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ARTICLE



LGBT rights and refugees: a case for prioritizing LGBT status in refugee admissions

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ABSTRACT

This article discusses the case of refugees who are LGBT, and the possible grounds for using LGBT status as a basis for prioritizing LGBT persons in refugee admissions. I argue that those states most willing and able to protect LGBT persons against a variety of (also) non-asylum-grounding injustices have strong moral reasons to admit and prioritize refugees with LGBT status over non-LGBT refugees in refugee admissions. These states – typically, Western liberal democracies – are uniquely positioned to provide effective protection for refugees who are LGBT, owing to the failures of other, also refugee receiving, states to do so. The case for prioritizing refugees with LGBT status is built upon two interrelated factors. First, on the specific vulnerability of LGBT persons to a variety of (also) non-asylum-grounding injustices, and second, on the relatively low number of countries that are both willing and able to protect LGBT persons against such injustices.

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Introduction

There are over 70 countries in the world that criminalize same-sex sexual activity or ‘promotion’ of such activity (ILGA 2017). The penalties, and the extent to which such penalties are enacted, vary from country to country, with eight states (or regions within states) being reported as de facto practising death penalty for gays. While several of the criminalizing countries have largely refrained from using the criminal codes against LGBT persons, there is no doubt that being gay comes with a stigma, and potential disadvantages and dangers for those identified as LGBT. This, it should be noted, also goes beyond the criminalizing countries, and may well be a reality for LGBT persons everywhere, even in countries with extensive anti-discrimination legislation and recognition of LGBT persons and their partnerships.

In this article, I discuss the case of refugees with LGBT status and the possible grounds for prioritizing LGBT persons in refugee admissions. Contrary to the majority of literature on refugees and LGBT rights, my focus is not primarily on the problematics associated with LGBT refugees (that is, refugees who flee persecution for being LGBT), but also on cases where refugee status is established on other, for example, religious or ethnic persecution grounds, and where the refugee is LGBT. I argue that the

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LGBT status of a refugee, even when incidental, makes them vulnerable to various forms of persecution, discrimination, and structural injustice, and that this should be taken into account in refugee admissions. Given the relatively low number of countries that are both willing and able to protect LGBT persons also against other, non-asylum-grounding injustices, provide these countries – typically, Western liberal democracies – strong moral reasons to prioritize refugees with LGBT status over non-LGBT refugees in refugee admissions.

A few clarifications are in order. First, in this article, I use the term ‘LGBT’ as an umbrella term for persons of various non-heterosexual orientations (typically Lesbian, Gay, and Bi), and non-conforming gender identifications (typically Trans). By doing so, I wish not to ignore the differences in the nature of these categories (sexuality vs. gender) or the kinds of disadvantages that persons from each category are likely to be subject to. Consequently, I acknowledge that some states, willing and able to protect, say, gays and lesbians may be less so in protecting transpersons, and that the eventual application of my argument will need to take this into account. For my present purposes, I nevertheless retain this umbrella usage of the term, that is also reflected by many LGBT(Q+) organizations, and international human rights frameworks (incl. UNHCR 2011, 2012).

Second, my usage of the term ‘refugee’ is based on, although not fixed to, the 1951 UN refugee convention that defines refugees as fleeing persecution. While this definition remains contested,¹ it nevertheless provides a starting point for assessing whether – given this, or some other, suitably modified definition – there may be moral grounds for states to prioritize certain refugees over others. Notably, while my focus here is on LGBT persons, I acknowledge the possibility of similar (albeit not identical) arguments being made for prioritizing some other groups, e.g. children (Schweiger 2019) or people with disabilities. I do not thus aim to argue that LGBT status should operate as the only, or overriding, ground for prioritization, although I believe that such status should provide moral reasons for certain states to admit and prioritize refugees with LGBT status (all other things equal).

Finally, by ‘prioritizing’ I mean a process by which a state gives priority to refugees with LGBT status over non-LGBT refugees when choosing to admit only one, but not both refugees. Such admission may happen via an international refugee resettlement scheme or via in situ asylum process – although I do not argue for the prioritizing of LGBT persons *for asylum in general*. I do not think that the LGBT status of a person should play a role in determining a person’s right to international protection – all refugees, regardless of their sexuality or gender, have this right (see also Fine 2020) – although this status may operate as a legitimate ground for prioritization, in circumstances where the state is using its coercive power to admit some refugees, while excluding others.²

The article proceeds as follows. I begin by giving a brief overview of the current situation of LGBT persons in the international refugee regime, and the challenges LGBT persons seeking asylum typically face. In section two, I provide a three-fold

¹For criticism on the convention definition, including its inability to account for persons fleeing other sources, e.g. war, hunger, economic deprivation, or climate change, see, e.g., Gibney (2004, 2015), Foster (2009), Betts (2013), Miller (2016).

²Notably, I thus begin with the assumption that states are, within certain constraints, morally permitted to exclude persons from their territory, although I wish not to take a stand on whether, in cases discussed here, the denying of admission to one of the refugees would be justified. Consequently, I aim my argument to hold both in cases where the state in question is fulfilling its duties of refugee admission (i.e. admitting as many refugees as it should do), and when it is not.

categorization of the kinds of injustices that LGBT persons are commonly subject to. In section three, I utilize this categorization to build a moral case for LGBT prioritization. In section four, I defend my view against some objections, before in section five, I conclude.

