

## REVIEW ESSAY

# Sex, Love, and Marriage: Questioning Gender and Sexuality Rights in International Law

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Nicholas Bamforth (ed.), *Sex Rights: The Oxford Amnesty Lectures 2002*, Oxford, Oxford University Press, 2005, ISBN 0192805614, 306 pp., £14.99 (pb).

Karen Knop (ed.), *Gender and Human Rights: The Collected Courses of the Academy of European Law, Volume XII/2*, 2004, Oxford, Oxford University Press, 2004, ISBN 0199260915, 256 pp., £30.00(pb).

### I. INTRODUCTION: THE RISE OF SEX AND GENDER RIGHTS

The cover of *Sex Rights: The Oxford Amnesty Lectures 2002* shows a picture of two men photographed from the back, with their hands holding each other's waists. They are walking towards a camera crew. Based on the way they are dressed, it seems that they have just been married. Both men are wearing white dress shirts and have similar hairstyles, with one wearing a black waistcoat over the white shirt and the other with black braces. This collection, based on the Oxford Amnesty Lectures series on gender and sexuality, thus apparently features on its cover the same-sex marriage of two men, ostensibly held in one of the few jurisdictions that have legalized such a union (perhaps the Netherlands, which was the first to do so, and was later followed by Belgium, Spain, Canada, Massachusetts (United States), and South Africa). And while we know that 'love and marriage go together like a horse and carriage', what has sex got to do with this? Would it not be more appropriate for a cover of a book entitled *Sex Rights* to feature two persons engaged in sex or having just engaged in sex rather than a marriage ceremony? Would it not be more appropriate to depict, on a cover of a book called *Sex Rights*, a picture of two men in a position that suggests they have just had sex, an act for which they could be persecuted and prosecuted in various jurisdictions?

So why, then, does a book on *Sex Rights* feature same-sex *marriage* on its cover?

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In the introduction we learn from the book's editor, Nicholas Bamforth, that its subject matter is gender, sexuality, and human rights. 'That issues of gender and sexuality fall squarely within the concerns of international and national human rights law', writes Bamforth, 'cannot be doubted' (p. 1). He notes that discrimination based on sex or sexual orientation is now recognized as prohibited under the prevailing human rights instruments in western Europe and Canada, as well as under the International Covenant on Civil and Political Rights (ICCPR);<sup>1</sup> even in the United States, which has lagged behind, the Supreme Court has handed down some breakthrough rulings. Following this clarification, Bamforth raises the following questions:

1. Are sex discrimination and sexual orientation discrimination two separate types of discrimination or part of a common phenomenon?
2. Does their inclusion under the umbrella of human rights protection require that we refine what we mean by human rights?
3. What weight should be attributed to general human rights norms in the clash with demands made in the name of particular religious and cultural traditions that apparently restrict the rights of women and sexual minorities? (pp. 1–2)

These questions arise in the light of certain developments that can be traced back to the early and mid-1990s and which brought gender and sexuality issues to the forefront of the international human rights discourse. The integration of gender into human rights was the result of what Susan Okin, in her essay in *Sex Rights*, 'Women's Human Rights in the Late Twentieth Century: One Step Forward, Two Steps Back', describes as a 'global movement for women's human rights', which introduced the slogan 'Women's rights are human rights'. This culminated in the 1993 UN Conference on Human Rights in Vienna, where much focus was given to women's rights (pp. 84–7) and whose final Declaration included recognition of such matters as gender-based violence, sexual harassment, and violence against women in public and private as human rights issues.<sup>2</sup> This was followed by the UN Conference on Women in Beijing in 1995, whose Declaration and Platform for Action reiterated that 'women's rights are human rights' and engaged with a broad spectrum of issues, including various issues of concern to women, such as matters relating to the poor and disadvantaged (pp. 87–90).<sup>3</sup> While great steps forward for women's rights, Okin reminds us that these developments, the result of the efforts of academics and activists, have to contend with cultural rights claims that reject women's equality and with structural adjustment policies that have detrimental effects on women.

