

MAKING SENSE OF LGBT ASYLUM CLAIMS:
CHANGE AND VARIATION IN
INSTITUTIONAL CONTEXTS

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I. INTRODUCTION

The objective of the following piece is to articulate recent developments in the global institutional context that have imbued lesbian, gay, bisexual, and transgender (LGBT) asylum claims with sense and moral rectitude. The guiding assumptions are (1) that such claims are neither conceivable nor morally righteous in most institutional contexts, (2) that developments in the global context map imperfectly onto developments in national contexts, opening socio-legal space for the assertion of LGBT asylum claims, and (3) that unpacking all this highlights ways to strengthen the sense and moral desirability of LGBT asylum claims.

I focus on three inter-related developments: the globalization of society, the individualization of society, and the rise of the global human-rights regime. Each development involves changes in rule-like cultural assumptions—those that are deeply taken for granted—and accompanying changes in their organizational distillations. These developments reconstitute

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basic features of so-called reality: the actors who populate the social world, the scripts from which they read, and the stages on which they play.¹ From an institutional perspective, the very concept of LGBT persons and the very idea of asylum claims are matters that demand explanation. I undertake these tasks below.

II. THE GLOBALIZATION OF SOCIETY

A first development that lends sense and moral rectitude to LGBT asylum claims is globalization itself. With globalization, the imagined boundaries of society spill over the national borders to which they had formerly largely been confined, and they take on worldwide dimensions. An encompassing system of meaning emerges, rooted in rationality and science. Imageries of unity and commonality proliferate: for example, human beings and human nature; world leaders and world hunger; and global climate change and global trade, to name a few. Almost no such imageries gained widespread usage before the late twentieth century.² Today, with globalization, they are commonplace. A human community on a worldwide scale is now a matter of course.³

Alongside the growing conceptual apparatus of a globalized society comes a growing organizational apparatus. A huge number of intergovernmental and international nongov-

1. For theoretical background, see generally PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1967); John W. Meyer, John Boli & George M. Thomas, *Ontology and Rationalization in the Western Cultural Account*, in *INSTITUTIONAL STRUCTURE: CONSTITUTING STATE, SOCIETY AND THE INDIVIDUAL* 12 (G.M. Thomas et al. eds., 1987); John W. Meyer, *World Society, Institutional Theory, and the Actor*, 36 *ANN. REV. SOC.* 1 (2010).

2. See ROLAND ROBERTSON, *GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE* 8 (1992) (describing emergence of “globalization” as a “significant concept” in the 1980s); GILI S. DRORI ET AL., *SCIENCE IN THE MODERN WORLD POLITY: INSTITUTIONALIZATION AND GLOBALIZATION* 23–42 (2003) (discussing diffuse effects of globalization of science).

3. See YASEMIN NUHOGLU SOYSAL, *LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE* 136–62 (1995) (introducing conception of citizenship that emphasizes universal personhood over nationality); Andreas Wimmer & Nina Glick Schiller, *Methodological Nationalism and Beyond: Nation-State Building, Migration and the Social Sciences*, 2 *GLOBAL NETWORKS* 301, 321–24 (2002) (identifying the increasingly transnational nature of migration studies).

ernmental organizations appear, prominently including the United Nations and its many subsidiaries. All sorts of global competitions spring forth, from World Cup Soccer to The World University Rankings. A whole host of communications technologies emerge, culminating in the capacity to share extraordinary amounts of information instantaneously with persons everywhere. And so on. World society now is not only culturally, but also organizationally, fact-like.

In the immediate context, what is important about all this is that the globalization of society establishes an essential edifice on which LGBT asylum claims—and asylum claims, generally—stand. When the boundaries of one's human community extend no further than to national (or religious or racial, etc.) borders, then one's obligations to one's fellow human beings end there, too. When those boundaries extend to the ends of the Earth, one's obligations to provide sanctuary broaden accordingly.

