marriage rights has become the most visible and dominant issue on the formal LGBTI rights agenda. The struggle for relationship recognition, it has been argued, imposes a heteronormative model of relationships on LGBTI people, erasing more complex queer subjectivities. Thus formal equality does little either to deconstruct normative understandings of gender or to validate broader versions and visions of gender in family and intimate life (see Barker, 2012).

In this chapter, I will elaborate on some of these conflicts around the acquisition of LGBTI rights. To begin I consider a little of the legal history of homosexuality and illustrate the ongoing impact of British colonialism in the development of anti-sodomy laws.

A LEGAL HISTORY OF HOMOSEXUALITY

The significance of law lies in the fact that it is an important social space, a particular set of cultural practices through which meaning and order are generated and enforced. (Moran, 1996: 2)

Volker Turk states that ‘homophobia is a human made construct, fed by political, religious, legal and even pseudo-medical justification’ (2013: 121). The intersection of these powerful mediums has historically played and continues to play a key role in both the ‘creation’ and the ‘demonization’ of the *homosexual*. Historically, homosexuality, or same-sex sexual relations, has been subject to various professional pronouncements on the nature and status of gay lives. Such pronouncements have led to the regulation of LGBTI existence with both positive and negative legal ramifications.

A brief overview of the legal history of *homosexuality* is littered with interventions proscribing LGBTI sexuality. The law’s invocation of the medically derived term ‘homosexual’ (by K.M. Kertbeny in the mid-1800s) ascribed particular meanings to LGBTI individuals, with a focus on the intimate lives of gay men. In the UK the offence of buggery dates back as far as 1533. Buggery was punishable by death in the UK until 1861, with the last execution for sodomy taking place in 1836. In 1861, the Offences against the Person Act removed the death penalty in favour of imprisonment. In 1885, a further amendment to the buggery laws sought to include acts of gross indecency where sodomy could not be proven. England and Wales finally repealed their sodomy laws via the Sexual Offences Act 1967, ten years after the recommendations outlined in the Wolfenden Report.

The spread of anti-sodomy laws worldwide was, in part, enacted by the UK as a colonial force from the sixteenth century onwards. The creation and implementation of legislation prohibiting sodomy during colonization aimed to control the native inhabitants and ‘civilize’ the populace. Prior to colonization the ‘policing’ of same-sex sexual activity was minor, and homosexuality was perceived as a social rather than legal problem. The moderate indigenous response led colonial forces to accuse ‘native’ cultures of failing to adequately punish ‘perverse’ sex. Sodomy laws embraced an ideology of ‘re-education of sexual mores’ as an attempt to assert Christian religious morality over colonized subjects (Human Rights Watch, 2008: 5–8).

The validity of this colonially imposed legislation has been subject to challenge in several countries, such as the Indian case of *NAZ Foundation v Government of N.C.T. of Delhi and Others* [2009]. The petitioners sought the repeal of s.377 of the Indian Penal Code (1860), which reads: ‘[W]hoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment ... which may extend to ten years.’ The petitioners claimed ‘queer Indians’ were still bound by the law of the British Raj, a law, they argued, that should have departed with the ousted colonial rulers in 1947 upon independence. They sought to characterize the law as an ‘abhorrent alien legacy’ and demanded the court abandon it as such. The petitioners in the case called upon the UK’s Foreign and Commonwealth Office to apologize for the imposition of this legislation and to acknowledge the ‘immense suffering’ that it had caused.

Former British colonial territories make up a notable number of the 78 United Nations (UN) member states that continue to criminalize consensual same-sex sexual activity. Criminalization can lead to both prosecution and persecution. The penalties imposed on lesbian and gay sexual conduct vary widely from state to state, as do their enforcement. Punishment includes incarceration from ten days (for example, Eritrea) to life (for example, Bangladesh), significant monetary fines (for example, Cameroon), commitment to an institution for psychiatric care (for example, Dominica) or, in extreme cases, the death penalty (for example, Iran, Nigeria and Mauritania). The death penalty is ordinarily only given after repeated convictions.

The status of LGBTI advocacy organizations in those states varies significantly. Broadly speaking LGBTI movements in the European Union (EU), the USA, Canada, Australia and some parts of South America (Argentina, Uruguay and Mexico) have permission and capacity to openly lobby their governments regarding rights in a transparent manner. The status of LGBTI groups in Russia, the West Indies, parts of

Africa (excluding South Africa) and the Middle East is more tenuous. LGBTI advocates in these states often engage in political and social advocacy at the expense of their own personal security. Of course, such generalizations minimize the discrimination that is still experienced in the 'West' and fail to realize the ongoing and public nature of work by activists in hostile states.

TRAVERSING DOMESTIC AND INTERNATIONAL LAW

The development of an LGBTI rights agenda relies on the combined input of local, national and international actors. In analysing the development of LGBTI rights, academic writing often looks to local and national circumstances that may have enabled change, including, for example: favourable political opportunities, such as the Labour Party coming to power in the UK in 1997 following the homophobic Conservative government of the 1980s (see Cooper, 1995); the rise of HIV/AIDS activism (Weait, 2007); and changes to family formation, such as increases in divorce rates and single-parent families, access to fertility services for lesbians and single women, and other examples (Boyd, 1997). While national events and national actors play a key role in shaping change, international decisions and international human rights statements on sexuality can also have a bearing.

