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Same-Sex Sexualities and the Globalization of Human Rights Discourse

Carl F. Stychin*

In the past decade, a “double movement of globalization” has taken place in the realm of gay rights. On the one hand, a globalization of human rights has occurred, whereby human rights have become a key criterion by which the “progress” of nations is evaluated. On the other hand, there has been a globalization of same-sex sexualities as identities. These movements have the potential to conflict with, rather than complement, each other in terms of progressing toward a greater recognition of gay rights worldwide: resistance to cosmopolitan claims to gay rights is often grounded in communitarian claims based in the language of the right of self-determination of a people. The article argues, however—largely through the use of case studies (Tasmania, Zimbabwe, and Romania)—that the discourse of universal human rights can and has been used successfully by local gay rights activists. This has taken place through the use of several strategies: the recognition of multiple and intersecting identities; the development of a discourse by which international legal standards become part of the “essence of a people”; and by the reclaiming of an authentic gay past within a national community context. In this way, gay rights activists have become able to move seamlessly between discourses of the local and the global. Ultimately, the article concludes, gay rights struggles will be most successful when they not only engage in the protection of human rights for individuals based on international human rights standards but also fight for inclusion at the level of communitarian political debate within the larger society.

Depuis dix ans, un double mouvement de mondialisation a eu cours dans la sphère des droits des gays et lesbiennes. D’une part, une mondialisation des droits de la personne, par laquelle ceux-ci sont devenus une mesure primordiale du «progrès des nations». D’autre part, une mondialisation des sexualités de même sexe comme identités. Ces mouvements ont le potentiel de s’opposer mutuellement plutôt que de se compléter et ainsi permettre une reconnaissance plus grande des droits des gays et lesbiennes dans le monde. Au cosmopolitisme animant la reconnaissance de ces droits s’opposent des revendications communautariennes fondées sur un discours d’autodétermination des peuples. Principalement sur la base d’études de cas (Tasmanie, Zimbabwe, Roumanie), cet article soutient toutefois que le discours universel des droits de la personne peut être (et a été) utilisé localement, avec succès, par des activistes des droits des gays et lesbiennes. Plusieurs stratégies ont été employées : la reconnaissance d’identités multiples et entrecroisées ; le déploiement d’un discours par lequel les standards juridiques internationaux forment une part de «l’essence d’un peuple» ; et la revendication d’un passé gai authentique à l’intérieur d’un contexte communautaire national. De cette manière, des activistes ont été capables d’utiliser à la fois un discours global et un discours local. L’article conclut qu’en dernière analyse, les luttes pour les droits des gays et lesbiennes connaîtront davantage de succès si elles s’emploient non seulement à protéger les droits des individus sur la base de standards internationaux de droits de la personne, mais visent aussi l’inclusion au niveau du débat politique communautaire ayant cours dans la société civile.

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Introduction	953
I. A Double Movement of Globalization	953
II. From National Communities to Supranational Standards	960
III. Human Rights or Special Rights	964
IV. From Rights to Politics	965
Concluding Thoughts	967

Introduction

Only a few years ago, it was sometimes queried whether “sexual orientation” raised any human rights issues.¹ Today, those questions have largely ceased to be asked, as sexuality has permeated human rights consciousness. For that, an enormous collective debt is owed to those many courageous activists around the world who have struggled in difficult and dangerous circumstances to articulate their claims openly in a discourse of human rights in order to better people’s lives. That is, they have used “human rights” as a way to connect with others in and out of struggle and to make a collective difference.

These human rights claims have also connected to the academic and judicial interpretations of human rights. In the past decade, we have witnessed a far more receptive attitude from courts and legislatures in a range of different ways. Same-sex sexuality cases have come to receive a more positive response from many national courts through the interpretation of domestic constitutional rights documents;² through the development of the common law;³ through transnational legal regimes, such as the European Union;⁴ and through the discourse of international law and international human rights.⁵ Moreover, these different levels and frames through which the language of rights can be mobilized often intersect and interact.⁶ As a consequence, rights proponents can claim that the strategy of deploying human rights in the sexuality arena has met with considerable success (but setbacks as well), and believers in liberal legal progress will argue that there is nowhere to go but forward in the making of human rights arguments.

I. A Double Movement of Globalization

This story of success and progress can be explained, I argue, through a double movement of globalization. First, we have witnessed a globalization of human rights,

¹ I was asked this very question by a law professor in 1994 at an academic conference on human rights.

² See *e.g.* *Egan v. Canada*, [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609; *M. v. H.*, [1999] 2 S.C.R. 3, 171 D.L.R. (4th) 577; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 193 D.L.R. (4th) 193.

³ See *e.g.* *Fitzpatrick v. Sterling Housing Association*, [2001] 1 A.C. 27, [1999] 4 All E.R. 705.

⁴ For example, the adoption by the Council of the European Union of a general framework directive on equal treatment in employment that includes “sexual orientation” among the prohibited grounds of discrimination, which all Member States of the EU have been required to implement: EU, *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.

⁵ See *e.g.* *Toonen v. Australia* (1994), CCPR/C/50/D/488/1992, online: Office of the High Commissioner for Human Rights <[http://www.unhchr.ch.tbs.doc.nsf/\(Symbol\)/d22a00bcd1320c9c80256724005e60d5?Opendocument](http://www.unhchr.ch.tbs.doc.nsf/(Symbol)/d22a00bcd1320c9c80256724005e60d5?Opendocument)>, holding that anti-gay sex laws violate a right to privacy.

⁶ For example, the development of domestic law may be informed by emerging international legal standards.

whereby human rights become, as Peter Fitzpatrick has argued, the “pervasive criteria” by which nations approach a universal standard of civilization, progress, and modernity.⁷ Rights transcend the particular (despite the fact that human rights discourse presumably must come from a particular place) and become the marker and measure of a global civil society embracing all “humans” (itself a historically contested concept).

