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## Theorising LGBT Rights as Human Rights: A Queer(itical) Analysis

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### Introduction

The past three decades have seen a proliferation in international activist and advocacy networks surrounding the global politics of lesbian, gay, bisexual and transgender (LGBT) rights. Although the domain of sexuality has long been the “focus of fierce ethical and moral debate” (Weeks, 2009: 2), it is only recently that sexual politics have become increasingly prominent on political agendas in both global and domestic realms. The appropriation of the human rights framework as a central vehicle for political claims has allowed LGBT rights to move into the “mainstream” (Wilson, 2008: 73), signifying a considerable shift in the political agendas of social movements concerned with LGBT politics. The drafting and signing of the Declaration of Montreal (International Conference on LGBT Human Rights, 2006) and the Yogyakarta Principles of the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Correa and Muntarhorn, 2007; hereafter Yogyakarta Principles) can be said to derive from, and epitomise a “significant acceleration and intensification of international struggles by LGBT movements” (Kollman and Waites, 2009: 1). Most recently, the United Nations Human Rights Council (UNHRC) adopted Resolution 27/32 on “Human Rights, Sexual Orientation and Gender Identity” which expressed “grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity” (UNHRC, 2014: online). Thus, sexual orientation and gender identity are finally achieving recognition and representation in global forums (Kollman and Waites, 2009).

Perhaps more significant, however, is that the adoption of a ‘human rights’ rhetoric and consolidation of a seemingly ‘international’ framework in the promotion of LGBT rights highlights the historical absence of LGBT persons from previous conceptions of the human (Butler, 2004).

In view of this history, queer theorists are profoundly critical of the use of a human rights framework. For Warner (1993: xxvi-xxvii)

“‘Queer’ gets its critical edge by defining itself against the normal rather than the heterosexual. . . . If queers, incessantly told to alter their ‘behaviour,’ can be understood as protesting not just the normal behaviour of the social, but the idea of normal behaviour, they will bring scepticism to the methodologies founded on that idea.”

In other words, rather than understanding queer theory and its subsequent politics to be a narrow critique of normative heterosexuality, a broadened conception of queer seeks to contest, challenge and analyse socio-political institutions, political structures, and socio-cultural processes (Valera et al, 2011: 2) in order to understand the various existing formations of power and domination. Thus, in this way queer theories “primarily investigate how queer subjectivities and practices...are disciplined, normalized, or capitalized upon by and for states, NGOs, and international corporations” (Weber, 2014: 597), or in this case, human rights.

The political strategies advanced by transnational LGBT rights advocacy have been criticised by a number of queer theorists as pursuing a “politics of normalisation” (Richardson, 2005: 515). Following this line of argument, rather being radically transformative, such policies and rights-based claims are instead viewed as conforming,

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heteronormative and even homonationalistic (Puar, 2007; Thiel, 2014: online).

This dissertation will therefore critically assess the political developments of the global LGBT movement, with specific reference to the conception of LGBT rights as Human Rights. I will analyse the ramifications of adopting the human rights framework as a means for achieving the political claims of LGBT persons. Key to this are the following questions:

- Should the political claims of LGBT persons be framed in terms of human rights?
- What are the implications of doing so?

I will draw principally on queer theory, as well as normative political theory, as a vehicle for critical engagement for conceptualising LGBT rights as Human Rights. By drawing upon queer theory and its destabilizing social and political critiques, I argue that queer analysis provides important insights into the contradictions inherent not only in LGBT politics, but also the international structure itself, in which the wider human rights discourse is embedded. As such, queer theory calls into question the universality of human rights, alongside assumptions about the state as guarantor of freedom, and asymmetric power relations in a deeply unequal yet increasingly globalized world. Nevertheless, whilst it is imperative to constantly challenge the regulatory and exclusionary aspect of human rights, rather than abandoning the concept I would suggest that the human rights framework provides the most effective means available for advancing the political claims of LGBT persons. Indeed, the inclusion of sexual orientation and gender identity in various human rights organisations and institutions demonstrates the flexibility and perpetual evolution of the human rights body.

## *Terminological Choices*

The term 'sexuality' encompasses a vast domain, with multiple contested meanings that have mutated and transformed both temporally and spatially. Challenges to the traditional heteronormative power structures, that is, the dominant and pervasive belief of heterosexuality as the norm, have seen an eruption of sexual diversity and the questioning of fixed notions of sexual binaries and continuums. There are a number of terms used to describe non-heterosexual and gender variant people which reflect concerns about inclusivity and exclusivity, as well as the political implications of doing so (Wilkinson, and Langlois, 2014: 251). It would be both naïve and erroneous to assume that all identities are sufficiently represented by LGBT: additional letters such as I for intersex, A for asexual and Q for queer and/or questioning are "added with increasing frequency" (Wilkinson and Langlois, 2014: 251). As a result, international organizations and institutions have adopted 'sexual orientation' and 'gender' (SOGI) in an attempt for a more inclusive, culturally neutral term. In addition, discourse surrounding LGBT rights tends to neglect the experience of bisexual, transgender and intersex persons, thereby leaving them marginalized within binary conceptions of gender. I have chosen to retain the use of the acronym LGBT to reflect the inclusions/exclusions of sexual diversities by the 'global' LGBT rights movement; although a queer critique of these categories will be explored in depth in Chapter 2.

The dissertation will be structured as follows. Chapter 1 introduces the theoretical premises underpinning the human rights regime, focusing specifically on the 'universality' and 'normativity' of human rights. Next, I briefly map the development of the 'global' LGBT movement and subsequent LGBT politics before presenting a conceptual outline of queer theory.

Chapter 2 begins by examining the initiatives undertaken for the emergence of LGBT and 'sexual orientation' rights within international human rights law and doctrine. I then proceed to utilize the queer framework as set out in chapter 1 in order to problematize the concepts of LGBT, 'sexual orientation' and 'gender identity'.

In the final chapter, I focus on only one aspect of the 'global' LGBT rights movement, specifically the pursuit of same-sex marriage. I examine the relationship between marriage, citizenship, and human rights before presenting queer critiques of the institution itself which is often presented to be the end goal of emancipatory LGBT rights.

Overall it is argued that the ascendance of LGBT rights in human rights discourse, whether this is through the

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articulation of 'sexual orientation' and 'gender identity' resolutions, or the pursuit of same-sex marriage can be interpreted as creating and stratifying new forms of heteronormativity (Warner, 1993) and homonormativity (Duggan, 2003). However, I argue against the abandoning of the human rights framework, instead arguing for constant refutation, contestation and to always be self-reflexive of the new exclusions and normativities that can arise from using such strategies.

## Chapter One: Theoretical Debates and a Queer Framework

"The term 'human right' is nearly criterionless. There are unusually few criteria for determining when the term is used correctly and when incorrectly – and not just among politicians, but among philosophers, political theorists, and jurisprudents as well. The language of human rights has, in this way, become debased." (Griffin, 2008: 14)

### Introduction

Human rights have become the dominant paradigm within which moral and legal claims are pursued. They are fundamental norms that protect all persons everywhere from grave political, legal and social violations (Nickel, 2014: online). They exist in both morality and the real world: in national and international law, in institutions, in the foreign policies of states, as well as the activities of political activists and a plethora of non-governmental organisations (NGOs) and networks (Beitz, 2009). Particularly since the end of the Cold War, human rights have become an elaborate international project that has ignited both empowerment, alongside deep scepticism and contestation that has become even more pronounced with the promotion of LGBT rights. The above quote by Griffin (2008) is two-fold: on the one hand, it highlights the nature and extent of human rights; on the other hand, it brings to attention the endless confusion that surrounds the 'proliferation' and thereby meaning of the term.

In this chapter, I outline concepts of human rights, focussing particularly on the notion of the universality of human rights and the normative power held by the rhetoric and international regime. Indeed, the inclusion of LGBT rights as human rights presents, perhaps, the greatest challenge to notions of universality enshrined in the human rights doctrine. I then proceed to briefly outline the changing politics of the LGBT movement, before providing a theoretical overview of queer theory. Much like the concept of human rights, queer theory and its politics are highly contentious. Thus, I hope that the conceptual frameworks provided in this chapter create a point of departure from which to analyse the questions addressed in later chapters.