International judicial decisions that call for change can place some pressure on national agendas. Evidence for this in the EU has been documented by a number of academics (Sommer et al., 2013). The combined effect of EU law and policy (via the European Commission, Parliament and Council) and judgments means that the decisions of the European Court of Justice and the European Court of Human Rights (ECtHR) have effects beyond the immediate parties. The multilateral nature of jurisprudence in the EU polity means states that are not party to a legal action may nevertheless feel its effects. Research carried out by Helfer and Voeten considered how positive LGBTI jurisprudence of the ECtHR shapes legal change across European jurisdictions. Their data suggest that if there is a preceding ECtHR decision regarding a particular policy the probability of a state changing its policy to reflect that jurisprudence rises by approximately 14 per cent. They claim that this may be due to: firstly, the threat of future litigation; secondly, the persuasive authority of judicial reasoning; and, thirdly, the agenda-setting effect of international court decisions (2014: 85–86). Beyond the scope of the decision, such jurisprudence may encourage alliances between national and international judges, and provide national judges with a

jurisprudential base to strike down a policy or, at the very least, declare the policy incompatible with human rights norms. See for example the English case of *Bellinger v Bellinger* [2003].

Case law is a key factor in the development of formal rights, but it is particularly effective when combined with a multi-pronged approach to advancing rights. Patternote and Kollman note, with regard to LGBTI policy, that ‘policy adoption in Europe has been accelerated by processes of international learning via transnational networks, elite lesson drawing as well as albeit – to a much lesser extent – more formal processes of policy harmonization’. More specifically, they note: ‘policy networks in Europe are incredibly porous and the lines between NGOs, domestic policymakers, transnational activists, EU officials, and legal experts are often blurred. Single actors wear multiple hats ... in multiple arenas’ (2013: 512–513). Policy actors being ‘networked’ in this way in the EU enables close partnerships to develop through a variety of social and political angles, providing the requisite momentum for policy change.

It was not until the early 1990s that sexual orientation became a human rights issue in the international arena. Mertus has noted that the International Lesbian and Gay Association (ILGA), established in 1978, was one of the first major LGBTI organizations to try to create a voice at the UN level. ILGA claimed LGBTI discrimination was a global issue, necessitating a global response (Mertus, 2007: 1039). ILGA submitted a number of applications for consultative status to the United Nations Economic and Social Council, which would have allowed them access to UN proceedings. ILGA’s applications were rejected owing to perceived inappropriate affiliations and negative votes from the USA, Iran, the Russian Federation and a number of other nations. It was not until December 2006 that ILGA, alongside the Danish National Association for Gays and Lesbians (LBL) and the German group the Lesbian and Gay Federation (LSVD), gained consultative status. Major international human rights NGOs Amnesty International and Human Rights Watch did not include action or reporting on LGBTI issues or individuals until the 1990s. In the mid-1990s, a number of key UN meetings set the stage for NGOs with a mandate on LGBTI rights to develop closer working relationships with other NGOs and government bodies. In particular the 1994 International Conference on Population and Development in Cairo and the 1995 Conference on Women in Beijing saw women’s groups and LGBTI NGOs develop greater allegiances, working towards shared goals and affiliations.

International conventions such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political

Rights (ICCPR) have provided the foundation for broad-based non-discrimination legislation. The Yogyakarta Principles of 2007, which specifically looked at sexual orientation and gender identity in relation to international human rights, have contributed to an even greater extent to the human rights discourse on discrimination based on sexuality and gender identity. Yogyakarta outlined and developed the UN's ongoing commitment to confronting discrimination, indicating how sexuality could be considered via the UDHR, the ICCPR and the Refugee Convention. The Yogyakarta Principles make five main recommendations to government. The first is that governments should protect people from homophobic and transphobic violence through the use of 'hate crime' laws and should recognize sexual orientation and gender identity as a basis for a claim to asylum. The second principle is that governments should work towards the prevention of torture and cruel, inhuman or degrading treatment, and provide avenues for redress and public investigation. Thirdly, governments should repeal laws that criminalize homosexuality, including sexual conduct between adults, and ensure individuals are not arbitrarily detained by law enforcement bodies simply because of their sexual orientation or gender identity. Fourth is encouragement for the enactment of laws that prohibit discrimination in access to services, employment and health. Finally, governments are encouraged to safeguard freedom of expression, association and peaceful assembly (for example, LGBTI safe spaces, pride marches) and protect such expression from acts of violence and intimidation by public and private actors as seen for example in Russia, Poland and Jamaica.