But there is another globalization move that has occurred: the universalizing of same-sex sexualities as identities.⁸ There are many examples that demonstrate the export of an Anglo-American, “Stonewall” model of sexuality, identity, and liberation.⁹ In the Stonewall model, same-sex sexuality marks an identity category that comes to be labelled as gay, lesbian, or both (and the two are often problematically conflated). Put crudely, who (in terms of gender) one has sexual relations with is the key to who you are, and the “coming out” is the central moment of identity formation.¹⁰ The sexual relations model has increasingly transcended its own cultural and historical roots to become universalized as *the* paradigm of sexual identity. This paradigm, however, is a dramatic oversimplification of the dynamics of sexual identity outside of a Western (or, more specifically, Anglo-American) frame.

Despite this globalization movement, activists in many non-Western countries travel between the universalizing and essentializing discourse of sexual identity (“we are everywhere”), to a local, historically and culturally-specific reading of sexuality that resists the bluntness of the Stonewall model.¹¹ Nevertheless, as gays come to appropriate a sexual identity, the universalizing language of human rights neatly fits the globalizing movement of sexual identity that seems to be occurring (most obviously in urban spaces around the globe). Furthermore, this fusion of the two movements of globalization has been advanced by human rights law and international human rights experts, who have assisted activists in many parts of the world and have brought to the attention of the world the abuses of human dignity that have been experienced.¹² Claims to privacy, equality, and dignity for those who have been

⁷ Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001) at 120 [Fitzpatrick, *Grounds of Law*].

⁸ Dennis Altman, *Global Sex* (Chicago: University of Chicago Press, 2002); Martin F. Manalansan IV, “(Re) Locating the Gay Filipino: Resistance, Postcolonialism, and Identity” (1993) 26:02/03 *J. of Homosexuality* 53.

⁹ In using the term “Stonewall”, I am referring to the birth of contemporary American lesbian and gay identity politics at the Stonewall riots in New York City in 1969.

¹⁰ On the centrality of “coming out” to a same-sex sexual identity, see Mark Blasius, “An Ethos of Lesbian and Gay Existence” in Mark Blasius, ed., *Sexual Identities, Queer Politics* (Princeton: Princeton University Press, 2001) 143. Note that I am passing over the interesting cultural question of what constitutes the “sexual”. See e.g. Gilbert Herdt, *Same Sex, Different Culture: Exploring Gay and Lesbian Lives* (Boulder: Westview Press, 1997).

¹¹ See Arnaldo Cruz-Malavé & Martin F. Manalansan IV, eds., *Queer Globalizations: Citizenship and the Afterlife of Colonialism* (New York: New York University Press, 2002).

¹² See e.g. *Public Scandals: Sexual Orientation and Criminal Law in Romania* (New York: Human Rights Watch and the International Gay and Lesbian Human Rights Commission, 1998), online:

constructed as less than human because of their same-sex sexual practices and desires, clearly lend themselves to these universalizing and globalizing currents. In this way, they become cosmopolitan claims to justice, which transcend the particularities of time and place through the powerful argument that flows from the desire to be “who we are”.¹³

Although the ways in which these human rights claims are made are important, what is no less interesting are the ways in which they have been *resisted* in a number of different cultural locations.¹⁴ we consistently find opposition to *cosmopolitan* claims to human justice firmly grounded in a *communitarian* language that speaks to the preservation of a particular community’s “way of life”, tradition, and often, national or local culture.¹⁵ Of course, “nation” (like sexuality and human rights) is a socially constructed, historically specific identity, which has come to be universalized.¹⁶ To use Benedict Anderson’s famous phrase, nations are “imagined communities”,¹⁷ and it is this imagining that provocatively has been deployed to resist claims for universal human rights through a reverse discourse that employs the language of difference, specificity, history, community, and ultimately, the language of rights itself.

None of this should be surprising. It is well documented how the construction of the imagined community of “nation” has frequently been realized through the deployment of gender, race, and sexuality.¹⁸ Women have been constructed as “mothers to the nation”, a discursive device by which procreation becomes central to national survival.¹⁹ Race has also been part of the constitutive formation of the nation, summed up memorably by Paul Gilroy’s phrase “there ain’t no black in the Union Jack.”²⁰ Less widely known are cases that demonstrate how, when the nation state perceives a threat to its existence, that danger is frequently translated into homosexualized terms. Male same-sex sexuality, for example, has been deployed as

Human Rights Watch <<http://www.hrw.org/reports97/romania>>; Baden Offord, *Homosexual Rights as Human Rights: Activism in Indonesia, Singapore and Australia* (Oxford: Peter Lang, 2003).

¹³ On cosmopolitanism, see e.g. Kimberly Hutchings & Roland Dannreuther, eds., *Cosmopolitan Citizenship* (Basingstoke: Macmillan, 1999); Gerard Delanty, *Citizenship in a Global Age: Society, Culture, Politics* (Buckingham: Open University Press, 2000).

¹⁴ See e.g. Carl F. Stychin, *A Nation by Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights* (Philadelphia: Temple University Press, 1998) [Stychin, *Nation by Rights*].

¹⁵ On communitarianism, see e.g. Elizabeth Frazer & Nicola Lacey, *The Politics of Community: A Feminist Critique of the Liberal Communitarian Debate* (Toronto: University of Toronto Press, 1993).

¹⁶ See e.g. Peter Jackson & Jan Penrose, eds., *Constructions of Race, Place and Nation* (Minneapolis: University of Minnesota Press, 1994).

¹⁷ Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, rev. ed. (London: Verso, 1991).

¹⁸ See Stychin, *Nation by Rights*, *supra* note 14, c. 1.