### 1.1 The Universality of Human Rights and the Normativity of Human Rights

In the most basic sense, human rights are the rights one has simply because one is human (Donnelly, 2013). The theoretical basis for human rights rests on two fundamental claims: first of all, every human being is said to have *special moral value*, second of all, *because* every human being has special moral value, "certain things ought not be done to any human being and certain things ought to be done for every human being" (Perry, 1997: 462). Furthermore, human rights are said to be *equal*, since human rights are applicable to all human beings with everyone having the same rights as everyone else; *inalienable*, insofar one cannot stop simply being a human being; and *universal* in the sense that they are held *universally* (Donnelly, 2013: 10). Whilst human rights have traditionally been conceived of as paramount moral rights (Donnelly, 2013: 11), they have been consolidated as international legal rights primarily through the Universal Declaration of Human Rights (UDHR, 1948) and the subsequent legal treaties detailing civil, political, cultural, social and economic rights, "meant to create a global safety net of rights applicable to all persons, everywhere" (Franck, 2001: online).

Human rights are held with respect to the state, endowing upon them powerful duties and obligations by setting the limits and requirements of state, and social, action (Donnelly, 2013:15). For example, lists of human rights such as the UDHR and the European Convention on Human Rights (ECHR, 1950), specify the minimum requirements and conditions for a "dignified life" (Donnelly, 2013: 16). In this sense, human rights affect both the foreign and domestic policies of sovereign states with the UDHR playing a central role in establishing the "contours of the contemporary consensus on internationally recognized human rights" (Donnelly, 2013: 24). The extent to which they have been adhered to and complied with, however, is challenged and tends to be the focus of much of the criticism surrounding

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the human rights regime and its implementation.

The globalization of human rights (Stychin, 20014) and its widespread institution both vertically, as codified in international law, and horizontally, as constituting a moral social project, is a tribute to their “legitimacy and cultural power” (Elliot, 2004: 2). That human rights are regarded as ‘self-evident’ and ‘natural’ coupled alongside its rhetoric of dignity, integrity and inviolability of every human being and its championing of absolute and irrevocable rights (Elliot, 2004: 2) can also be said to be a testament to the pervasiveness of its widespread ideology. Indeed, human rights have become, as Stychin (2004: 954) has argued, the universal standard against which nations are measured: the principal criterion of civilization, social development and modernity.

## *The Challenge of Cultural Relativism*

The human rights discourse and its ‘universality’ have long been challenged by ethnic or cultural relativists, and this often has profound implications when advocating LGBT rights. It is therefore useful to summarise the main points of this debate. However, one must be careful not to overstate the challenges presented by cultural relativism, since there is a risk of essentializing culture, human rights and the nuanced debate that exists in-between (Woods, 2014).

In very general terms, cultural relativists contend that ethical, political, legal and social values of a certain culture are firmly rooted in the traditions and beliefs of the culture in question. Cultural relativists sometimes accuse human rights advocates of ethnocentrism, and cultural imperialism (Nickel, 2014: online). For example, the charge of cultural imperialism has often been invoked when confronted with the imposition of LGBT rights by a number of actors, including states such as Uganda (Thoreson, 2011: online), but also by far-right Christian groups prevalent in countries such as the U.S. For a cultural relativist, the human rights as set in the UDHR are seen to have “no normative force in the face of divergent cultural traditions” (Donnelly, 2013: 108). Cultural relativism is thus a normative doctrine that denies the existence of universal values held by all humans, everywhere, and contends that a cross-cultural standard for evaluating human rights issues is non-existent. But as Woods (2014: 107) identifies, this itself is a universal claim and therefore self-refuting. Furthermore, whilst cultural diversity is an undeniable fact, cultural relativism tends to present culture as homogenous and static, rather than accounting for the multitude of differences *within* cultures, as well as between. Cultures themselves are a site of profound contestation and often subject to redefinition.

## *Feminist Criticisms of Universality*

Human rights ideology, as well as any conceptions human rights lists, are historically particular and specific (Elliot, 2004; Donnelly, 2013) and the question of *who* constitutes as ‘human’ is a historically contested concept. Feminist criticism has highlighted the myriad ways in which the rights of women have been “marginalized through a continued focus on the ‘rights of man’” (Hines, 2009: 89). Okin (1998: 34) observes, for example, “there can be little doubt both Locke and his contemporaries and the framers of the Universal Declaration had male households in mind when thinking about those who were to hold the ‘natural’ and ‘human’ rights’ they respectively argued for and proclaim”. The ‘universality’ of human rights has therefore also been challenged by feminist and queer theorists alike, and it is for these reasons that Charlesworth (1995: 105) believes that the human rights discourse “loses its claims to universal applicability”.

Feminists have also argued that the human rights discourse has consistently relied on a rigid, unitary category of “woman” (Bond, 2003: 72) and fails to recognize the inherent diversities and intersections of identity, such as ethnicity, race, class, religion and sexual orientation. Thus, although Article 1 and 2 of the UDHR (1948, emphasis added) proclaims “All human beings are born free and equal in dignity and rights”, and that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, *without distinction of any kind...*”, the challenges espoused by feminism indicate the many ways the human rights discourse may “protect the rights of the dominant over the marginal” (Hines, 2009: 90). In this view the dominant is taken to be white, middle-class, heterosexual, and able-bodied men.

The criticisms posited by feminist discourse bring to light the exclusionary nature of the human rights framework, and

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the necessity to take into account the philosophical, political and ethical limitations of the liberal tradition that bred human rights. This becomes even more pronounced when examining queer criticisms of LGBT rights as human rights since the discourse of 'universalism' can be argued to privilege the rights of individuals and social groups willing to conform to normative ways of being. That being said, however, rather than being a static, fixed and a-historical set of norms often presented in these criticisms, I argue that human rights are a constantly evolving, flexible and fluid body of living ideas, as demonstrated by the constant evolution of lists of human rights to encompass previously excluded subjects.

## *What Rights are Human Rights?*

Questions surrounding what rights count as human rights are highly contentious. For the likes of Cranston (1973), Wellman (1998) and Griffin (2008), the proliferation of rights has led to 'rights inflation' and subsequently the devaluation of human rights currency. To be more specific, Cranston (1973: 63) limits the definition of human rights to traditional civil and political rights, asserting these to be universal and paramount, whereas economic and social rights are subject to philosophical and political objections and "[do] not make sense" and are therefore unintelligible. Underlying many criticisms of the proliferation of rights is the distinction between 'negative' rights and 'positive' rights. According to this view, 'negative' rights require non-interference from others, whereas 'positive' rights require the provision of goods, services or opportunities. However, as Shue (1980) and Donnelly (2013) have shown, "All human rights require both positive action and restraint on the part of the state", and this distinction is therefore of little moral difference. Rather, a dichotomous understanding of rights obscures the diverse ways in which different 'spheres' of rights and rights violations may interact.

Human rights are often conceived as constituting three overarching types of rights, or rather, three generations of rights. First generation rights are political and civil rights, or for the likes of Wellman (1999: 15), "basic rights". These can be said to be affirmed in Articles 3 to 22 of the UDHR (1948) as well as the International Covenant on Civil and Political Rights (ICCPR, 1966) and encompass, among other rights, the right to self-determination, the right to a fair trial, the right to life, freedom of expression, as well as protections from slavery or torture. Second generation rights are taken to be social, economic and cultural rights, as stated in Articles 22 to 26 of the UDHR (1948) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966). These include the right to work, equal remuneration for work, and the right to education as well as the right to food, clothing and shelter, to name but a few. Third generation rights are often labelled as group rights or solidarity rights (Wellman, 1999: 29). In succinct terms, third generation rights are the rights of social groups, and as such claim the right to self-determination. Whilst it provides a useful organisational structure from which to show what rights are human rights, the delineation of rights into 'three generations' "oversimplifies a very complex history" (Woods, 2014: 17) and implies a hierarchy of categorisations that ignores the overlap and interplay that occurs between different rights when rights-claiming.