Of course, in a thoroughly and completely globalized human society, asylum claims would be meaningless. Under those conditions, fundamental assumptions, ideals, and behaviors would be standardized completely, and persons either would not need or could not find any place of refuge. It is precisely because society is incompletely globalized—with a world society overlaid onto enduring and differentiated national societies—that asylum claims arise.⁴

III. THE INDIVIDUALIZATION OF SOCIETY

Beyond globalization, a second global-institutional development that lends sense and moral rectitude to LGBT asylum claims is the individualization of society. Individualization reconstitutes the imagined bases of society. That which had been conceived as rooted in collective entities—especially families and nations—comes to be conceived as rooted in individuated persons. In the emergent cultural model, autonomous human beings—disembedded from corporate bodies and ren-

4. A fuller treatment of the issues at hand would stress the quality and form of contemporary globalization. Absent a global state, the unity of world society depends instead on a scientized cosmology. LGBT persons invoke scientific imageries when they claim natural variations in sexual preferences, and it is this invocation that renders discrimination as a violation of human rights rooted in natural law.

dered as existentially equal across collective boundaries—come to be understood as society's ultimate motivators and beneficiaries and as endowed with permissions and capacities to author their own destinies. Over the post-World War II period, it even grew commonplace to refer generally to persons as "individuals," as though persons naturally and automatically assume individualized forms.⁵

These cultural changes have manifold organizational expressions. The individualization of society contributes, for instance, to the rise and global diffusion of capitalism, organized around individualized wage labor and consumer choice; to the worldwide spread of democracy, organized around individualized citizenship and voting; and to cross-national flows of mass education, organized around individualized understanding and participation.⁶ With changes along these lines, individualized models of human society become seen as cultural and organizational realities.

Individualization enables the possibility of LGBT asylum claims in two critical ways. First, it constitutes LGBT persons, by changing evanescent relations—behavioral transactions between persons—into lasting identities, distinguishing individual persons. As many have noted, same-sex sexual activities have occurred for millennia, perhaps from the beginning of humankind. Only recently, however, have such activities come to characterize discrete individuals.⁷ The change happens as

5. See Peter L. Berger, *On the Obsolescence of the Concept of Honor*, 11 ARCHIVES EUROPÉENES DE SOCIOLOGIE 339 (1970); David John Frank & John W. Meyer, *The Profusion of Individual Roles and Identities in the Post-War Period*, 20 SOC. THEORY 86 (2002); John W. Meyer & Ronald L. Jepperson, *The "Actors" of Modern Society: The Cultural Construction of Social Agency*, 18 SOC. THEORY 100 (2000).

6. See Elizabeth H. McEneaney, *Elements of a Contemporary Primary School Science*, in SCIENCE AND THE MODERN WORLD POLITY: INSTITUTIONALIZATION AND GLOBALIZATION 136 (G.S. Drofi et al. eds., 2003); Francisco O. Ramirez, Yasemin Soysal & Suzanne Shanahan, *The Changing Logic of Political Citizenship: Cross-National Acquisition of Women's Suffrage Rights*, 62 AM. REV. 735 (1997); Beth A. Simmons, Frank Dobbin & Geoffrey Garrett, *Introduction: The International Diffusion of Liberalism*, 60 INT. ORG. 781 (2006).

7. See, e.g., Dennis Altman, *Rupture or Continuity? The Internationalization of Gay Identities*, 48 SOC. TEXT 77 (1996); Steven Seidman, Chet Meeks & Francie Traschen, *Beyond the Closet? The Changing Social Meaning of Homosexuality in the United States*, 2 SEXUALITIES 9 (1999); Carl F. Stychin, *Same-Sex Sexualities and the Globalization of Human Rights Discourse*, 49 MCGILL L.J. 951 (2004).

the fundamental redistribution of meaning marked by individualization reallocates the essential significance of sexual activities from the relational to the individual. Within the new institutional framework, same-sex sexual activities demarcate enduring features of individual persons. LGBT persons are born.

Individualization not only constitutes LGBT persons, it also legitimates them by altering the meanings and purposes of sex. In societies rooted in collective or corporate entities (families, nations, tribes, religious and racial groups, etc.), sex is ultimately about reproducing the collective order. Sex that does not serve this end via legitimate procreation (i.e., procreation that respects family, racial, and other collective boundaries) is stigmatized, and this includes LGBT sex. Burchell and Milton summarize the traditional view thus:

Sex not for purposes of procreation was “unnatural” and therefore sinful (whether performed intra- or extra-maritally) Homosexuality is characterized by a preference for sexual gratification with a person of the same gender. This preference, because it denies the procreation of the species, has been long condemned as being contrary to the order of nature and thus in violation of fundamental societal norms and moral attitudes.⁸

By contrast, in contemporary societies rooted in individual persons, sex is ultimately tied to sovereign personal choice and satisfaction, free from the constraining authorities of corporate bodies. A whole range of non-procreative sexual activities—along with the persons who practice them—enters the realm of legitimacy.⁹

8. See JONATHAN M. BURCHELL & JOHN MILTON, *PRINCIPLES OF CRIMINAL LAW* 561, 570 (1994). The priority of the collective order and the associated procreation imperative justify what are otherwise—to contemporary sensibilities—baffling religious (and sometimes criminal) prohibitions, e.g., against contraception and masturbation.