¹⁹ See Nira Yuval-Davis, *Gender and Nation* (London: Sage Publications, 1997).

²⁰ Paul Gilroy, *There Ain’t No Black in the Union Jack: The Cultural Politics of Race and Nation* (London: Routledge, 1992).

the alien “other”, linked to conspiracy, recruitment, the “third column”, and ultimately, constructed as a threat to Western civilization itself.²¹

Interesting inversions of this discourse of civilization can be documented within a post-colonial context. The southern African region provides perhaps the best known example, particularly as demonstrated by the discourses employed by Robert Mugabe in Zimbabwe, most famously around the Zimbabwean International Book Fair in 1995—for which the theme was “human rights” and which was to feature a presence by the organization Gays and Lesbians of Zimbabwe (“GALZ”). On the eve of the opening, a letter from the state director of information advised the book fair trustees that the government strongly objected to the presence of GALZ. The trustees, claiming that they had been placed in an impossible position, cancelled GALZ’s registration. A storm of protest ensued, much of it emanating from South Africa. In this example, Mugabe skilfully used a discourse of colonial contamination to shore up the post-colonial state, wherein homosexuality is attributed to the white colonizer, and homosexual relations were the means he used to exploit and contaminate the colonized sexually.²² Homosexuality becomes an abhorrent Western import.

This discourse is also an important means to strengthen the identity of the beleaguered nation state and the masculine subject, under threat in the current conditions of post-colonial globalization. The expulsion of homosexuals from the imagery of the nation state becomes metaphorically equated with the erasure of the white colonizer and, with him, his degenerate influence on a mythologized, pre-colonial, “pure” African (hetero) sexuality. Condemnations of sexual perversion thus are made in the name of an Afrocentric and specifically Zimbabwean national tradition. In this trope, the defence of heterosexuality becomes essential to securing the group right of self-determination of a people protecting its cultural heritage, pre-colonial way of life, and very survival. This is a communitarian claim in defence of a people against threats from globalization and (neo) colonial powers, and it also lends itself to the language of international human rights (i.e., the right of a community to preserve its way of life).

One can find parallel movements in the West, for example, in the campaign in the mid-1990s over the decriminalization of same-sex sexual acts in the state of Tasmania, Australia.²³ The goal of this struggle was explicitly achieved through the

²¹ See L.J. Moran, “The Uses of Homosexuality: Homosexuality for National Security” (1991) 19 *Int’l J. Soc. L.* 149; Lee Edelman, *Homographesis: Essays in Gay Literary and Cultural Theory* (New York: Routledge, 1994).

²² See Stychin, *Nation by Rights*, *supra* note 14 at 89-114; Oliver Phillips, “Zimbabwean Law and the Production of a White Man’s Disease” (1997) 6 *Social & Leg. Studies* 471; Matthew Engelke, “We Wondered What Human Rights He Was Talking About’: Human Rights, Homosexuality and the Zimbabwe International Book Fair” (1999) 19 *Critique of Anthropology* 289.

²³ See *e.g.* Stychin, *Nation by Rights*, *ibid.* at 145-93; Wayne Morgan, “Identifying Evil for What It Is: Tasmania, Sexual Perversity and the United Nations” (1994) 19 *Melbourne U. L. Rev.* 740;

deployment of a discourse of international human rights (cosmopolitan claim), which, it was successfully argued, had been incorporated into a set of Australian cultural values (a communitarian argument) that trumped the particular claim to a uniquely Tasmanian, heterosexual way of life. Australia has long entered into a range of treaty obligations and has sought to abide by their terms domestically, such as the *International Covenant of Civil and Political Rights*, which proved relevant in the case of same-sex sexuality in Tasmania through its protection of the right to privacy.²⁴ The explanation for the Tasmanian laws—an anomalous legal situation in Australia—was, as Australians will readily explain, the cultural “peculiarity” of Tasmania, an island state removed from an island continent. Gays, like other “outsiders” such as environmentalists, have been consistently constructed as those who had arrived in Tasmania to undermine the traditional values of “the people”.

The implicit, and sometimes explicit, argument of opponents of decriminalization thus was that to be an authentic Tasmanian was to be heterosexual. This was a somewhat more complex and nuanced battle over communitarian and cosmopolitan claims, but the language of rights—states’ rights—was often deployed in defence of the anti-gay laws.²⁵ In this resistance to gay rights claims, the community itself is constructed as under siege from powerful, metropolitan interests seeking to undermine the rights of a disadvantaged and disenfranchised, “politically incorrect” community.²⁶ Moreover, it was argued that the federal system of Australia was intended to protect states from these majoritarian impulses.²⁷

Thus, theoretically, we can often find ourselves in a cul-de-sac of rights claims spawned by the globalization of human rights and sexual identities. Resistance to gay rights is grounded in communitarian claims to difference, specificity, cultural authenticity, and history, which are also, in turn, grounded in the language of rights of self-determination of a people. The question is then about which self, which group, and which right to protect. What “trumps” what?

Although this may seem to be a theoretical dead end, a closer examination of social movement struggles reveals that activists have had relatively little difficulty rhetorically manoeuvring through the cul-de-sac. Gay rights activists, in an array of cultural contexts, have become highly skilled in answering claims to cultural

Miranda Morris, *The Pink Triangle: The Gay Law Reform Debate in Tasmania* (Sydney: New South Wales University Press, 1995).

²⁴ The UN Human Rights Committee found the Tasmanian law in violation of privacy rights in *Toonen*, *supra* note 5; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171.

²⁵ See Tim Tenbenschel, “International Human Rights Conventions and Australian Political Debates: Issues Raised by the ‘Toonen Case’” (1996) 31 *Austl. J. of Political Science* 7.

²⁶ I explore this point in detail in Stychin, *Nation by Rights*, *supra* note 14, c. 6.