Perhaps more significant is that lists of human rights emerge out of political struggles that redefine our understandings of 'humanness' and the major threats to a life of dignity (Donnelly, 2013: 98). In this way, then, the expansion of human rights reflects not a devaluation of human rights, but the ongoing process of social learning. I therefore adopt Correa et al's (2008:162) understanding of human rights as "relational, evolving and specific to historical and spatial contexts", rather than as a unitary, linear and liberal narrative. It is useful to conceive of rights more as a "discursive process rather than a continuous project, one that distinct social groups, operating out of particular situations and constraints, are constantly reinventing" (Correa et al, 2008: 162). This is illustrated by the growing body of core international human rights instruments to date. These include, the UDHR (1948), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965); the ICCPR (1966); the ICESCR (1966); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979); Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984); and the Convention on the Rights of the Child (CRC, 1989), to name a few.

## **1.2 The Birth of a Movement and the Development of LGBT Right**

Before an outline of queer theory can be formulated, it is necessary to locate the discourse within the context of the wider LGBT movement. This section will briefly map the development of the modern LGBT movement, and the

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politics pursued at present, to illustrate the conceptual shifts that occurred.

In June 1969, New York, lesbians, gay men, bisexuals, transgender individuals, “drag queens, dykes, street people and bar boys” (Adam, 1995: 81) launched a series of violent demonstrations after police raided a Greenwich Village gay bar called the Stonewall Inn. Despite bar raids being a common occurrence, this particular night ignited violent resistance which in turn catalysed the formation of various gay and lesbian movements, alongside unprecedented social change. The Stonewall riots have since become highly symbolic of the birth of the modern LGBT rights movement. It must be noted, however, that Stonewall was no isolated incident, and throughout the West political movements concerned with the decriminalization of homosexuality had been active for nearly a century (Adam, 1995; Foster, 1997; Sullivan, 2003), although none were global in scope. Germany’s Scientific Humanitarian Committee (Wissenschaftlich-humanitäres Komitee), founded in 1897 and shut down by the Nazis in 1933, is considered to be the world’s first gay-rights organization (Encarnación, 2013: 92). Meanwhile, in the U.S during the 1950s, groups formed what came to be known as the Homophile movement, whose politics aimed at assimilation into the mainstream culture by adopting “the political struggles of a minority group seeking tolerance from the heterosexual majority” (Richardson, 2005: 515).

Nevertheless, the period following the Stonewall riots was characterised by a subsequent shift away from assimilationist politics towards a more liberationist agenda. Within two years gay liberation groups proliferated throughout the U.S, Canada, Australia and Western Europe (Adam, 1995; Stein, 2012) with the radical aim of opposing ‘antihomosexual’ institutions. Most notable were groups such as the Gay Liberation Front (GLF) in the U.S, Canada and the U.K; the Campaign against Moral Persecution (CAMP) in Australia; the Netherland Association for the Integration of Homosexuality COC in the Netherlands; and the Front Homosexual Action Revolutionnaire (FHAR) in France (Adam, 1995: 94).

For Liberationists who rejected the assimilationist politics of the homophile movement, four key concerns can be identified: “Pride, Choice, Coming Out, and Liberation” (Sullivan, 2003: 29). Thus, the gay liberation movement posited gay liberation as revolutionary, calling for a new liberated lifestyle and a new sense of identity to be celebrated. This is best encapsulated by the GLF Manifesto (1978: online) which offered a radical critique of sexism and homophobia to show:

“How we can use our righteous anger to uproot the present oppressive system with its decaying and constricting ideology, and how we, together with other oppressed groups, can start to form a new order, and a liberated lifestyle, from the alternatives which we offer.”

Gay liberation movements were significant in their belief that to achieve sexual and political freedom it was necessary to eradicate the tyranny of traditional notions of gender and sexuality (Sullivan, 2003: 31), to oppose oppressive institutions and start a new order. By the mid-1970s, however, the gay liberation movement was in crisis, and began to factionalise and fragment as many women became disillusioned with the movements’ “usurpation by white, middle-class, gay men” (Sullivan, 2003: 32). What followed was the formation of radical lesbian feminists, an autonomous movement that evolved from the alienation (Stein, 2012: 91) of the gay liberation movements. Radical lesbian feminists joined gay liberation movements by emphasizing gender and sexual liberation, but did so in decidedly different ways, focusing predominantly on liberation from the patriarchy and the creation of separate spaces for women-identified women, which eventually charted a new direction for the overarching movement.

Evident in these movements is the absence of the ‘human rights’ lexicon. Gay liberation and radical lesbian feminist groups instead called for ‘liberation’ and ‘equality’ (Kollman and Waites, 2009: 4) and, as aforementioned, opposed the very institutions that had previously excluded them. It was not until the late 1980s, and more so the 1990s, that the ‘human rights’ lexicon entered the focus of LGBT organizations. The AIDS epidemic of the 1980s brought devastating consequences which reverberated around the world, with particularly dire implications for the LGBT community. In response to the health crisis, gay and lesbian movements contributed greatly in the fight against AIDS, resulting in the emergence of transnational LGBT movements (Stein, 2012: 143), which worked in conjunction with AIDS activist groups and organizations. In turn, the AIDS epidemic also fostered the mobilization of gay and lesbian movements, their radicalisation, and eventually, the emergence of queer activism which set to reorient and reject

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mainstream lesbian and gay politics (Stein, 2012: 143).

By the 1990s, “virtually every urban center” in North America, the European Union, Australia, New Zealand, and “many other major cities in Latin America, eastern Asia and South Africa” had a variety of LGBT organisations (Adam et al, 1998:1). The 1990s was characterised by a turn towards advocating for positive rights as well as a reorientation away from “sexual liberation” and towards “social integration” (Encarnacion, 2013: 93). Crucial to this ‘third wave’ of LGBT activism was “mainstreaming homosexuality” (Encarnacion, 2013: 93) by adopting norms of the society at large. Richardson (2005: 519) argues that the political goals currently sought by LGBT movements are dependent on a model that presupposes “‘equality’ requires ‘sameness’”, where ‘equality’ is interpreted as equal entitlement, to recognition and resources. In the US and Europe, the movements have specifically focused on civil rights, as well as access to welfare, and issues such as the right to marry and serve in the military (Richardson, 2005: 519). Meanwhile, internationally, LGBT rights activists focus on decriminalization. For Kollman and Waites (2009: 4) the strengthening of transnational LGBT networks contributed to the human rights turn of many LGBT movements. Organizations such as the International Lesbian and Gay Organization, which had existed since 1978 but had remained a “loose affiliation of disparate national groups until the organization embraced human rights rhetoric” (Kollman and Waites, 2009: 4), began to expand and focus more on professionalization, particularly in regards to international political lobbying. As such, six regional groups were created: ILGA Asia; ILGA Europe; ILGA Latin America & Caribbean; ILGA North America; ILGA Oceania; and Pan Africa (ILGA, 2015: online).

Notable advances continued to occur and the 2000s witness major developments in terms of global campaigning, with 2013 in particular being hailed as the “gayest year in history” (Encarnacion, 2013: 90). To date, seventeen countries have legalized same-sex marriage (Thiel, 2014b: 52), including England, Wales and France which legalised same-sex marriage in 2013. Nevertheless, 2013 also featured a “countervailing trend – the rise of some of the most odious anti-gay legislation in history” (Encarnacion, 2013: 91). As of 2014, seventy-eight countries still criminalize homosexuality (Itaborahy and Zhu, 2014: 9) including India and the Supreme Court’s ruling which reinstated a colonial-era ban on homosexual acts, whilst there are five countries that impose the death penalty (Iran, Mauritania, Sudan, Saudi Arabia and Yemen). Furthermore, in 2013/early 2014 nine countries, including Russia, Belarus, and Kyrgyzstan (Itaborahy and Zhu, 2014: 9) passed anti-‘homosexual propaganda’ laws. These events demonstrate a global divide and unevenness in the ‘global’ spread of LGBT rights, particularly that of LGBT rights as a human-rights norm.

## 1.3 A Queer [R]evolution?

Brontsema’s (2005: 4) study into the linguistic reclamations of ‘queer’ identifies several factors for how the term emerged: the restrictive ‘universal’ categories of gay and lesbian; the AIDS crisis and its identity-transcendent activism; and the formation of groups in the U.S such as Queer Nation and ACT-UP, whose politics of difference contributed to the reconceptualization of sexual identity. To be politically queer at the beginning of the 1990s was to challenge the “normalizing mechanisms of state power to name its sexual subjects: male or female, married or single, heterosexual or homosexual, natural or perverse” (Eng et al, 2005: 1). The use of the signifier *queer* served to mark a decisive distance from the essentializing conceptions of *gay* and *lesbian*, as well as the mainstream assimilationist politics associated with the movement. To be queer was to be ‘anti-normative’, by challenging binary conceptions of sexuality and gender (Stein, 2012: 184). Contemporary queer activism and academia have largely centred on critiquing “the emergence of homonormative forms of nationalism and institutionalised rights-based LGBT politics” (Sabsay, 2013: 80). In asking “what’s queer about queer studies now?” Eng et al (2005:1) bring to attention the need to reassess the political utility of queer, and its crucial application to a wide field of social critiques that goes beyond the domain of sexuality alone, to provide important insights of global political consequence and as an engaged mode of critical inquiry.