9. See Altman, *supra* note 7, at 84 (noting the recognition of gay communities in industrialized Western societies partially reflects application of the rights to happiness and to sexuality); David John Frank, Bayliss J. Camp & Steven A. Boutcher, *Worldwide Trends in the Criminal Regulation of Sex, 1945 to 2005*, 75 *AM. SOC. REV.* 867, 870 (2010) (arguing that the increasingly individualized world social models which emerged after World War II shifted sex “from an activity meant to propagate the collective order through sanc-

Obviously were society altogether individualized, LGBT persons would exist and enjoy social validity everywhere, nullifying corresponding asylum claims. It is because of the fact that individualization is uneven—more deeply institutionalized in world society than in many national societies—that LGBT asylum claims can exist.

IV. THE RISE OF THE GLOBAL HUMAN-RIGHTS REGIME

A third development that lends sense and moral rectitude to LGBT asylum claims is the rise of the global human-rights regime. The ascent of this regime gives legal expression to the globalized and individualized models of society discussed above. It asserts that all persons in all places possess human rights, conceived as the natural-law birthrights of every person in the world. Human rights are deemed to be inherent in human nature.¹⁰ As they are realized increasingly, the legal standing of persons grows detached from their membership in corporate entities—especially their membership in families and their citizenship in nation-states. The human rights model ties one's legal standing directly to one's individual personhood.¹¹

This foundational shift in the global cultural context transpires hand-in-hand with extraordinary organizational

tioned reproduction to an activity meant to enhance individual pleasure through self-expression”).

10. See JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 14 (2d ed. 2003) (“The source of human rights is man’s moral nature . . .”).

11. See, e.g., NITZA BERKOVITCH, *FROM MOTHERHOOD TO CITIZENSHIP: INTERNATIONAL ORGANIZATIONS AND WOMEN’S RIGHTS* 102–03 (1999) (arguing that the post-World War II conception of human rights “implied that each individual is vested with a set of ‘rights’ that are independent of their citizenship status”); Kiyoteru Tsutsui & Christine Min Wotipka *Global Civil Society and the International Human Rights Movement: Citizen Participation in Human Rights International Nongovernmental Organizations*, 83 *SOC. FORCES* 587, 597 (2004) (noting that oppressed citizens worldwide pressure their governments by using international channels to publicize human rights violations); David F. Suarez & Francisco O. Ramirez, *Human Rights and Citizenship: The Emergence of Human Rights Education*, in *CRITIQUE AND UTOPIA: NEW DEVELOPMENTS IN THE SOCIOLOGY OF EDUCATION IN THE TWENTY-FIRST CENTURY* 43, 44 (Carlos Alberto Torres & António Teodoro eds., 2007) (“[T]he human rights movement . . . brings about a shift in perspective from the individual as a citizen and a member of the nation to the person as a human member of world society.”).

changes. After World War II, human-rights treaties proliferate, beginning with the 1948 Universal Declaration of Human Rights. Intergovernmental organizations devoted to human rights also multiply, including the United Nations Commission on Human Rights (established 1946) and its successor the Human Rights Council (established 2006). Likewise, international nongovernmental organizations (INGOs) mushroom, such as Amnesty International and Human Rights Watch (founded in 1961 and 1978, respectively). These and related developments usher human rights into the domains of cultural and organizational verity.

The significance of all this is that the rise of the global human rights regime establishes an institutionalized legal framework within which LGBT persons can and do claim human rights protections.¹² In recent years, human rights treaties and intergovernmental organizations have begun to take on LGBT issues explicitly, for example the Office of the High Commissioner's 1994 decision against the criminalization of sodomy and the Council of Europe's 2000 directive against employment discrimination.¹³ Furthermore, many international nongovernmental organizations have arisen directly around LGBT claims, including the International Lesbian, Gay, Bisexual, Trans and Intersex Association, founded in 1978, and the International Gay and Lesbian Human Rights Commission, founded in 1990. Both have consultative status with the United Nations.¹⁴

12. See Stychin, *supra* note 7, at 953 (“[R]ights proponents can claim that the strategy of deploying human rights in the sexuality arena has met with considerable success . . .”).

13. *Toonen v. Australia*, Commc'n No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (Apr. 4, 1994) (Human Rights Comm.); Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303) 16 (EU).