²⁷ See Tenbenschel, *supra* note 25.

difference and cultural authenticity.²⁸ Specifically, I refer here to local activists engaged in social struggle resisting nationalist, heterosexist discourses, rather than international lobby groups, which may themselves fall into the trap of a highly cosmopolitan discourse that gives away too much of the communitarian ground to their opponents.²⁹ Moreover, international gay rights activism, particularly in some forms that emanate from the United States, is sometimes itself in danger of forms of neo-colonialism in relation to local contexts through its adoption of a discourse “in which a premodern, pre-political non-Euro-American queerness must consciously assume the burdens of representing itself to itself and others as ‘gay’ in order to attain political consciousness, subjectivity, and global modernity.”³⁰

By contrast, local activists have adopted a number of effective strategies in making claims to human rights, chief among which is a redeployment of the very communitarian arguments that have been used against them.³¹ Rather than speaking solely in cosmopolitan terms, we find gay activists first turning to local history and the cultural past to question the idea of an authentic, opposite-sex sexuality and tradition. In other words, they retell the story of nation, but with some new characters introduced (or they redefine well-known characters in terms of sexual desire). It is a reclaiming of a same-sex sexual history that challenges the idea that homosexuality has polluted a sexually pure culture.³² This, of course, is closely tied to discourses of colonialism. Activists sometimes claim to have discovered an authentic gay past, prior to its condemnation by the colonizer and the missionary in the name of civilization and Christianity. It may, for instance, involve reclaiming words within indigenous languages to describe same-sex desire. This strategy has proven to be extremely rhetorically powerful, albeit anthropologically problematic. It often falls into the trap of reading Western, twentieth century identity categories, such as “homosexual”, back into history and across cultures, which renders the analysis dubious. In response, it can be argued that historical accuracy is not particularly the point, and that the argument is not aimed at anthropologists. Rather, the rhetoric is politically salient and powerful. It rewrites the history of community, allowing for its reimagination in more inclusive terms.

²⁸ See generally the case studies in Stychin, *Nation by Rights*, *supra* note 14; Carl Stychin, *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (Oxford: Hart Publishing, 2003) [Stychin, *Governing Sexuality*].

²⁹ My point being that in adopting a highly universalist discourse, international lobby groups leave themselves open to claims grounded in the language of cultural relativism.

³⁰ Arnaldo Cruz-Malavé & Martin F. Manalansan IV, “Introduction: Dissident Sexualities/Alternative Globalisms” in Cruz-Malavé & Manalansan IV, eds., *supra* note 11, 1 at 5-6.

³¹ See generally Stychin, *Nation by Rights*, *supra* note 14; Stychin, *Governing Sexuality*, *supra* note 28; Nicole LaViolette & Sandra Whitworth, “No Safe Haven: Sexuality as a Universal Human Right and Gay and Lesbian Activism in International Politics” (1994) 23 *Millennium J. of Int’l Studies* 563.

³² See e.g. Stephen O. Murray & Will Roscoe, *Boy-Wives and Female Husbands: Studies of African Homosexualities* (New York: St. Martin’s Press, 1998).

A second strategy that again tackles communitarian claims on their own terrain has also proven powerful. Gay activists have skilfully devised a rhetoric that adopts the theoretical idea of multiple and intersecting identities, which often provides an effective response to the idea of a homogeneous, one-dimensional identity. For example, placards at demonstrations in Tasmania that read “GAY and TASMANIAN” provided an important counter to claims that these identities are mutually exclusive.³³ This is often an important dimension of strategy. It forces opponents to concede that, in their construction of the imagined community, indigenous gays *do* exist, and that they have been expelled from the bounds of community, rather than having never existed within it. In this way, gays are constituted as the disenfranchised and turned into non-citizen “others”. They have been forced to migrate to more hospitable surroundings and denied their right to participate as full political citizens of the broader community, unless their sexuality is closeted within the private sphere.³⁴ To strip your own people of citizenship—and this, I suggest, is crucial to gay rights arguments—is a move that is difficult to justify except in the defence of the survival of a people (although anti-gay discourse often in the past has merged quite seamlessly with an anti-communist discourse, which was described in precisely those terms).³⁵ That argument itself begins to unravel when gay rights arguments are framed in the language of privacy and equality. These are liberal values that most communities are loathe to dissociate from rhetorically (although part of the difficulty with cosmopolitan rights claims is the assumption of a liberal, universalist consensus, which does not necessarily exist within communitarian discourse).

This leads to the third activist strategy. Activists construct the language of human rights as an essential feature of the community in which the claim is being advanced. In this moment, the cosmopolitanism of rights becomes part of the self-constitution of a people and a community. It makes us who “we” are. This again proved very effective in the Tasmanian context, in which international human rights discourse was deployed as characteristic of the national law and of the Australian people.³⁶ More dramatically, it has been used very effectively by gay activists in the Republic of South Africa, in which respect for human rights is a leitmotif of the Constitution of the Rainbow Nation, with its extensive constitutional guarantees of equality and rights.³⁷ International legal standards thereby become part of the essence of a people. This can sometimes also provide a means to erase conveniently egregious abuses of

³³ See Morris, *supra* note 23.

³⁴ On the phenomenon of gay migration, see *e.g.* Jon Binnie, “Cosmopolitanism and the Sexed City” in David Bell & Azzedine Haddour, eds., *City Visions* (Harlow, England: Prentice Hall, 2000) 166.

³⁵ On citizenship and sexual identity, see David Bell & Jon Binnie, *The Sexual Citizen: Queer Politics and Beyond* (Cambridge: Polity Press, 2000); Shane Phelan, *Sexual Strangers: Gays, Lesbians, and Dilemmas of Citizenship* (Philadelphia: Temple University Press, 2001).