What, then, constitutes queer theory, and what is meant by the term ‘queer’? In “Critically Queer”, Butler (1993: 19) asserts that queer must be “never fully owned, but always and only redeployed, twisted, queered from prior usage and in the direction of urgent and expanding political purposes”. Rather than an identity, to be queer is an indefinable, deconstructing set of practices that challenges normative knowledge and identities (Sullivan, 2003: 44). To define queer would be un-queer: the fact that such a theory remains open to ongoing contestation and reinvention,

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contingent on its refutation of static notion, has always been one of the “field’s key theoretical and political promises” (Eng et al, 2005: 3). To the extent that queer is understood as destabilizing, deconstructing, and a “political move against hegemonic normativity” (Thoreson, 2011: online) rather than the limited move against heteronormativity, queer theory offers a focus on a multiplicity of identities that expands beyond the hetero/homo dichotomy, beyond the realm of sexual politics to challenge power relations more generally.

It is imperative to note, however, that rather than being global in scope, queer theory and its subsequent politics is Anglo-American in origin (Warner, 1993; Seidman, 1996). Queer politics may therefore be “complicit in reproducing classical hegemonic structures” (Varela et al. 2011: 11). Nevertheless, in light of this as Varela et al. (2011: 19) argue, if we can accept that queer politics is indeed complicit in hegemonic discourses, such as in the context of neoliberal individualism, “this does not mean that the subversive potential of queer theory and politics is forfeited”. Rather, it is useful to conceive of queer theory and its politics as an analytical tool or category that “address a ‘constitutive logic’ exactly because it does not carry meaning itself” (Varela et al, 2011: 8), whilst also bearing in mind its limitations. By adopting queer as an analytical framework, I seek to avoid the narrow classification of the term queer as a critique of normative heterosexuality and rigid gender binary. Through the use of further analytical categories within queer theory itself, I argue that “the queer theoretical project of subverting hierarchies that are built on regimes of normalisation” (Varela et al, 2011: 2) can facilitate a rethinking of power and domination, and the implications these have for LGBT rights.

## Conclusion

My aim in this chapter was to outline the theoretical foundations upon which the rest of the dissertation is based. Having explored the complexities that underpin human rights, the debates surrounding its universality and the numerous conceptions of what rights are considered human rights, I highlighted the need to constantly challenge the framework. However, rather than dismissing the framework altogether, I argue human rights to be a protean body of norms and legal rights that is constantly expanding. I then presented a brief history of the LGBT movement before providing a conceptualization of queer theory as an analytical category to critique the theorisation of LGBT rights as human rights, to which I turn in the following chapter.

## Chapter Two: LGBT Rights and Human Rights Doctrine

“The terms by which we are recognized as human are socially articulated and changeable. And sometimes the very terms that confer ‘humanness’ on some individuals are those that deprive certain other individuals of the possibility of achieving that status, producing a differential between the human and the less-than-human. These norms have far-reaching consequences for how we understand the model of the human entitled to rights or included in the participatory sphere of political deliberation.” (Butler, 2004: 2)

### Introduction

Langlois (2005: 15) states “human rights, like many moral ideas, emerged through a long historical process, particularist in temporal and geographical terms, dependent on many contingently related ideas and events.” In much the same vein, the emergence of sexual rights, in particular “sexual orientation” rights must be taken in consideration of their historical development vis-à-vis human rights, and the surrounding debates that sparked their materialization. Sexual rights are still very much the “newest kids on the block in international debates about the meanings and practices of human rights” (Petchesky, 2000: 81) and the human rights forum has become a fundamental site for realizing sexuality as personhood, as sex and sexuality are frequently argued to be an “essential part of ‘the human’ who might claim rights” (Roseman and Miller 2011: 315; Altman, 2001; Correa et al. 2008; Weeks, 2009).

Many LGBT social movements have organised themselves on the basis of essentialist identity politics, with sexual essentialism, that is, “the idea that sex is a natural force that exists prior to social life and shapes institutions” (Rubin, 2007: 156) having a particularly resounding prevalence. In the view of sexual essentialism, sex is considered to be a

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property of individuals and therefore “eternally unchanging, asocial and transhistorical” (Rubin, 2007: 156). Thus, many LGBT movements have rallied around the premise of their natural essence: a fixed self with same-sex desires (Gamson, 1995: 391). On the one hand, the use of an essentialist politics and clear collective identities, such as LGBT, has allowed for a pathway towards recognition and political gain. On the other hand, however, queer theory has exposed the reproduction of oppressive structures that arises from fixed identity categories. What arises, then, is a paradox: “fixed identity categories are both the basis for oppression and the basis for political power” (Gamson, 1995: 391). This chapter will examine the categories of ‘LGBT’, ‘Sexual Orientation’ and ‘Gender Identity’ frequently employed throughout international human rights discourse and by LGBT activists. I will begin by first outlining the initiatives undertaken in international human rights law and advocacy to include ‘sexual orientation’ and therefore LGBT rights, before critiquing the rigid identity categories by utilizing the queer framework established in Chapter 1.

Throughout the majority of its history, modern international human rights law has been largely silent on issues concerning LGBT persons. The first time international law explicitly addressed an ‘LGBT issue’, was the 1981 *Dudgeon v. the United Kingdom* case, whereby the European Court of Human Rights (ECtHR) abolished the sodomy law in Northern Ireland (Sanders, 2002: 13). Similarly in the UN, the 1994 *Toonen v. Australia* (hereafter *Toonen*) case saw the former UN Committee of Human Rights’ (UNCHR) decision to strike down the sodomy laws in Tasmania. *Toonen* was a seminal moment in history due to the UNCHR ruling that discrimination on the basis of sexual orientation was a form of discrimination on the basis of sex (Sanders, 2002: 13) as stated in Article 26 of the ICCP (1966). This was significant insofar as sexuality and sexual rights were acknowledged as relevant to human rights, and was “for the first time, implicitly recognized as a fundamental and positive aspect of human development” (Saiz, 2005:4). Furthermore, *Toonen* was noteworthy because it dismissed cultural relativism (Lau, 2004: 1700): the UNCHR deemed Tasmania’s argument against extending privacy rights to same-sex couples because of “local moral culture” unacceptable (Lau, 2004: 1700). Following the UNCHR decision that the ICCP protects the rights of ‘sexual minorities’, four other UN bodies declared their respective treaties to also protect the rights of ‘sexual minorities’, these being: CEDAW, CAT, CRC and CERC (Lau, 2004: 1702). All four major human rights treaty bodies stated, can and have been invoked to challenge a variety of violations based on sexual orientation or gender identity (Saiz, 2005: 8).

Nonetheless, as Saiz (2005: 4) has commented, “sexuality remains a battleground within the UN human rights system.” Despite calls to refer to sexual and gender identity issues, the UN World Conferences such as the Vienna, Cairo and Beijing Conferences, have refused to explicitly address the issue due to opposition on cultural and religious grounds by a number of delegates, which included the Holy See, the Vatican’s representation, a handful of Catholic countries and various Islamic countries, such as Sudan and Yemen (Girard, 2007: 34). Similarly, in 2003 the Brazil resolution ‘Human Rights and Sexual Orientation’ presented to the former UNCHR faced fierce opposition by the Holy See and the Organization of the Islamic Conference (OIC) arguing that “sexual orientation was not a proper subject for consideration by a human rights body” (Saiz, 2004: 5; Girard, 2007; O’Flaherty and Fisher, 2008) and thus was eventually abandoned in 2005. Furthermore, since the UNCHR was abolished in 2006, UN reforms have replaced it with the UN Human Rights Council (UNHRC) which has made references to sexual orientation issues since 2008, but still has yet to “grasp the issues” (Waites, 2009: 141).