The UN Human Rights Committee is one of the most influential human rights organizations, symbolically powerful, and relied on by regional bodies and national courts. The Committee includes a reporting mechanism that allows it to make observations and reflect on areas of concern through its 'concluding observations'. Possibly inadvertently, the Committee has also brought the language of LGBTI rights into the international sphere and into the reporting mechanisms of state signatories to the ICCPR. With the increased references to sexual orientation and gender identity in the UN these concerns become an integral part of the consideration for states in their own reporting. The emergence of LGBTI rights into spheres such as this has been somewhat tactically useful in bringing LGBTI rights to the discussion table of governments generally hostile to LGBTI politics (see Jamaican prime minister Portia Miller-Simpson in the 2012 leadership debates). Additionally the depth and detail of observations regarding sexuality and gender identity have increased over time, and the Committee has become more sensitive to the use of appropriate language regarding LGBTI-identified individuals. For

example, there has been a shift in the use of terms. Simple understandings of 'sexual orientation' morphed into the more focused use of LGBT. LGBT then shifted to incorporate the 'I' (for intersex) of LGBTI and has now begun to focus on more nuanced sexual and gendered identity (Gerber and Gory, 2014: 413–415). The use of such language has a trickle-down effect, with states being guided on how to refer to and discuss LGBTI concerns in their own country.

INTERNATIONALISM VERSUS IMPERIALISM

There are, of course, complexities and concerns in using international law and international conventions in order to guide and standardize the treatment of LGBTI individuals. It has been argued that the internationalization of LGBTI rights is based on a particular European- and US-centric version of LGBTI sexuality. The dominant understanding of 'sexual orientation' in the EU and North America assumes it refers to an individual's fixed and inherent sexual orientation and gender identity.

Legitimate concerns have been raised that the use of 'identity' terms such as LGBTI or sexual orientation may have the effect of excluding those who do not identify with this particular nomenclature. This may leave some non-normatively gendered/sexuality-conforming individuals even further outside the scope of legal protection and further outside of queer- or LGBTI-identified and identifiable communities. In some countries, the use of LGBTI may be unheard of outside urban areas. Individuals may have same-sex relations but may not refer to them or identify them as fitting within the scope of 'LGBTI' identity.

The dominant Western definition fails to provide a nuanced approach to sexual and intimate lives that may involve opposite-sex and same-sex relations but are not defined by those relations. The imposition of this definition risks recolonizing sexual orientation and gender identity. Rather, it may be useful to consider 'sexual orientation' and 'gender identity' as holding 'a range of potential meanings that are subject to contestation' (Waites, 2009: 152) and subject to contestation based on an acknowledgement of cultural difference and the way in which that impacts on intimacy.

One of the reasons sexuality is positioned in the West as an innate or essential characteristic rather than one that is fluid or has been consciously chosen may be the continued use of the law and medicalized discourse in the bid to gain formal recognition of LGBTI lives. The arguments deployed in court when trying to gain for example rights to privacy or family life are often based on an essentialist trope. Statements

about sexuality in these contexts often imply a lack of choice or a lack of conscious decision-making – that being gay is a genetic state. A more complex narrative of sexuality is that sexuality may be a choice; that sexuality and/or gender identity are not necessarily static is often excised from legal and social discourse. Thus, an understanding that sexuality is contingent and shifting and may incorporate intimate relationships with both men and women and/or identification as a man, a woman or neither at various points over a lifetime is removed from the scope of legal arguments and therefore legal recognition or protection and broader social acceptance (Sharpe, 2010).

The erasure of broader social and culturally specific models of sexuality, intimate relationships and gender identity is part of the critique of international LGBTI movements. Relying on limited definitions of sexual orientation fails to recognize the particular characteristics of other societies that may acknowledge non-normative versions of sexual orientation or gender identity but refuse to label that sexuality as LGBTI, for example the *fa'afafine* in Samoa or Thai *kathoey*-identified individuals. On the international stage, versions and visions of how sexuality is to be judged, codified and named must hold up against a Western human rights standard that can have the effect of erasing the peril and potential of cultural difference. Judith Butler has argued that 'the very public assertion of gayness calls into question what counts as reality, indeed, what counts as human life' (cited in Gross, 2008: 240). Aeyal Gross notes:

Butler regards the issue of the rights of sexual minorities as attempting to bring in to the scope of 'human', lives that are considered beyond its borders ... 'human' is defined in advance in terms that are Western, very often American, and therefore partial and parochial; hence 'the "human" at issue in human rights is already known, already defined', and a non-imperialist conception of international human rights 'must call into question what is meant by the human, and learn from the various ways and means by which it is defined across cultural venues'. (Gross, 2008: 240)

International LGBTI politics must ensure it is aware of its potential to repress particular cultural practices and understandings of sexuality. The dominance of a Western model of sexual orientation and gender identity and the damaging effect to local communities of imposing 'untested or unsuitable human rights strategies' should be seriously accounted for by non-indigenous NGOs, advocates and activists (Gerber and Gory, 2014: 419). International NGOs must give local actors the lead in domestic events, asking when and in what form they can offer assistance, or they

run the risk of continuing the very imperialist traditions that lead to the implementation of punitive laws in the first place.

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