³⁶ Stychin, *Nation by Rights*, *supra* note 14 at 171-93.

³⁷ See Pierre de Vos, “The Constitution Made Us Queer: The Sexual Orientation Clause in the South African Constitution and the Emergence of Gay and Lesbian Identity”, in Carl Stychin & Didi Herman, eds., *Sexuality in the Legal Arena* (London: Athlone Press, 2000).

rights that have occurred in the very self-constitution and imagining of the nation. For example, aboriginal peoples might have something to say about the rights-respecting *essence* of white settler societies.

The strategy also may involve the attempt to universalize and essentialize the concept of human rights, as activists claim a history of human rights in a non-Western context. In other words, human rights, like homosexuals, existed prior to the imperialist mission that devastated both—as part of a history of a community—and, therefore, are culturally *authentic* today.³⁸ Once again, this is undoubtedly anthropologically problematic, for both “human rights” and “homosexuality” are historically and culturally contingent.³⁹ They are a product of a time and place. Nevertheless, it may be a rhetorically and politically useful strategy.

In sum, we find activists operate at different registers simultaneously: from local, communitarian discourses through to cosmopolitan global claims. They argue from the local level on behalf of grassroots social movements to the transnational level, through organizations such as the International Lesbian and Gay Association.⁴⁰ It is this seamless movement between the local and the global that best describes human rights activism around same-sex sexualities today.

II. From National Communities to Supranational Standards

A somewhat different activist strategy unfolded relatively recently in Romania, a country that has a shocking history of human rights violations, including against lesbians and gay men, extending from the Ceaușescu era (and before) through the post-Communist period.⁴¹ The abuse of human rights was demonstrated by draconian laws against same-sex sexual acts and, moreover, against same-sex sexual expression.⁴² Most infamously, the 1968 Penal Code saw the enactment of articles 200-202.⁴³ Under article 200, sexual relations between persons of the same sex were

³⁸ For a fuller discussion in the South African context, see Mark Gevisser, “A Different Fight for Freedom: A History of South African Lesbian and Gay Organisation from the 1950s to the 1990s” in Mark Gevisser & Edwin Cameron, eds., *Defiant Desire: Gay and Lesbian Lives in South Africa* (New York: Routledge, 1995) 14.

³⁹ See LaViolette & Whitworth, *supra* note 31; Marie-Bénédicte Dembour, “Human Rights Talk and Anthropological Ambivalence: The Particular Context of Universal Claims” in Olivia Harris, ed., *Inside and Outside the Law: Anthropological Studies of Authority and Ambiguity* (London: Routledge, 1996) 19.

⁴⁰ The International Lesbian and Gay Association is an international federation of national and local groups dedicated to achieving equal rights for lesbians, gay men, bisexuals, and transgendered people. It was founded in 1978, and now has more than 350 member organizations, representing approximately 80 countries. See online: ILGA Home <<http://www.ilga.org/>>.

⁴¹ This history is documented by Human Rights Watch in *Public Scandals: Sexual Orientation and Criminal Law in Romania*, *supra* note 12.

⁴² Stychin, *Governing Sexuality*, *supra* note 28.

⁴³ See *The Penal Code of the Romanian Socialist Republic*, trans. by Simone-Marie Vrabiescu Kleckner (South Hackensack, N.J.: F.B. Rothman, 1976).

punishable by imprisonment of one to five years. Article 201 declared that acts of sexual perversion were illegal and subject to the same penalty as prescribed by article 200. Article 202 dealt with the sexual corruption of a minor. Human rights organizations have produced extensive and appalling documentation on the ways these laws were enforced during and after the Communist era.⁴⁴ Although the post-Ceaușescu government repealed the laws prohibiting abortion, it showed no similar desire to repeal anti-gay criminal laws.⁴⁵ With time, this intransigence dissipated as it became increasingly clear that Romania's future lay westward. It also became apparent that any invitations to join the institutions of the West would come with both political and economic conditions attached. With respect to homosexuality, this was true as early as 1993, when *rapporteurs* from the Council of Europe, visiting Romania following its application for admission, began raising the issue of the treatment of homosexuals.⁴⁶ Shrewd political activists in Romania, who formed a NGO called ACCEPT,⁴⁷ managed after many years of social struggle to take advantage of a European Union accession agenda, in which respect for human rights has become one of the criteria for entry into the EU. In this regard, ACCEPT had the active support of Dutch gay groups, and funding from the Dutch state.⁴⁸ Originally, funding was obtained from the Embassy of the Netherlands, and subsequently from the Dutch Ministry of Foreign Affairs, as part of a program designed to strengthen institutions in the target countries of Central and Eastern Europe through their "twinning" with institutions in the Netherlands. The Romanian activists were twinned with the federation of Dutch associations for the integration of homosexualities ("COC") and this partnership would continue, formally and informally, into the future. The COC-ACCEPT project funding and expertise were crucial in the setting up of an organizational infrastructure, the opening of office space, and the developing of programs and activities.

The arduous character of the Romanian struggle can be explained by the opposition of many nationalist members of Parliament, as well as a hostile press, and an Orthodox Church asserting its role in political life. For all of these forces, resistance to change would be characterized consistently in terms of the protection of a religious-cultural way of life, against outside influences and conspiracies seeking to undermine traditional Romanian values.⁴⁹ These tropes have a long history in

⁴⁴ Human Rights Watch, *supra* note 12.

⁴⁵ In fact, they were vigorously enforced by the post-Ceaușescu regime. On the draconian abortion laws in Ceaușescu's Romania, see Gail Kligman, *The Politics of Duplicity: Controlling Reproduction in Ceaușescu's Romania* (Berkeley: University of California Press, 1998).

⁴⁶ See Stychin, *Governing Sexuality*, *supra* note 28 at 119.