Further references to sexual orientation issues by the UN system have boomed and include a number of UN Special Procedures, that is, special Rapporteurs, representatives and working groups; speeches and statements by UN officials, such as by UN secretary General Ban-Ki Moon and UN High Commissioner for Human Rights Navi Pillay; the monumental UNHRC resolution adopted July 2011; and the more recent UNHRC resolution adopted September 2014 (OHCHR, 2015: online). Finally, initiatives such as the Declaration of Montreal (International Conference on LGBT Human Rights, 2006) and especially the Yogyakarta Principles for the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (hereafter Yogyakarta Principles), launched at the fourth session of the UNHRC in 2007 (Correa and Muntarhorn, 2007; Correa et al., 2008: 29; O’Flaherty and Fisher, 2008; Waites, 2009) have provided the catalyst towards the implementation of ‘sexual orientation’ and ‘gender identity’ onto the international agenda.

Despite mounting interest in human rights approaches to LGBT issues in recent years, there has been growing concern regarding the essentialist conceptions of LGBT identities employed by ‘global’ LGBT movements, the

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globalisation of a 'universal gay identity' and the impact this has for international LGBT politics in both the Global North and the Global South (Altman, 2001; Binnie, 2004).

## 2.2 A Critique of binary classifications and 'globalized' identities

There are several features of the human rights discourse which may render the application to LGBT rights as problematic from a queer perspective. At the most basic level, queer theory seeks to subvert common sense beliefs that gender and sexuality are fundamental truths of the self (Kopelson, 2002: 17), and thereby challenging essentialist logic. Interested in exploring the boundaries of sexual identities and politics, queer theory questions the demarcations of sexual categorizations and the regulatory process of subject formation. Traditional jurisprudence, on the other hand, "requires that individuals be classified into discrete and often binary categories" (Greenberg, 2006: 63), such as heterosexual vs. homosexual and male vs. female. Instantly, a contestation between the two can be identified and raises fundamental questions, such as: how do we organize around multiple forms of sexual identity shaped by various cultural contexts and spaces, and then frame these in the languages of rights (Budhiraja et al, 2010: 132)? There is a crucial need to confront not only the "disciplinary and regulatory side of the human rights framework" but also "the presumption of a sharp and necessary distinction between lives that are human and lives that are not" (Correa et al. 2008: 16) since this operates through unrelenting systems of normative violence, constraint and punishment for actual sexualized, gendered and racialized bodies.

Whilst rights-claiming by identity-based strategies has had a long history of successes and have unveiled the relentless inequalities that exist for marginalized communities, such strategies have failed to challenge underlying power structures "that stratify people into categories of privilege and oppression and structured, in part, through sexual hierarchies" (Budhiraja et al., 2010: 135). This "biopolitical move" (Petchesky, 2009: 107) has particularly pernicious effects. First of all, whilst the categories of lesbian (L) and gay (G) may fit into the homo/hetero binary, the categories of bisexual (B), transgender (T) and intersex (I) do not, thus raising questions about the suitability of a framework that may "fail to adequately protect individuals...who do not fall neatly into opposite classifications" (Greenberg, 2006: 63). Such a traditional binary system built upon identity constructs lends itself to protecting and privileging the rights of certain individuals and groups who neatly 'fit' in to a 'clear-cut' category, whilst systematically failing to protect those who do not.

Rather, emphasis on rigid and static identity categories reaffirms the hegemonic heteronormativity (Warner, 1993) that characterises the international structure in which the human rights discourse and its institutions are embedded. Here, heteronormativity is taken to designate:

"A regime that organizes sex and sexuality in order to match heterosexual norms. It denotes a rigid sexual binary of bodily morphology that is supported by gender and sexual identities. As such, heteronormativity is criticized as a naturalising force that is based on the seductive, coercive or violent character of social norms" (Varela et al., 2011: 11).

In this view, the inclusion of LGBT rights as human rights "fails to disturb hegemonic systems of domination" (Kopelson, 2002: 19), which in this sense, is heteronormativity. Rather than seeking social transformations, it prescribes politics of "affirmation and recognition...[and] the inclusion of subordinate groups into society's extant power structures" (Kopelson, 2002: 19). Subsuming LGBT identity politics into the human rights regime is heteronormative insofar as the essentialist and dichotomous categories re-inscribe traditional binaries, instead of deconstructing and destabilizing them. Heteronormativity carries with itself regulatory practices (Chambers, 2007: 666) and "accrues privilege to those behaviours, practices and relations that more closely approximate the norm" whilst stigmatising and marginalising those who deviate from it.

Altman (2001: 126) has commented that organizations such as the ILGA and the International Gay and Lesbian Human Rights Commission (IGLHRC) promote a "universal language of identity politics". The idea of a global LGBT identity is not only absurd, but becomes particularly contentious when considering that the categorical identities of LGBT are often perceived to be a product of Western conceptualisations of sexuality and gender (Waites, 2009: 139). For some, a universal gay identity and international gay activism is seen as hegemonic and neo-colonialist

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(Hildebrandt, 2012: 850; Stychin, 2003: 958) and has been dubbed the “Gay International” (Massad, 2007: 161). Writing specifically about the representation of sexual diversity in Arab and Muslim cultures in the Global North, Massad (2007: 161) argues that the ‘Gay International’, which consists of predominantly of western male white-dominated organizations, operates from a Western perspective, and thus shores up orientalist discourse. Whether this is indeed orientalist or not, needs further interrogation.

Conceptions of sexuality are complex and multifaceted, and in many parts of the world same-sex sexual behaviours are not necessarily associated with a specific identity (Budhiraja et al., 2010: 135). Indeed, there are those who deny that LGBT people, as conceptualised by international organizations such as the ILGA, even exist in their nations. For example, former Iranian President Ahmadinejad’s speech in New York 2007, provoked a torrential response from the international community when he stated “In Iran, we don’t have homosexuals like in your country” (Cited in BBC, 2007: online), a country where homosexuality is punishable by death. Ilkkan (2008: 1) asserts that rather than a statement of personal conviction, it was a political one “reflecting the stand of the majority of Middle Eastern governments on sexual freedom and rights”. The implication from such a denial renders invisible a significant segment of the population, making them even more vulnerable to severe human rights violations and heightened persecution. It also raises difficult questions about the implications of a universalized ‘gay’ identity’, since it “ignores important idiosyncrasies for LGBT people across cultural contexts” (Hildebrandt, 2012: 850) and can quite possibly contribute to the conditions that give rise to repressive policies and violations.

## 2.3 The Ascendancy of ‘Sexual Orientation’ and ‘Gender Identity’

In light of this, there has been a pivotal ascendancy in the use of the terms “sexual orientation” and “gender identity” throughout dominant human rights reformulations and international LGBT advocacy. Most notable are the definitions of the terms in the Yogyakarta Principles (Correa and Muntharbhorn, 2007). Here, sexual orientation is understood to refer to:

“Each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender” (Correa and Muntharbhorn, 2007: 6).

Whilst gender identity is understood to refer to:

“Each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical, or other means) and other expressions of gender, including dress, speech and mannerisms.” (Correa and Muntharbhorn, 2007: 6).

The displacement of the narrow categories LGBT by sexual orientation and gender identity marks what Waites (2009: 139) determines “the establishment of a new discursive framework” that exists in tension with what can be called a “global ‘queer’ politics”. Although the seemingly ‘neutral’ terminology signals an acknowledgement of the implications posed by binary categories, it is necessary to also question the assumptions that underpin sexual orientation and gender identity.

In *Epistemology of the Closet*, Sedgwick (1990: 8) identifies a central issue in that the “ubiquitous category” of sexual orientation is constantly interpreted with regards to gender, or more specifically, in preference of one gender over another. In this sense, the category sexual orientation still falls prey to the dichotomous binaries of man or woman. This is clearly limiting in view of queer politics which seeks to subvert and deconstruct rigid distinctions, instead striving to validate other forms of sexual desire that do not have this focus on gender (Warner, 1993).