LGBT persons and the international refugee regime

The vast majority of literature on LGBT rights and refugees has focused on questions relating to LGBT status *as a basis* for asylum. According to the 1951 UN refugee convention:

A refugee is a person outside their country who has a well-founded fear of persecution owing to their race, nationality, religion, political opinion, or membership of a particular social group. (UN 1951, Art 1.)

In relation to LGBT persons, the last category – membership of a particular social group – has become crucial. As confirmed by the UNHCR interpretative documents (incl. UNHCR 2011, 2012) and by various national and regional legislations (e.g. Council of European Union 2004, 2011), LGBT people have, during the last 20 years or so, been recognized as a relevant kind of social group, the persecution of which may ground asylum (Millband 2013). Typically, the debates on LGBT refugees have focused on two issues. (1) On the question of what counts as ‘well-founded fear of persecution’, and 2) how to establish that the person, applying for asylum on this basis, really is LGBT.

In relation to the first issue, while many LGBT rights activists, as well as legal scholars, have argued that the existence of anti-gay criminal codes should suffice for the establishing of ‘well-founded fear of persecution’, in both theory and practice, such a criterion remains contested.³ On the one hand, the criterion of criminalization may be viewed as over-inclusive. It may not be enough that a person comes from a criminalizing country, but the criminal code must also have substantive consequences (e.g. imprisonment) and be actively enforced. Furthermore, for the ‘well-founded fear of persecution’ to be established, the person may also need to show that *they* would be thus persecuted. For LGBT persons, this requirement of individualized fear of persecution has proven especially problematic, as in many cases a person’s sexual orientation or gender identity may be hidden. While the so-called ‘discretion reasoning’ (i.e. the idea of LGBT persons being able to avoid persecution by remaining ‘discreet’) has largely been deemed invalid (Spijkerboer 2013, 220n7),⁴ the possibility, and prevalence, of LGBT persons concealing their identity has continued to raise questions at several stages of the asylum processes (Spijkerboer 2013; Jansen and Spijkerboer 2011). On the other hand, the criterion of criminalization may be viewed as under-inclusive, as it fails to capture some of the cases where LGBT persons should (normatively speaking) qualify as a refugee. Should a state, for example, fail to protect LGBT persons against homo- or transphobic violence, or even enact this violence (despite having no anti-gay legislation), the requirement of ‘well-founded fear of persecution’ may be established.⁵

³For an overview of the usage of criminalization criterion in LGBT cases, including the UNHCR guidance on the role of criminalization, see Jansen (2013).

⁴On the specifics of the discretion reasoning in LGBT contexts, see Weßels (2013).

⁵On the recognition of non-state agents as actors of persecution see Lister (2016).

With respect to the second issue, that of establishing the LGBT status of a refugee, much debate has focused on the ethical issues relating to the often invasive methods by which a person's sexual (or gender) orientation is 'proved'. The rationale for requiring such 'proof' comes from the states' need to distinguish false applications from genuine ones and to avoid opportunistic usages of LGBT status by non-LGBT persons. These methods have ranged from outright physically degrading (e.g. phallometric testing of physical arousal) to privacy-invasive interrogation and interviewing methods, requiring the person to explain, often in graphic detail, their sexual histories and acts they have engaged in (O'Leary 2008; Lewis 2014). Given the immense social stigma, homophobia, and persecution that LGBT refugees are fleeing from, the requirement to disclose one's intimate life to the authorities can be seen as both invasive and unreasonably demanding. As LGBT refugees have often been forced to hide or suppress their sexuality, it may not be reasonable to expect them to suddenly be open and articulate of it. When combined with the 'well-founded fear of persecution' requirement, those LGBT persons struggling to disclose or be open about their sexuality have often failed to establish a 'well-founded fear of persecution', as their closeting or discretion has, until then, protected them from persecution.

Criminalization, lack of protection, and structural injustice

Starting from the above-discussed criminalization criterion of persecution, in this section, I propose a threefold categorization of the kinds of injustices LGBT persons may commonly be subject to. Contrary to the often used division between persecution and discrimination, this categorization aims to stay neutral in regards to what qualifies as 'well-founded fear of persecution' as it does not aim to track any division between the kinds of injustices typically seen as grounding asylum and those that are not. This is important, as my argument for LGBT prioritization is intended to apply to all refugees with LGBT status, not only refugees who are fleeing persecution for being LGBT. Furthermore, as I try to argue, the basis for such prioritization need not have to do with the severeness of the persecution that LGBT persons are subject to, but may also relate to the severeness and widespreadness of other types of injustices – the normative relevance of which the present categorization aims to capture.

Active state-sponsored persecution/criminalization

As a first category of injustice, LGBT persons may be subject to various types of anti-gay (or, more broadly, anti-LGBT) criminal codes. While it may remain an open question (cf. my discussion in the previous section) whether the mere existence of such criminal codes suffices for the 'well-founded fear of persecution' to be established, for my present purposes, I call the existence of such criminal codes, whether commonly effected or not, 'active state-sponsored persecution'.