14. See Robert Evans, *UN Council Votes to Recognize Global Gay Grouping*, REUTERS, July 27, 2011, available at <http://af.reuters.com/article/topNews/idAFJ0E76Q02K20110727> (reporting U.N. decision granting consultative status to International Lesbian, Gay, Bisexual, Trans and Intersex Association); Press Release, Econ. & Soc. Council, *Economic and Social Council Holds Joint Meeting with Peacebuilding Commission*, U.N. Press Release ECOSOC/6445 (July 19, 2011) (announcing consultative status of International Gay and Lesbian Human Rights Commission).

One indicator of the global diffusion of LGBT human rights appears in Figure 1. It depicts the total number of nation-state ties to (or memberships in) eleven LGBT international nongovernmental organizations between 1965 and 2005. Before 1980, there are no LGBT INGO memberships. By 2005, the total is more than 250, representing more than 100 different countries.¹⁵ Recently and rapidly, a global LGBT movement springs into being.

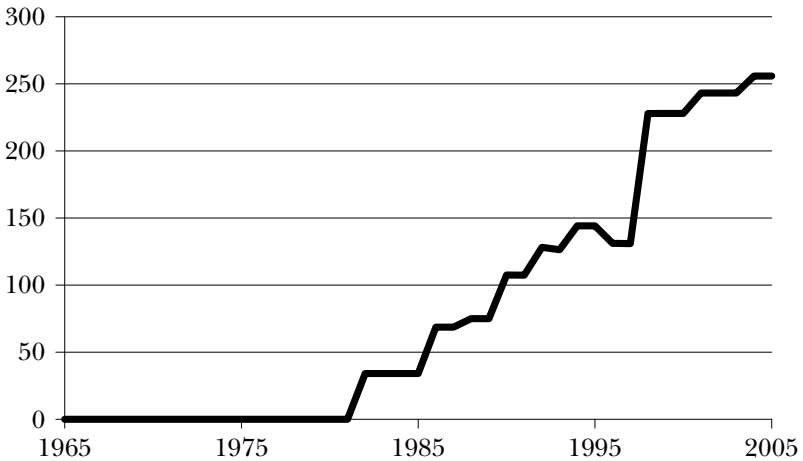


FIGURE 1: COUNTRY TIES TO 11 LGBT INGOs, 1965–2005

Naturally, nation-states are not equally well connected to LGBT international nongovernmental organizations. By 2005, for example, France and Germany have representatives in ten of the eleven LGBT INGOs represented in Figure 1. Lebanon and Uruguay, meanwhile, have representatives in only one.

The institutionalization of LGBT rights is patchy, in short. It is increasingly strong at the world level and also in many countries. But in many nation-states, the commitment to LGBT rights remains weak or nonexistent. The unevenness of institutionalization opens the socio-legal space essential to LGBT asylum claims.

15. I collected these data from Y.B. INT'L ORGS. (1965–2005).

V. THE RECONSTITUTION OF NATIONAL LAWS REGULATING SEXUAL ACTIVITY

Absent the developments articulated above, LGBT asylum claims would lack sense and moral force. A globalized world provides the universalized human foundations on which LGBT asylum claims rest. An individualized world supplies the claimants—the LGBT persons—and offers legitimacy to their claims. A human-rights-ified world is one in which globalized and individualized models of human society acquire legal status. These changes lay essential groundwork for LGBT asylum claims.

Before they gain traction, however, at least one further change must take place: the decriminalization of LGBT sex. Prior to this development, LGBT persons remain, in many countries, common criminals (as they do today in such places as Belize, Botswana, and Malaysia).¹⁶

Indeed, the globalized, individualized, and human-rights-ified world described above mobilizes strongly, as a first order of business, against enduring criminal prohibitions against LGBT sex. The Yogyakarta Principles—the so-called global charter for LGBT rights, launched in 2007 at the U.N. Human Rights Council—opens as follows:

Principle 1: THE RIGHT TO THE UNIVERSAL ENJOYMENT OF HUMAN RIGHTS.

All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights. States shall embody the principles of the universality, interrelatedness, interdependence and indivisibility of all human rights in their national constitutions or other appropriate legislation and ensure the practical realization of the universal enjoyment of all human rights; [and states shall further] amend any legislation, including crimi-

16. DANIEL OTTOSSON, INTERNATIONAL LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION, *STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS PROHIBITING SAME SEX ACTIVITY BETWEEN CONSENTING ADULTS* 9, 26, 35 (2010).

nal law, to ensure its consistency with the universal enjoyment of all human rights¹⁷

Only with the realization of this commitment to decriminalize the sexual activities of LGBT persons do LGBT asylum claims enter the realm of plausibility. Until that time, such persons may be defined, at least in their own countries, by criminal behaviors.