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1. International Covenant on Civil and Political Rights, UN Doc. A/6316 (1966) (hereinafter ICCPR).  
 2. Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23 (1993). Notably, gender-based violence is not limited to violence against women. Indeed, although the discussion of gender often focuses on issues pertaining to women's rights, one should not overlook the effect of the gender system on men. See, e.g., S. Sivakumaran, 'Sexual Violence against Men in Armed Conflict', (2007) 18 EJIL 253.  
 3. Beijing Declaration and Platform for Action, UN Docs. A/CONF.177/20 and A/CONF.177/20/Add.1 (1995). For a discussion, see 'Women', in S. Marks and A. Clapham, *International Human Rights Lexicon* (2005), 411.

The ramifications of these developments are further explored in *Gender and Human Rights*, edited by Karen Knop, a volume in the Collected Courses of the Academy of European Law. But whereas *Gender and Human Rights* engages with questions emanating from the ‘women’s rights are human rights’ movement, *Sex Rights*, albeit also exploring questions of gender, expands the scope to questions of sex and sexual orientation. The story of the integration of the issue of sexuality – or sexual orientation – into the human rights sphere is different from that of gender.<sup>4</sup> Sexuality did not carve out a place in international human rights through declarations issued by UN international conferences. In fact, as late as 2004, the UN Commission on Human Rights failed to address the proposed Brazilian Resolution on Human Rights and Sexual Orientation.<sup>5</sup> Rather, a set of almost simultaneous developments led to the inclusion of sexuality in the sphere of human rights. In 1995, two seminal books on the topic were published, respectively entitled *Sexual Orientation: A Human Right*<sup>6</sup> and *Sexual Orientation and Human Rights*.<sup>7</sup> This had been preceded in 1994 by the UN Human Rights Committee’s first decision on sexual orientation, holding that a statute enacted in Tasmania, Australia, criminalizing various forms of sexual contact between men, including all forms of sexual contact between consenting adult homosexual men in private, was in violation of the ICCPR and, moreover, that sexual orientation discrimination is prohibited under the Covenant.<sup>8</sup> In the same year, Amnesty International became the first major human rights non-governmental organization (NGO) to publish a report on sexual orientation, significantly entitled *Breaking the Silence: Human Rights Violations Based on Sexual Orientation*.<sup>9</sup> Other NGOs, both general and specialized, subsequently became active in this area. Thus it seemed only natural in 1998 for Amnesty to launch a campaign bearing the slogan ‘Gay rights are human rights’, echoing the women’s human rights movement slogan. The gay rights slogan seems to entail a uniform conception of both sexuality and rights – an understanding that both ‘gay’ and ‘rights’ are or should be identically conceived everywhere. Notably, this slogan was voiced at a time when the singularity of these very concepts was being questioned. The invocation of ‘gay’ as a universal phenomenon has happened at a time when queer theory<sup>10</sup> is challenging our understanding of this identity as trans-cultural and trans-historical and pointing to the fact that sexuality may mean different things in different societies and different

4. For a discussion, see ‘Sexuality’, in Marks and Clapham, *supra* note 3, 327

5. Proposed Resolution on Human Rights and Sexual Orientation, UN Doc. E/CN.4/2003/L.92 (2003). See Human Rights Watch, ‘Sexual Orientation and Gender Identity: Briefing to the 60th Session of the UN Commission on Human Rights’, January 2004, available at <http://hrw.org/english/docs/2004/02/02/global17249.htm>. In the third session of the Human Rights Council, which replaced the Commission, held in December 2006, the so-called Norwegian Statement, made on behalf of 54 states, became the most significant statement to date made in the framework of the United Nations on sexual orientation and gender identity rights. See [http://www.ilga-europe.org/europe/issues/international/norwegian\\_statement\\_at\\_the\\_un](http://www.ilga-europe.org/europe/issues/international/norwegian_statement_at_the_un).

6. E. Heinze, *Sexual Orientation – A Human Right: An Essay on International Human Rights Law* (1995).

7. R. Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (1995).

8. *Toonen v. Australia*, UN Human Rights Committee, UN Doc. CCPR/C/50/D/488/1992 (1994) (hereinafter ‘*Toonen v. Australia*’).