Passive state-sponsored persecution/lack of state protection

Apart from 'active state-sponsored persecution/criminalization', LGBT persons may also be subject to various other types of injustices – including violence, harassment,

and discrimination – against which they lack effective state protection. For example, a gay person who is attacked and beaten on the street (for being gay), but is not able to report this to the police (due to the police not taking violence against gays seriously) is an example of ‘passive state-sponsored persecution/lack of state protection’. Such a lack of protection may be combined with active criminal code, but it need not be. On some occasions, the acts of violence, harassment, and discrimination may also be performed by state-agents (such as the police) who, despite being legally required to protect all members of society, engage in systematic harassment of LGBT persons. Let us illustrate some of the complexities within this category by identifying four axes via which such persecution/lack of protection may differ.

(1) The agents whose acts the state fails to provide effective protection against may be non-state actors (private persons, groups, organizations) or state agents themselves.⁶ (2) The harm caused to the LGBT persons may vary from severe physical violence (beatings, mutilations) to different forms of psychological or social consequences (social exclusion, discrimination). (3) The failure of the state may be all-affecting (i.e. affect all LGBT persons) or be determined by a variety of other factors (e.g. affecting only a certain class, sub-category, or ethnic group). (4) The passive state-sponsored persecution may be in accordance or against the formal law of the state. For example, the state may lack relevant anti-discrimination legislation, thus making the failure of the state to protect LGBT persons against discrimination compatible with the existing legal frameworks; or it may have extensive, legally codified protection for LGBT persons, but still fail to provide adequate protection. Given these complexities, and the axes via which such ‘persecution/lack of protection’ may differ (including *agents*, *harm*, *scope*, and *law-alignment*), it is clear that different societies may manifest very different types and sets of such injustices. These different types nevertheless share one common feature. That is, that the failure of the state to protect LGBT persons can be traced back to an identifiable and, in many (although not all) cases, also a deliberate failure by the state to protect LGBT persons against the deliberate and willing actions of others. This makes ‘passive state-sponsored persecution/lack of protection’ substantively different from the third category of injustice encountered by LGBT persons: structural injustice.

Structural injustice

As a third general category of injustice, LGBT persons may also be subject to a number of structural injustices – none of which would typically be viewed as constituting the kind of persecution referred to in the refugee convention.⁷ According to Iris Young,

Structural injustice, then, exists when social processes put large groups of persons under systematic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time that these processes enable others to dominate or have a wide range of opportunities for developing and exercising capacities available to them. (Young 2011, 52)

⁶The distinction between active and passive state-sponsored persecution does not therefore hang on whether the perpetrator is a state- or non-state agent, but on the (often fine) line between acts that are *based upon* the existing legal frameworks, and those that are not.

⁷For an account on how structural injustices may nevertheless lead to and enable other injustices, including persecution, see Parekh (2012).

Structural injustices occur when a number of individuals and institutions act in accordance with generally accepted norms that, in effect, create a systematic power imbalance and disadvantage a particular group in society. For example, in a typically heteronormative society – that is, a society where the presumed sexual orientation of a person is heterosexual – LGBT persons may find themselves variously disadvantaged. In social services (commonly designed for default heterosexual persons⁸), school textbooks (portraying heterosexual families), media representation (incorporating the stereotypical token gay), and places of recreation (cafes, nightclubs, sports associations), LGBT persons are often excluded, marginalized, or simply not catered for. While none of the above may be viewed as outright discriminatory,⁹ the effects of widespread heteronormativity can nevertheless be seen as constituting the kind of ‘threat of domination or deprivation of the means to develop and exercise their capacities’ that Young labels as structural injustices. Contrary to the two previous categories (active and passive state-sponsored persecution), however, these injustices may not be traced back to the wilfully repressive policies of the state, or (in most cases) to the malevolent acts of others (civil servants, media companies, cafe owners), but are produced by different agents acting according to the generally accepted norms of society. Importantly, as Young explicates, ‘Structural injustice is a kind of moral wrong distinct from the wrongful action of an individual agent or the willfully repressive policies of a state.’ (Young 2011, 52.) That is, structural injustice is a distinctive kind of injustice from both ‘active state-sponsored persecution/criminalization’ and ‘passive state-sponsored persecution/lack of state protection’.

Having provided a threefold categorization of the types of injustices LGBT persons may commonly be subjected to, I now turn to utilize this categorization to build a moral case for LGBT prioritization in refugee admissions. Notably, my argument needs not to focus on the exact lines between the different categories of injustice (these, I content, will remain contested), although it will draw upon the differences between the potential refugee receiving countries to protect LGBT persons against the different types of injustices.

A moral case for prioritizing LGBT persons in refugee admissions

In the literature on refugee admissions, states’ ability to protect refugees is often taken to ground a moral duty of these states to admit more refugees into their territories.¹⁰ Those states best positioned to protect refugees should fulfil their duties and, in present circumstances, admit larger numbers of refugees than they are currently admitting. The criteria for assessing which states are ‘best positioned to protect refugees’ may, of course, be contested, with factors such as financial capacity, physical proximity and integrative ability having been suggested as relevant.¹¹ In this section, I take this argument a step further. I argue that those states, best positioned to protect refugees

⁸Examples may include family planning services (typically designed for heterosexual couples), housing benefits (that presume the social status of co-inhabitants from their gender), welfare benefits (based on the assumed status of co-inhabitants), etc.