⁴⁷ See online: ACCEPT <<http://www.accept-romania.ro/>>.

⁴⁸ See Stychin, *Governing Sexuality*, *supra* note 28 at 120-21.

⁴⁹ See Tom Gallagher, "Nationalism and Romanian Political Culture in the 1990s", in Duncan Light & David Phinnemore, eds., *Post-Communist Romania: Coming to Terms with Transition* (Basingstoke: Palgrave, 2001) 104; Denise Roman, "Gendering Eastern Europe: Pre-Feminism, Prejudice and East-West Dialogues in Post-Communist Romania" (2001) 24 *Women's Studies Int'l Forum* 53.

Romania and have been consistently deployed in the name of ethnic nationalism. As well, for the Orthodox Church, the issue of homosexuality provided a means to claim its authority, which enabled it to draw attention away from its own dubious past association with the Ceausescu regime. Within this narrative of nation, many groups—not only homosexuals, but also Jews, Hungarians, and Roma—are constructed as “other” to the essence of a Romanian identity. They become undeserving of human rights because they have been constructed as *less than human*.⁵⁰ The eventual repeal of the anti-gay laws and the enactment of anti-discrimination law (which includes “sexual orientation” as an enumerated ground of non-discrimination) occurred in January 2002.⁵¹ ACCEPT executive members will readily admit that it was pressure from the institutions of the EU, which they fostered and encouraged, that ultimately led to legal change.⁵²

The turn to the institutions of the European Union, which have also placed pressure on the Romanian state regarding the human rights of the Roma, institutionalized children, and other minorities, becomes part of a reimagining of identity focused on a highly constructed notion of “Europeanness”, in which respect for human rights becomes a condition of, and an inherent aspect of, what it means to be European.⁵³ Quite obviously, the boundaries of Europe are currently up for grabs in the circumstances of EU expansion. In this reading, “Europe” is emblematic of civilization itself because of its respect for human rights. Outside of the fortress of Europe, by contrast, one enters the non-rights respecting, uncivilized “other”. That other desires entry into civilization, which, of course, is currently subject to EU immigration control that seeks to protect European civilization from the barbarians at the gates.⁵⁴

The acceptance of “European values” has been explicitly described by EU politicians as a precondition for entry into the Union, and this was strategically highly useful for gay activists in Romania, as anti-gay laws become perceived as incompatible with those values. For example, in a letter from eight members of the European Parliament, Prime Minister Nastase was told that “[w]e look forward to welcoming Romania into the European Union, but an essential prerequisite is that we must share the same values. Discrimination on whatever ground may never be

⁵⁰ See generally Tom Gallagher, *Romania After Ceausescu: The Politics of Intolerance* (Edinburgh: Edinburgh University Press, 1995).

⁵¹ *Law for the adoption of Government Emergency Ordinance No. 89/2001*, published in Romania’s Official Gazette, Part I no. 65/30.01.2002.

⁵² Interview of A. Coman, former Executive Director, ACCEPT, in Sinaea, Romania (7 August 2001) [“Coman Interview”].

⁵³ Armin von Bogdandy, “The European Union as a Human Rights Organization?: Human Rights and the Core of the European Union” (2000) 37 C.M.L. Rev. 1307.

⁵⁴ See e.g. Peter Fitzpatrick, ed., *Nationalism, Racism and the Rule of Law* (Aldershot: Dartmouth, 1995); Kum-Kum Bhavnani, “Towards a Multicultural Europe?: ‘Race’, Nation and Identity in 1992 and Beyond” (1993) 45 Feminist Rev. 30.

permitted.”⁵⁵ In this way, European institutions have a civilizing and disciplinary function, but human rights are only a small part of that role. The imposition of neo-liberal economic policies as a condition for EU accession is of far more interest and importance to the EU, and to the West more generally. This is apparent also in the relationship between Romania and the International Monetary Fund and the World Bank, throughout the post-Communist period. Conditions for financial support have included privatization and industrial restructuring; the creation of a climate conducive to foreign investment; the elimination of government price controls and industrial subsidies; and the liberalization of the foreign exchange market.⁵⁶

While the Romanian state agreed to repeal its anti-gay laws—as with the neo-liberal agenda, what choice did it really have?—this was only after some years of resistance on the basis that this was an internal, domestic matter. The irony was not lost on many observers of this struggle that the civilizing club of Europe itself has a far from illustrious history of human rights protection on this, or many other, grounds. After all, the idea of “European values” has a chilling historical pedigree. That is, the imagining of Europe is often on the basis of a highly selective memory. In this way, human rights can become a marker of the civilized European and globalized order and, as Peter Fitzpatrick has compellingly argued, as human rights become “the self-constituting mark of the global,” this is simultaneously “a mark of differentiation, a mark of exclusion and marginalization.”⁵⁷ The “other” to European civilization continues to be produced, as it has been throughout the history of “European civilization” (which could then justify the imperialist mission). Within the Romanian, and more widely, the Eastern European context, this is all too apparent. The EU and its human rights law are “exalted as epitomes of the universal and progressive in opposition to the particular and reactionary realms of the nation.”⁵⁸ The post-Communist nation states of the region become, from the perspective of the EU, undisciplined, reactionary, non-rights respecting, particularistic, and uncivilized nations that require the discipline of the EU to transcend their particularity and approach the universal, rights respecting dimension of nationhood. In this way, the EU becomes the civilized version of nationhood, while simultaneously transcending the idea of nationhood. Human rights discourse, as Fitzpatrick has shown, is deeply implicated in these discourses of nationhood, civilization, and savagery, and there is some considerable evidence for Fitzpatrick’s thesis in the context of EU accession in Eastern Europe.⁵⁹

⁵⁵ Letter from eight Members of the European Parliament to Romanian Prime Minister Adrian Nastase (29 May 2001) [unpublished, on file with author].

