

2010

## Sexual Rights and State Governance

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### Recommended Citation

Katherine M. Franke, *Sexual Rights and State Governance*, 104 AM. SOC'Y INT'L L. PROC. 385 (2010).  
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finding reports document instances of government failure to meet obligations under human rights law. A number of human rights organizations have looked at different aspects of governments' failure to prevent maternal mortality and have demonstrated how human rights norms are implicated. Some examples:

- The Center for Reproductive Rights has reported on maternal mortality in Mali,<sup>14</sup> drawing a link between women's low status in society, which is reinforced in the law, and high rates of maternal death. It has also reported on maternal death in Nigeria,<sup>15</sup> addressing the failure of governments to prioritize investments in maternal health care despite political commitments to do so.
- Physicians for Human Rights examined maternal mortality in Peru by analyzing health system failures, including systemic inequities and discrimination.<sup>16</sup>
- Human Rights Watch addressed maternal mortality in India, looking in particular at a lack of health care system accountability for maternal death.<sup>17</sup>
- Amnesty International just released a report targeting disparities in access to maternal health care in the United States, which is obviously a high-resource setting.<sup>18</sup>

Another strategy is litigation—bringing an individual complaint to a human rights body. The challenge is to show not only that a woman's pregnancy-related death was preventable, but also that the death resulted from a government's systemic failure to ensure her right to life or right to health. In some settings, a preventable maternal death may look like a case of provider malpractice. The task of the human rights advocate is to show that responsibility lies beyond a single provider and can be attributed to a health system failure. The Center for Reproductive Rights has brought to the CEDAW Committee, under the CEDAW Convention's Optional Protocol, the case of Alyne de Silva Pimental, a woman of African descent who died unnecessarily of pregnancy complications in Brazil. The case seeks accountability for multiple failures of the Brazilian health system to provide Alyne with standard medical care for pregnancy complications. The shortfalls in the Brazilian health system have resulted in a disproportionately high number of maternal deaths among low-income women. The petition asserts violations of Alyne's right to life and to health, among other rights.<sup>19</sup>

## SEXUAL RIGHTS AND STATE GOVERNANCE

*By Katherine Franke\**

We sit at an interesting juncture in the evolution (in some cases, devolution) of the idea of sexual rights in international law. For at the very moment that we are experiencing a

<sup>14</sup> CENTER FOR REPRODUCTIVE RIGHTS, *CLAIMING OUR RIGHTS: SURVIVING PREGNANCY AND CHILDBIRTH IN MALI* (2003).

<sup>15</sup> CENTER FOR REPRODUCTIVE RIGHTS, *BROKEN PROMISES: HUMAN RIGHTS, ACCOUNTABILITY, AND MATERNAL DEATH IN NIGERIA* (2008).

<sup>16</sup> PHYSICIANS FOR HUMAN RIGHTS, *DEADLY DELAYS: MATERNAL MORTALITY IN PERU: A RIGHTS-BASED APPROACH TO SAFE MOTHERHOOD* (2007).

<sup>17</sup> HUMAN RIGHTS WATCH, *NO TALLY OF THE ANGUISH: ACCOUNTABILITY IN MATERNAL HEALTH CARE IN INDIA* (2009).

<sup>18</sup> AMNESTY INTERNATIONAL USA, *DEADLY DELIVERY: THE MATERNAL HEALTH CARE CRISIS IN THE USA* (2010).

<sup>19</sup> Center for Reproductive Rights, Case Summary: *Alyne da Silva Pimentel v. Brazil* (Committee on the Elimination of Discrimination Against Women), available at <http://reproductiverights.org/en/case/alyne-da-silva-pimentel-v-brazil-committee-on-the-elimination-of-discrimination-against-women>.

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retraction in both domestic and international commitments to rights associated with sexual and reproductive health, we see sexual rights of a less-reproductive nature gaining greater uptake and acceptance. It is the moral hazard associated with perceived gains in the domain of international rights for lesbians and gay men that I want to address today. In the end, the point I want to bring home is that a particular kind of caution, and indeed a new kind of politics, is called for when the state becomes a partner in the project of converting wrongs into rights and outlaws into rights-bearing citizens. The “patriotized” rights-bearing lesbian or gay subject and “its” movement have a duty to actively resist being mustered into nationalist projects undertaken in its name and purportedly on its behalf.

Let me start off with a couple examples of what I am getting at. Last August, a masked gunman stormed into the meeting place of lesbian and gay youth in a Tel Aviv community center and began shooting. He killed two teenagers and wounded 10 or more others. Israeli President Benjamin Netanyahu immediately commented, “This is not just a blow to the gay-lesbian community. This is a blow to all Israeli youth and Israeli society.” President Shimon Peres echoed these remarks at a rally honoring the murdered gay teens, “The gunshots that hit the gay community earlier this week hit us all. As people. As Jews. As Israelis.”

These remarks, while laudable for their strong condemnation of violence against gay and lesbian people, signal something quite interesting about the relationship between homosexuality, the state of Israel, the Jewish people, and the idea of a modern, democratic, and tolerant state. When and how did homophobic violence acquire such meaning in Israel, such that the President and Prime Minister were expected to, and did, embody the role of national victim before domestic and international audiences immediately after the shooting?