⁹With possible exception to social services, should they be, not only presumptively designed for non-LGBT persons, but also exclusively available to them.

¹⁰For different variations of this argument, see, e.g., Carens (2013), Ferracioli (2014), Parekh (2017).

¹¹For debate, see Gibney (2004, 2015), Carens (2013, 214–215), Miller (2016, 89–93), Holtug (2016).

with LGBT status, also have strong moral reasons to prioritize them in refugee admissions. Rather than being an argument about the general relation between the state's ability to grant asylum and its duty to do so, my argument operates on a different level. I aim to show that there are morally relevant features of the case that go beyond the question of state's ability to grant asylum, pertaining to the state's ability, and willingness, to protect LGBT persons also against other types of injustices. In order to make this case, I first utilize the categorization of the previous section to place the potential refugee-receiving countries into three groups, after which I discuss what such grouping means for LGBT prioritization.

Let us thus divide the potential refugee-receiving countries into three groups. These groups are identified by the types of persecution and injustice that LGBT persons in each country group are subject to, with the first group incorporating the 70+ criminalizing countries ('active state-sponsored persecution/criminalization'), and the third those countries that are, for example, by effective anti-discrimination legislation and recognition of same-sex partnerships, viewed as both willing and able to protect LGBT persons within their jurisdictions. In between these two groups, there are a number of countries that, to different extents, fail to protect LGBT persons within their territories (characterized by 'passive state-sponsored persecution/lack of state protection').

This grouping is, of course, very rough and ready, and the placing of different countries into different groups may be contested. Apart from the criminalization criterion, there are no straight-forward criteria for categorization, as there are no comprehensive data on the extent to which LGBT persons in different countries are subject to persecution, lack of protection, or structural injustices. The public attitude surveys (e.g. ILGA), human rights reports (UN, Amnesty, etc.), reports from local LGBT associations, as well as the existence (or lack of) anti-discrimination legislation may nevertheless be used as proxies, indicating the levels of LGBT persecution/protection in different countries. Many non-criminalizing countries, for example in Eastern Europe, Asia, and middle-America, would, according to such assessment, be placed into the middle group of countries where being gay comes with a notable stigma and disadvantage, and where state protection against, e.g., homophobic violence is not always given.

In relation to refugees with LGBT status, the three groups of countries are differently positioned, both (1) in their ability to provide asylum to such refugees, and (2) in providing effective protection for such refugees against the variety of LGBT-based persecution and injustice. Note that these are two separate issues: a state may be able to provide asylum to refugees with LGBT status (and thus protect them against the kinds of persecution referred to in the refugee convention), but fail to provide effective protection against, e.g., LGBT discrimination. Of the three country groups described above, only the first group (including the 70+ criminalizing countries) are incapable of both tasks. In the case of LGBT refugees (that is, those whose refugee status is determined by them being LGBT), the access to asylum is simply blocked. In the case of other refugees with LGBT status, this access may remain open, but with the price of these refugees being in substantive danger, should their LGBT status become known.

In relation to the two remaining groups of countries, the following applies. While the two groups may not necessarily differ in their ability to grant asylum to refugees with LGBT status, they are nevertheless differently positioned when it comes to the

protection of LGBT persons against a variety of other, non-asylum-grounding injustices. This, I argue, provides strong moral reasons for the better-positioned countries (the least persecutory/most LGBT-friendly) to prioritize refugees with LGBT status – as not doing so would render them subject to a variety of LGBT-based persecution and injustice elsewhere. The general principle here resorts not only to the duties we may acquire based on the needs of others and our ability to attend to them but also to the additional moral reasons we may acquire on the basis of others' moral failures.

Let us illustrate this underlying principle – that is, that the specification of our duties of rescue may be crucially affected by the moral failures of others – with a common (moral philosophical) scenario of a child that is about to drown in a pond.¹²

#1. A child is about to drown in a pond. Two persons (A and B) are standing next to the pond, and are thus both in a position to rescue the child from drowning. Person A, however, has a muscular dysfunction that causes her to grip objects with an abnormally strong force. While rescuing the child, A would thus inflict physical injury to the child (say, by breaking some of the child's bones), while B could rescue the child with no injury inflicted. Both A and B are aware of this fact.

While we could maintain that both A and B retain their duty to rescue the child from drowning, it would also seem that A's muscular dysfunction, and the perfectly predictable consequences thereof, provide B additional moral reasons to make sure that *they* rescue the child. This is so, as not rescuing the child would mean subjecting the child to substantive physical harm in the hands of the rescuee by A.¹³

This, I believe, applies regardless of what the source of A's gripping the child with abnormally strong force is.

#2. Say that, instead of having a muscular dysfunction, A is a person of despicable character who, should there be a child to be rescued from drowning, would let their annoyance of such task take over and grip the child with abnormal physical force.