⁵⁶ Colin Jones, “Rumbles Felt in Romania” *The Banker* 147:856 (June 1997) 41.

⁵⁷ Fitzpatrick, *Grounds of Law*, *supra* note 7 at 200.

⁵⁸ *Ibid.* at 136-37.

⁵⁹ *Ibid.* at 122.

III. Human Rights or Special Rights

The EU's self-image as civilizing non-rights respecting "others" brings me back to the central problem of human rights as political claims: the tension between the constitutively universalizing character of human rights discourse (despite its inevitably socially constructed and historically specific reality), and the validity of claims to the cultural difference and specificity of communities. Moreover, these claims to difference can also be framed in the language of rights, which underscores the political indeterminacy of the discourse of rights more generally.⁶⁰ Within the context of the EU, this is apparent in terms of the "rights of member states" in the face of EU law, and language such as the "margin of appreciation" and "subsidiarity" underscores the concern for a right of *national* communities to be different.⁶¹ Within federal systems, the language of "states' rights" has a long history, and certainly was invoked in Australia during the Tasmanian human rights dispute. Similarly, for the postcolonial state resisting gay rights claims, one can find resort to a right of the self-determination of a historically colonized people (group) to resist a westernized and oppressive language of individual, bourgeois rights.

The particularized right of the nation often proves a remarkably inventive use of the language of rights in a range of different cultural contexts. In these narratives, we find the homophobic state fuelling an anti-gay rights discourse by constructing its "self" and its (homogenized and essentialized) people as oppressed by the claims of a privileged elite undeserving of "special rights".⁶² Rights are grounded in the particular and unique contribution of heterosexuals (and their reproduction) to the common good. In this way, rights and duties connect, and the promotion of the common good is located in the heteronormative private sphere of the nuclear family. These narratives rely upon the defence of a right to a traditional way of life for a people (composed of heterosexual families) under threat from a variety of privileged sources, which are selectively invoked depending upon the political context: urban elites; liberal, white political correctness; individualism; the West; neo-colonial powers; wealthy gay men; et cetera. Anti-gay discourse here relies upon the right to defend an oppressed, geographically based community from powerful interests seeking to sweep away ways of life and belief systems shared by a people that simply wants to be left alone, with lives uncomplicated by gay rights (and, for that matter, modernity).

⁶⁰ See Jane K. Cowen, Marie-Bénédicte Dembour & Richard A. Wilson, eds., *Culture and Rights: Anthropological Perspectives* (Cambridge: Cambridge University Press, 2001).

⁶¹ See Larry Catá Backer, "Harmonization, Subsidiarity and Cultural Difference: An Essay on the Dynamics of Opposition Within Federative and International Legal Systems" (1997) 4 *Tulsa J. Comp. & Int'l L.* 185.

⁶² On special rights discourse, see Didi Herman, *The Antigay Agenda: Orthodox Vision and the Christian Right* (Chicago: University of Chicago Press, 1997) at 111-36; Jonathan Goldberg-Hiller, *The Limits to Union: Same-Sex Marriage and the Politics of Civil Rights* (Ann Arbor: University of Michigan Press, 2002).

What these rights-grounded discourses underscore is not only the centrality of rights discourse, but the political manipulability of human rights talk. As Costas Douzinas has incisively concluded,

Human rights as a principle of popular politics express the indeterminacy and openness of society and politics. They undermine the attempt to police some social identities and sanction others and their indeterminacy means that the boundaries of society are always contested and never coincide fully with whatever crystallisations, power and legal entitlement impose.⁶³

Struggles around sexuality rights neatly demonstrate this very important point. Human rights claims by gays can trouble the anti-gay communitarian discourse, but simultaneously, claims by communities of difference, grounded in the language of human rights, challenge the logic of cosmopolitan claims made in the name of a universalizing discourse of sexuality rights. Rights discourse may have become “the fate of postmodernity”⁶⁴ and, for that matter, the product of a global consumerist society, but as a consequence, they are open to *all consumers equally*, and their deployment is limited only by the imaginations of those who wish to make claims.

IV. From Rights to Politics

It is tempting to end the story there, to conclude that rights are politically indeterminate, socially constructed (as are sexuality and nationhood), and open to both cosmopolitan and communitarian claims. But if that is the conclusion, then we are left—perhaps particularly *because of* the language of rights—with a tendency toward polarization and irreconcilable political demands. Ultimately, though, I expect gay rights arguments will win the day because of their easy articulation as part of globalization discourse. They represent the triumph of the global and of modernity itself. The language of rights cannot, however, apolitically provide resolutions to these moments. Legal claims *have* led to results but a turn to law does not mask the political character of the dispute and its outcome. If anything, it exacerbates both.

In this respect, gay rights disputes demonstrate a wider point made by Richard Bellamy and Dario Castiglione concerning politics and the state today.⁶⁵ They suggest that both cosmopolitan and communitarian pressures are engendered by globalizing currents, which push the state in opposite directions. Furthermore, they argue that the cosmopolitanism of rights must be tempered by a communitarian belief in democratic debate and engagement with political institutions leading to a spirit of compromise between previously polarized groups. This must be achieved through a politics of

⁶³ Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart Publishing, 2000) at 375.

⁶⁴ *Ibid.* at 1.