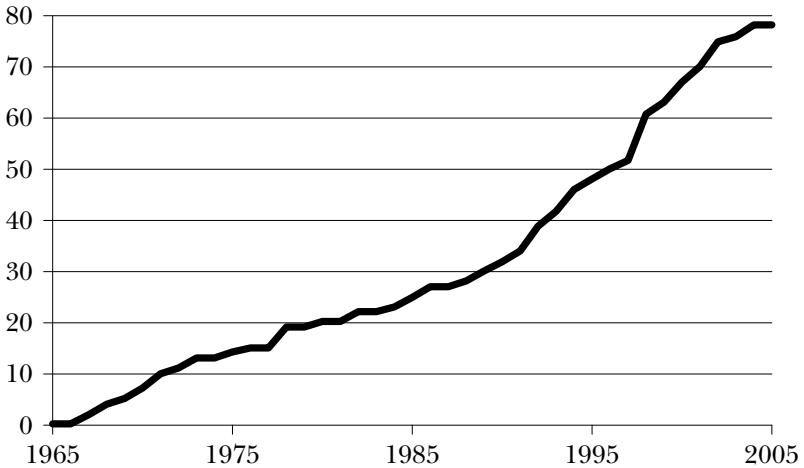


FIGURE 2: CUMULATIVE NUMBER OF COUNTRIES TO DECRIMINALIZE SODOMY, 1965–2005

It is thus critical to recognize that, in the recent period, decriminalization has happened rapidly on a worldwide basis. Figure 2 shows the cumulative number of nation-states to decriminalize sodomy between 1965 and 2005 (“sodomy” is here used in its general sense, to encompass all sorts of same-sex sexual relations, between men and between women). The number multiplies very quickly, especially given the fact that about half the world’s approximately 200 countries—most of them Napoleonic Code countries—did not criminalize LGBT sex at the period’s outset.¹⁸

17. YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY (2007), available at <http://www.yogyakartaprinciples.org/>.

18. The Napoleonic Code countries include France, its conquests in the Napoleonic Wars, and their colonies. See Frank, Camp & Boutcher, *supra* note 9, at 885. See also David John Frank, Steven A. Boutcher & Bayliss

Decriminalization removes a fundamental barrier against LGBT asylum claims. It is the last change in the global institutional context required to usher in the contemporary era.

VI. STRENGTHENING THE SENSE AND MORAL RECTITUDE OF LGBT ASYLUM CLAIMS

The transformations outlined above not only delineate the roadmap leading to the point at which LGBT asylum claims develop sense and moral righteousness. They also direct us forward to a point at which such claims possess more of the same. We remain, after all, in transitional territory.

With the continuation of existing tendencies toward globalization, individualization, and human rights, one can envision a future in which negative legal and social sanctions against LGBT persons all but disappear from the world, rendering asylum claims as obsolete. In this—no doubt utopian—vision, one can also picture an array of positive legal protections for LGBT persons, upholding their rights across the sectors of public life. But utopian visions seldom come to fruition untainted by history, and one need not search far to find forces with the potential to undermine existing tendencies. Global economic and political crises come immediately to mind.

For now, at least, globalization has extended the boundaries of the human community. Individualization has constituted and legitimated LGBT persons. The rise of human rights has given legal expression to globalized and individualized models of society. And all three have promoted the decriminalization of LGBT sex. These ongoing developments in the global institutional context underlie what must be regarded as a surprising and historically anachronistic development: the imagination of, and growing respect for, LGBT asylum claims.

Camp, *The Reform of Sodomy Laws from a World Society Perspective*, in *QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW* 123, 136 (S. Barclay et al. eds., 2009) (noting that the Napoleonic Wars proliferated versions of a penal code, modeled after the French Penal Code, lacking a prohibition against sodomy). Contrary to the suggestions of Hathaway and Pobjoy in this volume, decriminalization has occurred in at least a handful of countries in the Global South: Costa Rica in 1970, Cameroon in 1972, Colombia in 1980, Laos in 1990, Bahamas in 1991, Ecuador in 1997, Chile in 1998, and Cape Verde in 2004. *Id.* at 128.