While I do not think that A's despicable character should affect the basic duty of rescue (of either A or B: should neither of them rescue the child, they would be equally blameworthy), it would seem that B's knowledge of A's despicable character should provide B additional moral reasons to make sure that *they* rescue the child. This is so, as not rescuing the child would mean subjecting them to substantive physical harm in the hands of the rescuee by A.

It may be objected that these scenarios are very different from the cases of refugee prioritization. In #1 & #2, no choice between rescuable children needs to be made, as the question is simply of whether A's failure to rescue the child without inflicting injury should provide B additional moral reasons to make sure that *they* rescue the child. Let us therefore alter the scenario a bit.

#3. There are ten children drowning in a pond. Next to the pond, there are five persons (A, B, C, D, E) who can rescue children from drowning (note that I remain agnostic about whether the five persons can rescue all, or only some of the ten children,

¹²For critique of using standard pond cases to illustrate our duties to refugees, see Owen (2016). While my examples aim to avoid most of these critiques, some issues (most notably, the temporal continuity of the situation) remain.

¹³Stephanie Collins (2018) discusses different kinds of costs (recipient-relative, agent-relative, and ideal-relative) that may affect our duties of assistance in non-ideal circumstances. For my present purposes, I focus on the recipient-relative costs, and take the (morally acceptable) agent-relative costs as equal, while focusing on the reasons that the failure of others may bring to the agents in question.

but they are nevertheless all in a position to rescue some children). Let us say further that the five persons are of different characters manifested in their reactions to different types of children. Person A is despicable (but in a very egalitarian way), and would inflict injury to any child they rescue. Person B might not particularly like rescuing children, but should they do so, they would at least try not to grip the child with too much physical force (or let the characteristics of the child affect the force they use). Persons C, D, and E, however, are of a less egalitarian nature, and let the characteristics of the child affect the level of force they use in rescue. Importantly, of the ten drowning children, one is deemed (by C, D, and E) to possess the kinds of characteristics they find difficult to tolerate, thus resulting in C, D, and E using abnormally strong force and inflicting injury to that one child (should one of them rescue this child).

It should be emphasized that there is no question of whether the infliction of injury (by A, C, D, or E) is morally wrong. It is, and none of the agents should inflict injury to any of the children they rescue. It should also be noted that, should B not be in the vicinity of the pond (or, for other reasons, fail to rescue that one child), it would be wrong for the others not to rescue this child (given they were in a position to do so). In fact, it would be wrong for them not to rescue the child regardless of B's existence (given they were in a position to do so). Importantly, however, it would seem that the failure of the four others (A, C, D, E) to rescue this one child without inflicting injury, should provide B additional moral reasons to rescue precisely this child, as they are now in a unique position to do so. That is, while nine of the drowning children can be rescued (without further injury) by any of the four persons (recall that A rescues no-one without inflicting injury), one of the children can only be rescued (without additional injury) by B.

For our present case, refugees are obviously represented by the drowning children (with that one drowning child being a refugee with LGBT status), and the persons A, B, C, D, E represent the potential refugee-receiving countries. Note that, in this scenario, all five countries are potential refugee-receiving countries. There may, of course, be other countries around the pond, who would not rescue a child (with or without inflicting injury), but for the sake of simplicity, I leave these countries out of the picture. It may also be that for one of the countries, for example, E, the characteristics of that one child are deemed so intolerable that they would outright refuse to rescue that child, thus representing the first group of countries (characterized by 'active state-sponsored persecution/criminalization'). The other countries, however, are all in a position to rescue any or some of the children (that is, to grant asylum to refugees, including refugees with LGBT status), but only B (the third group of most LGBT-friendly countries) is able to rescue that one child without inflicting injury. That is, only the third group of countries are able and willing to grant asylum to refugees with LGBT status *and* protect them against a number of other types of injustices ('passive state-sponsored persecution/lack of state protection'). This, I believe, should also give this group of countries – typically, Western liberal democracies – additional moral reasons to admit refugees with LGBT status and, when choices need to be made, prioritize refugees with LGBT status over non-LGBT refugees in refugee admissions.

Note two important features of my argument here. First, my argument rests on the existing non-ideal circumstances, and on the relatively low number of countries that are both willing and able to protect refugees with LGBT status without subjecting them to

considerable danger, harm, or injustice. Given the relatively low number of such countries (as opposed to the much higher number of countries that admit refugees in general), this provides the ‘willing and able’ states moral reasons to take in such refugees, as they presently occupy the best – and relatively unique – position to protect such refugees *also* against a number of non-asylum-grounding injustices. This does not imply that the treatment of LGBT persons by the two other groups of countries should thus be accepted as given, or that the ‘willing and able’ states should be viewed as doing a perfect job in LGBT protection (the widespread structural injustices show they are not), but that they are nevertheless in a substantively better position to protect such refugees than the two other groups of countries.