The answer lies in significant part in recent efforts by the Israeli government to rebrand itself in a self-conscious and well-funded campaign termed alternately “Brand Israel” and “Israel Beyond the Conflict.” According to the Israeli government—whether Labor, Kadima, or Likud—a modern, democratic, and tolerant state should respond with empathy and outrage when “their homosexuals” are attacked. Indeed, for some this is what distinguishes a state such as Israel from, for instance, its Muslim and Arab neighbors. Various pro-Israel advocates, including the Israeli government, have seen a strategic advantage in comparing Israel’s tolerance of gay people with intolerance toward gays in neighboring Arab and Muslim countries. Thus the Knesset has approved the allocation of significant funds to support a public relations campaign to “make people like us,” as then-Foreign Minister Tzipi Livni put it. The explicit goal was to blunt and distract criticism of Israel’s Operation Cast Lead—the military intervention in Gaza—by emphasizing its relative tolerance of sexual minorities as compared with its less enlightened and less modern neighbors. Note that I am not just reading between the lines here, or putting an uncharitable gloss on the instrumental embrace of gay rights by the Israeli state—they are upfront about what they’re doing.

My second example comes from the European Union. In 1993 Romania started the process of pursuing membership in the European Union. According to EU rules, accession countries have to go through a two-step process to begin membership negotiations. First, the candidate country must demonstrate that it has achieved stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities. Having done this, the country must then show appropriate economic and market reforms to render it eligible for participation in European markets.

With respect to the first criterion—showing that it was a rights-respecting nation—Romania, as you might guess, had some work to do. It had had a shocking modern history of human rights violations, from Ceausescu’s rule through the post-Communist era. The criminal

treatment of homosexuality and the invasion of women's bodies in the name of the nation, as well as discrimination against Roma, were among the most extreme forms of state-sponsored rights-abridging behavior. In 1968 Romania enacted Article 200, a law criminalizing sodomy both in public and in private. The sodomy law supplemented Ceausescu's other pro-natalist decrees that compelled women to undergo periodic and compulsory gynecological examinations and severely punished abortions. In 1986 Ceausescu declared "the fetus to be the socialist property of the whole society. Giving birth is a patriotic duty . . . those who refuse to have children are deserters."

In 1993 when Romania sought admission to the European Union, it was visited by a delegation from the Council of Europe whose rapporteurs cited the sodomy law as a human rights deficit that the Romanian government would have to rectify before negotiations could proceed. So a new gay rights NGO was formed in Bucharest, largely funded by the Dutch, the sole mission of which was to seek repeal of Article 200. For a state like Romania, being viewed as a serious candidate for admission to the EU meant performing plausible modernity by having a recognizable minority of citizens who could stand up and say "I'm gay," who were recognized as being discriminated against in ways similar to that in the European metropole, and who could then be protected from that discrimination by the Romanian state.

In the end, Romania was able to satisfy the first step of the Copenhagen criteria for EU eligibility by repealing Article 200—the legally formalistic price of admission into the economic community of the EU. Little attention was paid to the rights of women, to reproductive rights, to the plight of the Roma, or to the creation of healthy institutions of civil society that would, in the long run, better serve the interests of women and minorities than would the state.

So what is to be learned from these two examples? In some respects, the deployment of lesbian, gay, bisexual, and transgender (LGBT) rights by states to further other national and nationalist interests is nothing new. Woodrow Wilson used the enfranchisement of women in the United States in the immediate post-World War I period as a means by which to champion the moral superiority of the United States, and the U.S. military was racially integrated by Harry Truman after World War II for reasons that had as much to do with efforts to distinguish the United States from the Soviet Union as the rightness of African American civil rights.

What I am concerned about is how a state's operationalization of sexuality and sexual rights should trigger a set of ethical concerns back at the home office of the NGOs working to advance sex and sexuality-based human rights. When nonstate actors seek to engage the human rights apparatus in the name of the rights and freedoms of certain populations, a duty should be triggered to take into account the ways in which the meaning and implications of their work may not be of their own making or design. Some scholars have warned of a kind of moral atrophy that sets in to some right-based social movements precisely at the moment that the state "takes up" their cause. Might a kind of atrophy be at risk when the state starts doing the heavy lifting related to defending the rights of sexual minorities? Whether in the sodomy reform politics of post-Ceausescu Romania or in today's same-sex marriage politics in the United States, there is a risk that the rights-bearing gay subject—a new "good citizen"—emerges in the foreground of a national landscape that by contrast highlights at its margin others who are not so good.

We might laud Israeli's political leadership when it stood up for the gays after the Tel Aviv shooting, but we ought to note the circumstances when these leaders stood down in the face of similar violence perpetrated in more trying circumstances from the perspective

of the liberal state. The “patriotized” rights-bearing LGBT subject and “its” movement have a duty to actively resist being conscripted into nationalist projects undertaken in its name and purportedly on its behalf. The state’s embrace of the sexual citizenship of these new human rights holders risks rendering more vulnerable a range of identities and policies that have refused to conform to state-endorsed normative homo- or hetero-sexuality. This is true both for queers whose desires refuse to orient themselves ineluctably toward marriage, or some Muslims with sexual norms and practices of polyamory, homosociality, and modesty. Under this scenario, newly enfranchised gay citizens find themselves implicated, whether they want to or not, in the construction and identification of the “enemies of the state.”

The moral atrophy that has kept us from recognizing the tragedy of these strategies and outcomes is where more critical, and indeed discomfiting, work needs to be done, by theorists and activists alike. This means rethinking the horizon of success in this work. “Victory”—in the sense of gaining the state as a partner, rather than an adversary, in the struggle to recognize and defend LGBT rights—ought to set off a trip wire that ignites a new set of strategies and politics. This must necessarily include a deliberate effort to counteract, if not sabotage, the pull of the state to muster rights-based movements into its larger governance projects, accompanied by an affirmative resistance to conceptions of citizenship that figure nationality by and through the creation of a constitutive other who resides in the state’s and human right’s outside.