⁶⁵ Richard Bellamy & Dario Castiglione, “The Communitarian Ghost in the Cosmopolitan Machine: Constitutionalism, Democracy and the Reconfiguration of Politics in the New Europe” in Richard Bellamy, ed., *Constitutionalism, Democracy and Sovereignty: American and European Perspectives* (Aldershot: Avebury, 1996) 111.

reciprocity, compromise, and toleration.⁶⁶ The focus thus turns to political practices and institutions through which rights can be given meaning. Bellamy and Castiglione provide, in this way, a more communitarian account of liberalism as a means through which to embed rights within a network of relationships, and thereby, to provide a bridge through the cosmopolitan-communitarian divide.⁶⁷

In my experience, gay rights activists aspire to engage in precisely this politics of the wider communities of which they are a part, and to do so explicitly from their positions as lesbians and gay men (as well as from other politicized identity positions). Their struggles are for citizenship and belonging to a wider collectivity in which they can have voice and participate. The difficulty is that anti-gay rights campaigners so often seek to exclude them from politics except to the extent that homosexuality is depoliticized and closeted.

This was particularly true in Romania. The struggle over the decriminalization of same-sex sexual activities clearly was a crucial human rights issue on its own terms. The law was brutally applied to deny fundamental dignity to individuals. However, activists also saw this struggle as a precondition to achieving wider political change towards the creation of something akin to Bellamy's⁶⁸ politics of reciprocity and compromise.⁶⁹ The term I use to describe this politics is "civility". In interviewing lesbian and gay Romanians, I found a deep desire for a politics that was based on reciprocity, compromise, and civility. In this regard, many saw the struggle over human rights as a means to achieve a more "civil" society, rather than only the realization of cosmopolitan, universal rights. Indeed, ACCEPT explicitly sees its role, now that basic human rights have been achieved, as participation in a dialogue within civil society and with the state as part of a wider participatory politics.⁷⁰ In this way, the politics of rights activism is grounded in a recognition of the wider *potential* of human rights beyond the immediate claim itself.

There is considerable irony in my use of the term civility. Critics of human rights discourse point to the way in which human rights have become the measure of "civilization" and that, in turn, is derived only through its opposite: "It was created in the divide between 'the European family of nations' and 'savages or barbarians' who were beyond the pale of nationhood, speech and history."⁷¹ Despite the rhetorical power of that critical analysis, what struck me in Romania—a prime example of a nation state constructed in EU discourse today as lawless, chaotic, and backward—was the yearning for civil society and the belief that human rights were a necessary step to achieve a politics of civility. The term civility usefully highlights the political

⁶⁶ See also Richard Bellamy, *Liberalism and Pluralism: Towards a Politics of Compromise* (London: Routledge, 1999).

⁶⁷ Bellamy & Castiglione, *supra* note 65.

⁶⁸ Bellamy, *supra* note 66.

⁶⁹ "Coman Interview", *supra* note 52.

⁷⁰ *Ibid.*

⁷¹ Fitzpatrick, *Grounds of Law*, *supra* note 7 at 122.

indeterminacy of human rights. While we can accept and appreciate Fitzpatrick's trenchant critique of human rights discourse in the world today,⁷² we also need to recognize the powerful popular imagery of rights and the *desire* to deploy rights for transformative effect.

From the struggles of human rights organizations mobilized on the ground around sexuality, we can find operating within activism a response to the theoretical difficulties in the use of the globalizing cosmopolitanism of rights discourse when it meets rights claims made by communities of difference. The key may be to see the deployment of human rights as a "calling card" to enter into political and civil society; indeed, a calling card to enter what was constructed as a community of difference (or, to put it differently, to heterogenize a community). Activist strategies in practice move between cosmopolitan and communitarian discourses, and this is an important moment in bridging this divide. It allows for claims, not to abstract cosmopolitan rights, but to participation as full members of a wider community, and to have specific grievances emanating from same-sex sexualities recognized and heard as legitimate citizenship claims made by full members of that community.

Concluding Thoughts

In conclusion, the implications of this analysis are multi-faceted. While we will, I predict, increasingly see lesbians and gay men achieving human rights victories and successfully making claims to full citizenship, with these rights to participate within wider society come responsibilities to engage in struggles for political transformation. In my view, it is easy for gay politics to become politically conservative in an era of gay marriage and same-sex partnership benefits. These arguably assimilationist political moves also lead to the construction of some "queers" as rights undeserving—the dangerous, and the uncivilizable. It becomes far too tempting for "citizen gay" to consume human rights and then withdraw from any kind of progressive politics, especially when those who have bestowed the rights are also pursuing policies that are eviscerating the human rights of others on issues from migration to counterterrorism. In this regard, my claim has always been that law (including the law of human rights) can operate in an explicitly juridical way through repression and social control (the enforcement of anti-gay sex laws exemplifies this), but also that legal discourse can operate in a more subtle, disciplinary mode by encouraging individuals, in an infinite variety of ways, to conform to how the law constructs proper—even civilized—behaviour. The way such behaviour is constructed by law is informed, I would also claim, by a wider neo-liberal economic hegemony that emphasizes the privatization of responsibility for others and the withdrawal of the state from many aspects of care. In this way, law acts as a force for the discipline and normalization of the self. To gain rights in such a political context, and to be satisfied with them as a final result, thus would be a hollow victory indeed, and would

⁷² *Ibid.* at 122.

undermine the transformative potential (since it is only a potential) of human rights discourse. In other words, to be included and to be brought within a community does not by itself transform that community in terms of its ongoing need to construct boundaries of membership; to construct “insiders” and “outsiders”; the rights “deserving” and the rest. So too, same-sex sexual communities must themselves continue to be interrogated for their own exclusions and marginalizations (such as around race, gender, and social class). For the privileged within communities who are achieving the most from inclusion (i.e., those who are not disadvantaged along other vectors of oppression), there are particular responsibilities to fight for those who are constructed as rights undeserving.

In my view, this is the challenge and the potential of human rights discourse. The critique of rights is that lesbian and gay human rights struggles have become disconnected from politics and, moreover, that we have become depoliticized consumers through the fetishization of rights. But, to the extent that rights may provide a key that opens the political realm on the basis of full citizenship, the language of human rights does remain a valuable discourse in today’s political tool box.