Second, as illustrated by the construction of the pond case #3, my argument is built upon the assumption that the relevant refugee-receiving states (B, C, D, E) are all in at least relatively equal position to protect (non-LGBT)-refugees in their territories. That is, I take it that the non-LGBT refugees are not subjected to similar types of (non-asylum-grounding) injustices in any of these states (B, C, D, E) as refugees with LGBT status are (in states C, D, E, but not in B). This, of course, may not always be the case, as some states (most notably, very poor states that nevertheless host the vast majority of world’s refugee population) may not be in a position to provide effective protection to any refugees (at least to any comparable extent to the richer, and far fewer refugees hosting, states). While this observation may somewhat constraint the general applicability of my argument, it does not make it trivial. Many countries, including many of the so-called middle-group countries (in, e.g., Eastern Europe, Asia, middle-America) can arguably be seen as being in at least relatively equal position to protect refugees in general (while not providing efficient protection to LGBT persons), and even those countries, struggling to provide for the basic needs of refugees, are often guilty of subjecting refugees with LGBT status to additional injustices. Thus, given the vulnerability of LGBT persons to a variety of (also) non-asylum-grounding injustices, and the relatively low number of states that are both willing and able to protect LGBT persons also against these injustices, a moral case for LGBT prioritization holds.

Some objections

I wish to end by discussing three possible objections to my view. The first objection (*problem of opportunism*) draws from some of the common concerns relating to refugee admission practices, while the two other objections (*problem of homogeneity* and *problem of global status quo*) focus more directly on the underlying principle at hand.

The problem of opportunism

Let us thus presume that those states best positioned to protect refugees with LGBT status, were to start prioritizing these refugees in their admission practices. Given that many of these states are likely to be viewed as attractive (typically, rich Western liberal states with economic prosperity and high levels of opportunity), the worry arises, would not such a system of prioritization lead to opportunistic claims by non-LGBT persons in an attempt to increase their chances of being admitted into these countries. This worry is also an addendum to one of the common debates on refugees and LGBT rights

(discussed in the first section) about the ways in which the LGBT status of a refugee is established. Thus, the worry is not only about whether LGBT prioritization would lead to opportunism but also about the methods by which those refugees eligible for such prioritization would be identified.

In response to the latter concern, that of the often invasive and degrading interrogation processes, it should be noted that this is not a concern about the principled case for prioritization, but about the possible – albeit unnecessary – methods of identification. As already accepted in various contexts, the self-disclosure of one's LGBT status operates as a relatively accurate¹⁴ method of identification, thus resolving many (while not all) ethical issues relating to LGBT identification in refugee contexts. In relation to the background worry of opportunism, two issues need to be kept separate. On the one hand, there is the question of whether such system of prioritization would in fact lead to (widespread) opportunism. It may not be possible to answer this question in the abstract. However, given the specific vulnerability of LGBT persons in both asylum contexts (refugee routes, reception centres etc.) and in broader societies, one may reasonably question the extent to which non-LGBT refugees would be willing to declare themselves as LGBT and, consequently, be subject to the variety of negative consequences relating to this status.¹⁵ On the other hand, and more importantly for my purposes, there is the question of whether the worry of opportunism can be used against my main argument about the moral grounds for LGBT prioritization in refugee admissions. I think it cannot. It is only if the moral costs of opportunism outweigh the moral benefits of prioritization (and if such costs, i.e. opportunism, are inherently built into the system of prioritization) that the case holds. In the absence of such a case, however, the worry of opportunism remains a practical worry of implementation, rather than an objection to my main argument as such.

The problem of homogeneity

As an extension of an argument against particular types of immigration criteria, based on one's cultural, religious, or ethnic affinity,¹⁶ it could be objected that one's sexual orientation or gender identity should also not be used as a criterion for selection. The argument against using such criteria can, of course, be formulated in a number of ways, but here I focus on one particular issue: the problem of such criteria enforcing (cultural, religious, or ethnic) homogeneity and the consequent devaluing of those outside such homogeneity. In relation to religion, the argument goes roughly as follows. Should, for example, a predominantly Christian country use Christianity as one of its immigration criteria (or have a strong preference for Christian immigrants), this can be interpreted as an attempt to preserve or even increase religious homogeneity within that particular country. Consequently, the non-Christian members are further marginalized by

¹⁴For difficulties of self-closure, including the reluctance of refugees to disclose their sexuality to authorities, and the cultural variations of what constitutes 'gay', see Middelkoop 2013.

¹⁵This is not to say that no refugee would be willing to do so, nor that the negative consequences of declaring oneself as LGBT would always be such as to deter non-LGBT persons from doing so. It is simply to point to the fact that, at least in present circumstances, such deterrents against the opportunistic usage of LGBT status exist, thus making the worry of (widespread) opportunism suspect.

¹⁶Even those most sympathetic towards states' right to decide their own immigration policies are typically opposed to ethnicity-based (and, albeit often to lesser extents, religion- and culture-based) criteria. Cf., e.g., Wellman (2008).

a strong symbolic message: your religion is not as valuable as ours, and it is, and consequently you are, not wanted here (at least beyond what is presently tolerated).