For example, within this framework of understandings bisexuality is often erased. Considered “unthinkable and nonsensical” (Waites, 2009: 146) to dominant conceptions of a singular sexual orientation, whereby sexual orientation is seen to constitute a “single core aspect of a singular self”, bisexuality is rendered invisible and marginalized. Sexual definition and meaning in Western culture has been structured around binary oppositions such

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as “secrecy/disclosure, knowledge/ignorance, masculine/feminine, natural/artificial, same/different, active/passive, in/out” (Angelides, 2013: 61; Sedgwick, 1990). Precisely because bisexuality cannot be represented through and within these binary formulations, bisexuality as a category is either eradicated or subsumed by either hetero or homo, thereby reproducing heteronormative structures rather than disrupting them. One might also note how *bi*-sexuality has the same prefix of *bi*-nary which implies a structure of two alternatives existing in opposition to each other. However, for someone who may identify as bisexual, this ‘structure of opposites’ plays no particular bearing on the logic of attraction, and precisely because bisexuality cannot be represented as a fixed and stable category, Angelides (2013: 65) argues that it therefore “provides deconstructive leverage for challenging and exposing the stability and fixity of sexual identity”.

Similarly, the term ‘gender identity’ is often taken to refer to transgenderism. Transgenderism is understood here “as a concept encompassing a variety of forms of identification and behaviour defying the dominant sex and gender binaries” (Waites, 2009: 147). A number of transgender theorists have contested the concept of gender identity as politically problematic (Stryker and Whittle, 2006; Hines, 2007) since it tends to privilege clear-cut binaries. The restrictive focus on the dualist-model (male v. female) of gender identity (Waites, 2009: 147) allows no space for blurred identifications or fluidity. Take for example the *metis* in Nepal, *travesti* in Latin America, *hijras* in India, and those who identify as genderqueer in the UK and US, all of whom demand to be recognized in their own terms rather than from traditional points of departure like masculine and feminine (Budhiraja et al., 2010: 131). As Feinberg (2013: 205) states, “simplistic and rigid gender codes are neither eternal nor natural. They are changing social concepts”.

Sexual orientation and gender identity as categories thus underscores how categorical thinking is problematic and restrictive. Nevertheless, rather than abandoning the terms, it is useful to evaluate whether they can be *queered* – that is, reinterpreted, reconceptualised and expanded by inscribing new meanings and through the constant contestation of the discourses on which they are founded (Ahmed, 2006). For Waites (2009: 151) this means developing political analysis that notes explicitly “the exclusionary effects of using the concepts ‘sexual orientation’ and ‘gender identity’ within currently dominant discursive frames, in order to transform their dominant meanings”. Some advocacy has shifted away from the rallying around collective identities, instead looking towards Mohanty’s (1997) concept of a “common context of struggle” as a foundation for non-heterosexual people to cohere as a group. Building upon the common context of struggle, Budhiraja et al. (2010: 132) propose a pairing of sexual rights and gender justice “as a useful, and potentially liberatory framework”. They argue that a sexual rights framework accounts for the multiplicity of ways in which the sexuality is always locally, historically and culturally embedded, whilst also facilitating broader coalition building (Budhiraja et al., 2010: 141) for rights claims connected to autonomy over one’s body, dignity and free expression, as well as the right to be free from discrimination, torture and violence, to name a few. The question that begs is whether the human rights framework is able to implement a broad enough understanding of sexual rights in order to be inclusive enough of, as well as guarantee the freedom to be who one is, whatever that is (Correa et al., 2008: 190).

## Conclusion

As demonstrated in this chapter, the reliance on clear-cut identity constructs and the promotion of a ‘universal’ LGBT identity by ‘international’ advocacy networks reinforces the heteronormativity of the international system, rather than challenging and subverting it. This consequently contributes to and reproduces the conditions in which systems of normative violence, punishment and constraint may arise. The mainstreaming of sexual orientation and gender identity in international human rights discourse signals a welcome shift away from the narrow focus of a universal ‘gay’ identity and the limiting categories of LGBT. However, it is apparent that current dominant understandings of sexual orientation and gender identity may also reinforce dichotomous thinking and risks losing “more radical understandings of gender, sexuality and power relations” (Waites, 2009: 152). What is vital, then, is the need to critically engage with such terms in order to expose the many ways that they may re-inscribe the exclusionary effects of trying to intelligibly conceive of a diverse range of sexual identities within a human rights framework.

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## Chapter Three: Same-Sex Marriage

"We must not fool ourselves into believing that marriage will make it acceptable to be gay or lesbian. We will be liberated only when we are respected and accepted for our differences and the diversity we provide to this society. Marriage is not a path to that liberation." (Ettelbrick, 1997: 124)

### Introduction

The human rights of LGBT and same-sex practicing persons have been invoked in multiple and contradictory ways (Thoreson, 2011: online). There has been a series of profound social and political changes since the 1990s, and the numerous positive and negative aspects of these changes can be witnessed in most countries in the Global North and the Global South (Brown, 2012: 1065). To focus on only one aspect, at the centre of this shift has been the pursuit of marriage equality. As demonstrated in the last chapter, advancing LGBT rights as human rights involves advancing sharp distinctions of whose lives count as human and whose lives do not. It also involves advancing types of sexual subjects 'deserving' of particular rights and recognition which is undoubtedly problematic insofar as it reinforces certain normativities in a myriad of ways, evident in the same-sex marriage debate.

In this chapter, I will analyse the dilemmas that lay at the heart of same-sex marriage, human rights and queer politics: on the one hand, the inclusion of same-sex couples has the potential to disrupt heteronormative structures; on the other hand, "by consenting to a hegemonic institution" (Varela and Dhawan, 2012: 91) same-sex marriage legitimizes certain relationships at the expense of others and consolidates a set of norms, laws and practices that constitutes which lives are worth living. In the words of Warner (2000: 87), the question that begs is "if marriage is so fundamental to a program of rights, why did gay men and lesbians resist it over the twenty-five year period of their most defiant activism?"

### 3.1 Framing the Debate

Within most countries of the Global North, domestic policies and International and national LGBT advocacy networks have focused predominantly on the issue of same-sex marriage. At the time of writing, 18 countries have legalized same-sex marriage (Netherlands, Belgium, Spain, Canada, South Africa, Norway, Sweden, Portugal, Iceland, Argentina, Denmark, France, Brazil, Uruguay, New Zealand, Britain, Luxembourg and Finland), whilst in the U.S 37 states now allow same-sex couples to marry (Freedom to Marry, 2015: online). The legal availability of same-sex marriage has become a marker of the advancement of liberal democracies (Scott, 2013: 534). This is clearly illustrated in the ILGA's (2014) annual 'Lesbian and Gay Rights in the World' Map, which colourfully details the levels of state homophobia and persecution to recognition and protection. Most significantly, marriage "which is enshrined as an ideal" (Scott, 2013: 535) is directly opposed to death. For example, the UK and South Africa are shaded the ideal of dark green to indicate the recognition of same-sex marriage. The US is coloured the lightest shade of green to indicate the lack of specific legislation nationwide, whilst spots of dark green mark the states in which same-sex marriage is legalized. Meanwhile the ominous colour of deep red stains the likes of Mauritania and Saudi Arabia, for example, to show the presence of the death penalty (ILGA, 2014).

Interestingly, what ILGA's hierarchical map fails to highlight is the prevalence of hate violence against non-heteronormative individuals in the apparently 'advanced' liberal democracies. Stonewall's (2013: 4) *Homophobic Hate Crime: The Gay British Crime Survey*, reports:

"Hate crimes and incidents remain a serious issue in Britain with one in six lesbian, gay and bisexual people experiencing a homophobic hate crime or incident over the last three years."

The Guardian (2014) also warned of a rise in 2014 of the number of violent homophobic attacks being reported to the police in the UK. In terms of the U.S, the National Coalition of Anti-Violence Program's (2014: 9) *Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate Violence in 2013* documented

"Multi-year trends revealing that anti-LGBTQ and HIV-affected hate violence disproportionately impacts transgender

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women, LGBTQ and HIV-affected communities of colour, transgender people, and transgender people of colour.”

Meanwhile, in South Africa, the first country in the world to include provisions of non-discrimination based on sexual orientation in 1996 and the first African country to legalize same-sex marriage in 2006, gender-based violence has reached “the highest level of sexual violence in a country not at war” (Scot, 2013: 535). The Human Rights Watch (HRW, 2011) reports that those most critically affected are black lesbians and transgender men. Granted, whilst the levels of violence experienced by sexually non-normative and gender variant people in places like the U.S and U.K may be considerably lower than for those living in countries with state-sponsored homophobia, the examples of rising hate crime and violence within seemingly ‘advanced’ democracies suggests that equal marriage legislation, and by extension inclusion into citizenship, comes at a great cost.