An equivalent argument does not, however, work in the case of LGBT prioritization. While it could perhaps still be argued that, by prioritizing refugees with LGBT status, the willing and able states are aiming to increase the already substantive presence of LGBT persons in their societies, it seems farfetched, to say the least, to view such prioritization as increasing homogeneity, or as sending a message of disesteem to those non-LGBT. While this may seem obvious, what is important are the reasons why this is so. Notably, there is an important normative difference between the prioritization on the basis of, e.g., dominant religion, and on the basis of non-typical sexual orientation or gender identity. Contrary to the first case where the prioritization criteria could well be seen as increasing homogeneity and dominance of one group over others, in the case of LGBT persons, the prioritization is working to an opposite effect, increasing diversity.¹⁷ The symbolic message of the first case – that of the disvaluing of minority religion(s) – is also different. Rather than a message to the existing majority (non-LGBT persons), the symbolic message is better interpreted as directed to the existing minority (LGBT persons): your sexuality and/or gender identity is as valuable as any other, so much so that we are willing to do our best to protect persons with such identity here, as we know that a vast majority of other states in the world fail to do so.

The problem of global status quo and inverse prioritization

But perhaps I have failed to acknowledge the proper scope of the issue and the arena on which such system of prioritization should be assessed. From a global perspective, it could be argued that, should the willing and able countries with already substantive LGBT communities prioritize refugees with LGBT status over non-LGBT refugees, this may lead to the strengthening of the LGBT communities in such countries, but fail to tackle the underlying problems of insufficient protection elsewhere. Consequently, the existing division of the world into LGBT-friendly and non-friendly countries would be strengthened, and inverse systems of prioritization – those of non-LGBT-friendly states prioritizing non-LGBT refugees – put in place.

While I think there is some force to this objection, I also think that it relies on false premises, and fails to acknowledge an important asymmetry between LGBT and non-LGBT prioritization. Firstly, while the prioritization of refugees with LGBT status may have some symbolic effects as to the LGBT-friendliness of some states, the consequences of such prioritization for the existing LGBT communities are far from straightforward. The prioritization of refugees with LGBT status does not necessarily lead to the strengthening of the local LGBT communities or to the bettering of public attitudes towards LGBT persons. In the current climate of anti-refugee sentiment, such prioritization may even have negative effects, as the public attitudes towards LGBT persons may start to turn sour by the association of LGBT persons with refugees. All this is, of course, speculation,¹⁸ but

¹⁷This may not, of course, be the only normatively relevant difference between the two cases, although it is the difference that, I believe, responds most directly to the problem of homogeneity described above.

¹⁸To my current knowledge, there are no reliable data on the effects of LGBT refugee admissions to the public attitudes towards LGBT persons. Some such data exists of the effects of other groups of refugees, e.g. the arrival of many Syrian Muslim refugees since 2015 to the general attitudes and the increase of islamophobia in Europe (cf. Osiewicz 2017). While the two cases are not transferrable, the more general point about the non-straight-forward relation between minority numbers and attitudes towards minority groups remains.

suffices to show that the consequences of such prioritization for the LGBT-friendliness or unfriendliness of different countries are at least not obvious.

But perhaps the worry here is not only about such reinforcing of the global status quo but a more substantive worry about the non-LGBT-friendly (yet refugee receiving) states thus being allowed to adopt inverse systems of prioritization in their refugee admissions. Admittedly, this worry may hold at the level of real-world politics but does not work at the level of principle. This is so, as the two cases of prioritization are not symmetric. Firstly, while the failures of the middle group of states to provide LGBT persons effective protection within their territories provide the willing and able states moral reasons to prioritize refugees with LGBT status, the middle-group states have no equivalent morally acceptable reasons to prioritize non-LGBT refugees in their admissions. This is so, as the failures of these states to protect LGBT persons against a number of (non-asylum-grounding) injustices remain moral failures regardless, and can thus be seen as providing these states a moral duty to improve their treatment of LGBT persons, rather than an excuse to deviate from their ordinary moral obligations. Secondly, there is an important asymmetry in the number of states that are able and willing to protect the two groups of refugees (LGBT and non-LGBT) against a variety of non-asylum-grounding injustices. While the LGBT-friendly states are in a unique position to protect refugees with LGBT status (owing to the moral failures of others), the same does not apply vice versa. The non-LGBT-friendly (yet refugee receiving) states are not in a unique position to protect non-LGBT refugees – thus disallowing an equivalent argument for inverse prioritization.

Conclusion

In this article, I have argued that those states best positioned to protect LGBT persons within their territories – typically, Western liberal democracies – have strong moral reasons to admit and prioritize refugees with LGBT status in refugee admissions. This case was built upon two interrelated factors: firstly, on the specific vulnerability of LGBT persons to a variety of (also) non-asylum-grounding injustices; and secondly, on the relatively low number of states that are both able and willing to protect LGBT persons also against these injustices. Contrary to the majority of literature on refugees and LGBT rights, my focus here has not been restricted to cases where the person's refugee status is determined by their status as LGBT, but on all refugees (regardless of their grounds for being refugee) who are LGBT.

It should be emphasized that my argument here is *not* an argument for prioritizing LGBT persons (over non-LGBT persons) in their claims for refugee status and thus in their right to international protection. All refugees, regardless of their sexual orientation and gender identity, have this right, and the failure of the international community to provide such protection is an equally strong moral failure, regardless of whether the person is LGBT or not. When the duties of such international protection are distributed, however, the ability and willingness of states to protect LGBT persons, not only against persecution, but also against a variety of non-asylum-grounding injustices should be taken into account.