## 3.2 The Link between Human Rights, Citizenship and Marriage

Arguably, whether or not LGBT and non-heteronormative individuals can or should be citizens lies at the heart of the same-sex marriage debate (Brandzel, 2005). Marriage is often understood as a prerequisite to the provision of certain rights and material benefits, underlying our understanding of a ‘responsible citizen’ (Josephon, 2005: 270). Like human rights, citizenship “is a compelling signifier in the nexus of grammars of social relations” (Wilson, 2009: 74). Hard to define and elusive, citizenship encompasses a wide range of ideas, practices and institutions and has been characterized as such throughout Citizenship theory. Within the liberal democratic frame, formal citizenship is conventionally conceived of as legal recognition by the state, conferred at birth or through naturalization, and bestowing specific rights, duties and obligations in relation to that state (Marshall, 1992; Nash, 2009: 1067; Wilson, 2009: 74). The conventional concept of citizenship is contested, however, and a useful distinction of four separate yet intertwined conceptions of citizenship is provided by Brandzel (2005: 76; Bosniak, 2000) as follows:

“Citizenship as legal recognition by an organized political community; citizenship as either the enjoyment of or the possession of rights in political and/ or social communities; citizenship as the practice of political and social engagement, activity, and/or organization; and citizenship as identity and the collective experience of belonging to a community.”

Nevertheless, human rights and the conventional definition of citizenship have “long been closely entwined” (Nash, 2009: 1068), with human rights following on the heels of the earlier rights tradition, and sharing similar roots in liberal individualism.

Enshrined in the idea of citizenship is the rise of the nation-state and, like human rights with its delineations of ‘human’ and ‘less-than-human’, implicitly and explicitly promotes normative distinctions between ‘citizens’ and ‘non-citizens’. Citizenship is, therefore, discriminatory and exclusionary in nature, and discriminatory treatment of non-citizens is often justified as a means to protect nation-state formation, as well as to protect and preserve the rights and benefits associated with full citizenship for those formally recognized as citizens (Brandzel, 2005: 176). In the US, for example, Halewood (2011: 313) argues that the binary identities of ‘citizen’ and ‘non-citizen’ are racially loaded; reflecting on the one hand the xenophobic perception of non-citizens as “aliens”, whilst on the other hand perpetuating “value in the notion of deserving, legitimate, and racialized (white) citizenship”.

## 3.3 The Centrality of Marriage to Citizenship and the State

The regulation of marriage is, both historically and presently, of fundamental concern to the state. For Cott (1995: 109):

“The institution of marriage and the modern state have been mutually constitutive. As much as (legal) marriage does not exist without being authorised by the state, one of the principal means that the state can use to prove its existence – to announce its sovereignty and uphold its populace – is its authority over marriage.”

A number of feminist, postcolonial and queer theorists have highlighted the ways the institution of marriage has been instrumental in producing and maintaining notions of normative citizenship, by producing a regulated heterosexual,

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gendered and racialized hierarchy of citizens (Cott, 1995, 1998; Card, 1996; Stevens, 1997; Brandzel, 2005: 177; Varela and Dhawan, 2011; Scott, 2013).

Cott (1998: 1442) demonstrates how the institution of marriage has been the primary vehicle through which a gendered order of social relations has been sustained in the U.S., whereby historically women's citizenship, mobility, and ability to naturalize has been directly linked to their marital status. Stevens (1997: 68) highlights the racialized aspect of marriage, manifested in numerous marriage laws such as the 'Antimiscegenation' laws which prohibited interracial marriage until 1967, in order to regulate the 'whiteness' of the country. Similarly in South Africa, during the apartheid regime marriage was "linked directly to whiteness and heteronormativity" (Scott, 2013: 536) and was absolutely crucial in maintaining racialized regimes of segregation and regulating alternate forms of desire. Further, in the context of Germany during the Nazi regime, laws such as the *Nürnberger Gesetze* (Nuremberg Laws) introduced in 1935, forbade mixed marriages and extramarital-relations between Jews and Germans, as well as other 'non-Aryans' such as 'non-whites' (Varela and Dhawan, 2011: 100) in order to preserve the 'purity' of the nation. Underlying the regulation of the institution of marriage outlined in the examples above is the assumption that the goal of marriage is to reproduce, thus highlighting a fundamental link between marriage and reproduction often alluded to by conservative and religious opponents of same-sex marriage. Zivi (2014: 293) terms this 'reprosexuality' and 'repronormativity', which refer to

"The network of ideas and practices, policies, and economic conditions that promote biological and cultural reproduction as the primary goal for adults, making parenthood a necessary and celebrated practice vital to individual self-fulfillment and national stability."

Arguably, then, marriage is a heteronormative, repronormative and hegemonic institution in that it functions as a reconfiguration of state power through the creation and maintaining of heterosexuality as the norm, inextricably linked to a sexualized, gendered and racialized body politic. Opposition to same-sex marriage in the majority of countries by conservative and religious groups, who tend to cite marriage to solely be between a man and a woman, demonstrates the perceived threat it poses to the "hegemony of heterosexuality" (Varela and Dhawan, 2011: 91) and how central this heteronormativity is for the idea of the nation.

## 3.4 A Queer Critique of Same-Sex Marriage

Franke (2006: 240) argues that what we are witnessing in the global pursuit for same-sex marriage is a *'radical substitution or transformation of the nature of homosexual desire'*, a desire that has shifted from one of mis-recognition of same-sex sexual practices as criminal, to one of non-recognition by the state. Proponents of same-sex marriage argue that people of the same-sex should have a right to get married for a variety of reasons, which range on a continuum from the idea that LGBT individuals will finally get the equality and recognition from the state that they deserve, to notions that they are of equal footing to heterosexuals and thus should be allowed to settle down and start a family (Yep et al., 2008). It is often argued that these rights will bring a wreath of other practical benefits, such as tax benefits, immigration benefits and numerous economic privileges. Conservative LGBT associations and advocates have presented the right to marry as *the* goal of LGBT politics. For the likes of Sullivan (1996: 256), who urges LGBT communities to become more mainstreamed and assimilationist, "legalizing gay marriage would offer homosexuals the same deal society now offers heterosexuals" and subsequently fully integrate gays and lesbians into the national polity.

Indeed, such arguments sit in opposition to queer articulations of emancipatory politics and there are a number of important points to make here from a queer perspective. First, implicit in such arguments for same-sex marriage is the supposition that 'equality', commonly interpreted to mean equality of resources and recognition, requires 'sameness' (Richardson, 2005: 519). A glaring problem with this assumption is that it suggests that people with non-normative sexualities, such as, but not limited to, lesbians, gay men, bisexuals and transgender people as well as heterosexuals, have the same desires, needs and interests. As Richardson (2005: 520) argues, to the extent that LGBT communities are "socially heterogeneous", issues attached to different identity markers such as race, gender and class are subsumed and obscured and thereby remain unaddressed. The failure of LGBT organizing, for example, to critically engage with questions of racism and classism in South Africa resulted in "instances of violence

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against black and particularly poor lesbians” that is “distanced from a privileged (through relations to whiteness or class privilege) LGBTIQ population” (Scott, 2013: 547).

Second, the inextricable link between marriage, citizenship and the state calls into question the construction of a normative sexual subject, specifically, the construction of a normative gay and lesbian citizen, echoing earlier arguments about identity formation. According to Warner (2000) this is achieved through the processes of “purification” and “gentrification” whereby the lesbian and gay population are reconfigured as desexualized normative citizens. The call to normalcy by proponents of same-sex marriage and LGBT advocacy groups have “reduced the space for ‘deviant’ sexual practices and intimacies” (Brandzel, 2005: 196) consequently creating further rigid sexual binaries of those who are considered ‘normal’ and ‘abnormal/improper’, bolstering heteronormativity and cycles of normative violence. For heteronormativity is the presumption of a particular type of citizen: heterosexual, monogamous, white, middle-class, child-rearing and materialistic (Brandzel, 2005: 196). Meanwhile, Duggan (2003: 50) takes this further by analysing the relationship between assimilatory politics and neoliberalism, to argue against the right to marry risks stabilizing ‘homonormativity’: a politics that

“Does not contest dominant heteronormative assumptions and institutions, but upholds and sustains them, while promising the possibility of a demobilized gay constituency and a privatized, depoliticized gay culture anchored in domesticity and consumption.”

In many ways, traditional relationship constructions of marriage are extremely contrary to queer conceptions of relationship construction, which aim to challenge and deconstruct conventional and heteronormative understandings of gender, sex and sexuality (Yep et al., 2008). Queer challenges us to *resist* and oppose, rather than acquiesce to, existing mechanisms of domination and power; or in other words, it challenges us to “to reorganize or, perhaps more accurately, to disorganize, rather than merely organize around” (Kopelson, 2002: 19). Same-sex marriage, as envisioned by those such as Sullivan (1996), reproduces the kind of regulatory control that has been so fundamental to traditional marriage, heterosexuality, and the nation, along the lines of property, ownership, monogamy, conformity and reproductivity. Queer theorists thus reject participation in a “historically patriarchal and heterosexist institution [that] will do more to perpetuate a state governed system of unequal relations than to reform it from within” (Yep et al. 2008: 54).

Varela and Dhawan (2011:104) argue that dismissing same-sex marriage as conservative and assimilatory risks underestimating its potential subversive power:

“If hegemonic heteronormativity functions through normalizing hetero-alliances, then by opening up the institution of marriage to negotiation, there is the possibility of not only denaturalizing heterosexuality but also rendering visible the embedded violence exerted through the exclusiveness of the right to get married.”

By analysing various countries in Europe, such as Spain, where same-sex marriage has been legalized, Varela and Dhawan (2011: 105) bring to light the numerous fundamental changes that have occurred concerning tax laws, medical insurance and other benefits such as access to citizenship through marriage with EU citizens for displaced “queer postcolonial migrants”. In this view, there have been some positive gains from same-sex marriage. In particular, it is argued that the debate on same-sex marriage has not only called into question the centrality of heterosexuality to marriage, but also exposed the regulatory relationship between marriage and the state in policing normative citizenship (Brandzel, 2005). Meanwhile, Zivi (2014) argues that the same-sex debate calls to attention the performative nature of marriage itself. First, “to have to defend traditional marriage through legal arguments and other practices suggests that it is hardly something natural” (Zivi, 2014: 97) and reveals marriage and ‘good’ citizenship to be political “achievements”. Second, marriage is performative because it is an activity in which “the saying is a doing that creates something new” (Zivi, 2014: 97). By proclaiming “I now pronounce you husband and wife”, for example, new identities and relationships are formed.

But these do come at a cost. While there may be some gains to be made by same-sex marriage, this is primarily limited to benefitting a small group of people perceived to be ‘good’ citizens and thus made intelligible by consenting and conforming to the norm. As Butler argues (2004: 5), “the recent efforts to promote lesbian and gay marriage also

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promote a norm that threatens to render illegitimate and abject those sexual arrangements that do not comply with the marriage norm.” Specific rhetoric and practices such as domesticity, the traditional family unit and repronormativity promoted by marriage only serve to strengthen the norms of the institution and the wider structure in which it is embedded. Furthermore, critical questions need to be asked about theorising same-sex marriage in states where “violence against women, and against anyone suspected of non-gender conformity, is malevolent and widespread” (Bennett, 2014: 11), such as South Africa.

## Conclusion

To conclude, marriage is a public institution and its regulation has been of utmost importance to the state. To the extent that queer is a deconstructing set of practices that challenges normative underlying assumptions and identities, marriage and by extension citizenship seems antithetical to visions of a queer future. Queer critiques of same-sex marriage confront us with the paradox of the inclusion/exclusion of non-normative bodies and sexualities into citizenship, and subsequently the national polity. Indeed the most radically queer and subversive act would be to get rid of state-sanctioned marriage altogether (Chambers, 2007: 675). However, rather dismiss of same-sex marriage entirely, my aim to problematize and contest the creation of new normativities and exclusions that occur within socio-political institutions. Whilst on the one hand the pursuit of same-sex marriage rights has “dented some elements of heteronormativity” (Brandzel, 2005: 196), it has arguably served to bolster and reify it on the whole, by reasserting new subject formations of who is to be considered a ‘responsible’ citizen and marginalising those who deviate, as well as failing to account for the complexities of the interplay between sexuality, gender, race and classism etc. By presenting same-sex marriage as *the* desirable goal of LGBT human rights, juxtaposed against death, LGBT organizations and advocates, such as the ILGA, risk normalizing an exclusionary and privileged institution “at the expense of other crucial social and economic transformations needed for queer populations globally” (Scott, 2013: 549).

## Chapter Four: Conclusion

The global politics of LGBT rights as human rights has increasingly emerged as a pressing, yet controversial, issue on the international stage. This dissertation has critically analysed the implications that arise from pursuing LGBT rights as human rights. I have demonstrated the continuing importance of queer theory as an analytical framework for questioning and destabilizing the underlying assumptions that characterise human rights and identity-politics. Human rights are often perceived to be great equalizers, with its notions of inherent equality and universality. Queer theory calls into question the levels of inclusivity and liberation assumed to be inherent in human rights, exposing rigid conceptions of humanness, which produce a sharp differential between lives which are ‘human’ and those who are ‘less-than-human’. To the extent that a major goal of human rights is to create norms and rules, its relationship with queer theory, and its political move *against* normativity, appears to be irreconcilable. Nonetheless, it is not the aim of this dissertation to abandon the project of human rights. Rather, the purpose has been to critically examine the problematic nature of norms that pervade conceptions of human rights and its sexual subjects.

Of course, these limitations “are not only applicable to human rights as they pertain to sexuality” (Thoreson, 2011: online). Many LGBT rights movements have organised themselves around identity, namely the categorisations of LGBT and the more neutral ‘sexual orientation’ and ‘gender identity’. From the view point of queer analysis, which seeks to subvert essentialist logic, such strategies fail to disturb the structures of domination, instead reifying existing hierarchies of oppression and privilege. LGBT rights groups that rally around identity-politics re-inscribe traditional binaries, becoming exclusionary by failing to account for difference within difference. Thus, such LGBT human rights advocacy may be implicit in creating conditions that contribute to cycles of normative violence, punishment and constraint, and this becomes more apparent when trying to deploy the same strategies and sexual epistemologies within the culturally, socially and politically divergent Global South.

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From this point of departure, I then presented a queer analysis of same-sex marriage, which is often promoted as the end-goal for LGBT human rights in the Global North: a marker of social development and advanced liberal democracies. Marriage, I argue, is inextricably linked to notions of citizenship and the state and is therefore heteronormative, hegemonic and inherently political, having played a central role in the state's formulation of racialized, gendered and sexualized citizenry. The legalization of same-sex marriage does, in many ways, replicate a reliance on the state and reinforces particular ways of being, re-inscribing existing normativities and codifications of legitimate sexual subjects. However, some benefits of same-sex marriage have also been noted, and proponents argue that inclusion into the national polity through marriage has the potential to be both transformative and subversive. Whether we witness transformative progress as a result of the legalization of same-sex marriage still remains to be seen. The marriage equality campaign is a reminder of the need to be "acutely aware of the costs associated with efforts to promote same-sex marriage rights wherever that may be" (Zivi, 2014: 302), and reflects, in part, how the wider LGBT human rights movement may be complicit in stabilising regimes of heteronormativity.

Derrida once wrote "we must (il faut) more than ever stand on the side of human rights" but they "are never sufficient" (cited in Correa et al., 2008: 152). Human rights have provided a critical platform in which "rights are a necessary and irrepressible mode of expressions" (Correa et al., 2008: 153), where norms are created, reified but also destabilized and challenged. LGBT human rights make evident the insufficiency of human rights and perhaps present the greatest challenge, whilst simultaneously demonstrating the fluid, protean and evolutionary nature of the framework. Human rights have always been a "paradoxical instrument of political and social change" (Zivi, 2014: 302) and the analysis provided in this dissertation makes that remarkably clear. Nevertheless, human rights remain the most politically viable means of pursuing claims to social justice. The topics addressed in this dissertation remind us to constantly re-evaluate, reconceive, deconstruct, challenge, contest and always be critically self-aware of the need to constantly reinvent the meanings of human rights, LGBT rights and the norms and exclusions that lie between.

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