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References

- Betts, A. 2013. *Survival Migration*. Ithaca: Cornell University Press.
- Carens, J. 2013. *Ethics of Immigration*. Oxford: Oxford University Press.
- CEU. 2004. *Council Directive 2004/83/EC*. Luxembourg: Council of the European Union.
- CEU. 2011. *Qualification Directive 2011/95/EU*. Strasbourg: Council of the European Union.
- Collins, S. 2018. "When Does 'Can' Imply 'Ought'?" *International Journal of Philosophical Studies* 26 (3): 354–375. doi:10.1080/09672559.2018.1489643.
- Ferracioli, L. 2014. "The Appeal and Danger of a New Refugee Convention." *Social Theory and Practice* 40 (1): 123–144. doi:10.5840/soctheorpract20144016.
- Fine, S. 2020. "Refugees and the Limits of Political Philosophy." *Ethics & Global Politics*.
- Foster, M. 2009. *International Refugee Law and Socio-Economic Rights*. Cambridge: Cambridge University Press.
- Gibney, M. 2004. *The Ethics and Politics of Asylum*. Cambridge: Cambridge University Press.
- Gibney, M. 2015. "Refugees and Justice between States." *European Journal of Political Theory* 14 (4): 448–463. doi:10.1177/1474885115585325.
- Holtug, N. 2016. "A Fair Distribution of Refugees in the European Union." *Journal of Global Ethics* 12 (3): 279–288. doi:10.1080/17449626.2016.1251483.
- ILGA. 2017. *State-Sponsored Homophobia 2017: A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition*. Geneva: ILGA.
- Jansen, S. 2013. "Introduction: Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe." In *Fleeing Homophobia*, edited by T. Spijkerboer, 6–10. London: Routledge.
- Jansen, S., and T. Spijkerboer. 2011. *Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*. Amsterdam: Vrije Universiteit Amsterdam.
- Lewis, R. 2014. "Gay? Prove It": The Politics of Queer Anti-deportation Activism." *Sexualities* 17 (8): 958–975. doi:10.1177/1363460714552253.
- Lister, M. 2016. "The Place of Persecution and Non-State Action in Refugee Protection." In *The Ethics and Politics of Immigration*, edited by A. Sager. London: Rowman & Littlefield.
- Middelkoop, L. 2013. "Normativity and Credibility of Sexual Orientation in Asylum Decision Making." In *Fleeing Homophobia*, edited by T. Spijkerboer. 154–175. London: Routledge.

- Millband, J. 2013. "Sexual Orientation and Refugee Status Determination over the past 20 Years: Unsteady Progress through Standard Sequences?" In *Fleeing Homophobia*, edited by T. Spijkerboer, 32–54. London: Routledge.
- Miller, D. 2016. *Strangers in Our Midst*. Oxford: Oxford University Press.
- O'Leary, B. 2008. "We Cannot Claim Any Particular Knowledge of the Ways of Homosexuals, Still Less of Iranian Homosexuals ... " * the Particular Problems Facing Those Who Seek Asylum on the Basis of Their Sexual Identity." *Feminist Legal Studies* 16: 87–95. doi:10.1007/s10691-007-9080-z.
- Osiewicz, P. 2017. *Europe's Islamophobia and the Refugee Crisis*. Washington: Middle East Institute.
- Owen, D. 2016. "Refugees, Fairness and Taking up the Slack: On Justice and the International Refugee Regime." *Moral Philosophy and Politics* 3 (2): 141–164. doi:10.1515/mopp-2016-0001.
- Parekh, S. 2012. "Does Ordinary Injustice Make Extraordinary Injustice Possible? Gender, Structural Injustice, and the Ethics of Refugee Determination." *Journal of Global Ethics* 8 (2–3): 269–281. doi:10.1080/17449626.2012.716790.
- Parekh, S. 2017. *Refugees and the Ethics of Forced Displacement*. New York: Routledge Taylor & Francis.
- Schweiger, G. 2019. "Should States Prioritize Child Refugees?" *Ethics & Global Politics* 12 (2): 46–61. doi:10.1080/16544951.2019.1649958.
- Spijkerboer, T. 2013. "Sexual Identity, Normativity and Asylum." In *Fleeing Homophobia*, 217–238, edited by T. Spijkerboer. London: Routledge.
- UN General Assembly. 1951. *Convention Relating to the Status of Refugees*. United Nations, Treaty Series, Vol. 189, p. 137.
- UNHCR. 2011. *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*. Geneva: UNHCR.
- UNHCR. 2012. *Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation And/or Gender Identity*. Geneva: UNHCR.
- Wellman, C. 2008. "Immigration and Freedom of Association." *Ethics* 119 (1): 109–141. doi:10.1086/592311.
- Weßels, J. 2013. "Discretion in Sexuality-based Asylum Cases: An Adaptive Phenomenon." In *Fleeing Homophobia*, edited by Spijkerboer, 55–81. London: Routledge.
- Young, I. 2011. *Marion, Responsibility for Justice*. Oxford: Oxford University Press.