9. Amnesty International, *Breaking the Silence: Human Rights Violations Based on Sexual Orientation* (1994).

10. For an introduction to queer theory, see A. Jagose, *Queer Theory: An Introduction* (1996). For an introduction to queer legal theory, see C. Stychin, *Law’s Desire: Sexuality and the Limits of Justice* (1995), 140–56.

periods.<sup>11</sup> But the slogan assumes the universality not only of so-called gayness, but also of rights. The axiom that rights are the same everywhere has been called into doubt by approaches suggesting a need to examine the cultural contexts in which rights claims are being made.<sup>12</sup> Moreover, the slogan embodies a resort to rights as the ultimate emancipatory project at a time when the limitations of international human rights as tools of emancipation are being raised from a critical perspective.<sup>13</sup> Finally, the slogan 'Gay rights are human rights' entails a perception of the universality of 'human' itself; thus it requires us to think not only of the globalized 'gay' and globalized 'rights', but also of the globalized 'human'.

Through a reading of *Sex Rights* and *Gender and Human Rights*, this essay explores the problems involved in integrating emancipatory struggles around gender (and, specifically, what has come to be known as 'gender identity') and sex, sexuality, and sexual orientation into the international human rights discourse. In section 2 I address the dilemmas raised by the implied universality in such ideas as 'women's rights are human rights' and, even more strongly, in 'gay rights are human rights'. Section 3 examines the relationship between gender and rights and between gender and sexuality analyses, and section 4 turns to the shift from sex rights to marriage rights within gay and lesbian international human rights advocacy. In section 5 I consider the recent Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, in the light of some of the issues raised in the previous parts. Finally, section 6 offers some concluding thoughts on sex, gender, and human rights, and addresses the various conflicts inherent to the gender and sexuality rights project.

Diverging from the tendency to understand new rights projects centred on gender and sexuality as converging and integrating into the general international human rights movement and among themselves, the analysis in this essay seeks to contend with the various conflicts arising among and within the different projects. In contrast to a unified perception of the gender and sexuality rights project, it is the argument of this essay that a critical queer perspective mandates taking note of the conflicting projects expressively symbolized by the discrepancy between the title of *Sex Rights* and the picture on its cover – and consider the many choices these conflicts entail along the way.

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11. On the historical context of modern gay identity, see D. Halperin, *One Hundred Years of Homosexuality* (1990). On 'gay' identity as a product of globalization, see D. Altman, 'Global Gaze/Global Gays', (1997) 3 *GLQ* 417. On the complex interaction between local and global identities in this context, see L. Rofel, 'Qualities of Desire: Imagining Gay Identities in China', (1999) 5 *GLQ* 451. See also D. Altman, 'Rupture or Continuity? The Internationalization of Gay Identities', in J. C. Hawley (ed.), *Post-Colonial, Queer: Theoretical Intersections* (2001), 19. For a discussion of the complexities of 'queer globalization', see A. Cruz-Malavé and M. F. Manalansan IV, 'Dissident Sexualities/Alternative Globalisms', in A. Cruz-Malavé and M. F. Manalansan IV (eds.), *Queer Globalization: Citizenship and the Afterlife of Colonialism* (2002), 1–10. For some accounts of forms of sexuality that differ from modern Western forms, see, e.g., G. H. Herdt (ed.), *Rituals of Manhood: Male Initiation in Papua New Guinea* (1982); T. Watanabe and J. Iwata, *The Love of the Samurai: A Thousand Years of Japanese Homosexuality* (1989).
  12. For a collection of sources on the cultural relativism and human rights debate, see H. Steiner and P. Alston, *International Human Rights in Context* (2000), 323–553.
  13. See, e.g., David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2004), 3–35.

## 2. UNIVERSALITY AND ITS DISCONTENTS

As discussed, the slogan ‘Gay rights are human rights’ implies a universality to concepts of humanity, rights, and sexuality. In her chapter in *Sex Rights*, Judith Butler argues that the very public assertion of gayness calls into question what counts as reality, indeed, what counts as a human life. In her view, the task of international lesbian and gay politics is ‘no less than a remaking of reality, a reconstituting of the human, and a brokering of the question, what is and is not livable’ (p. 65). Thus Butler regards the issue of the rights of sexual minorities as attempting to bring into the scope of ‘human’ lives that are considered beyond its borders. Keeping our notion of the ‘human’ open to future rearticulation is thus, in her view, essential to the project of international human rights discourse and politics. Time and time again, ‘human’ is defined in advance in terms that are Western, very often American, and therefore partial and parochial; hence ‘the “human” at issue in human rights is already known, already defined’, and a non-imperialist conception of international human rights ‘must call into question what is meant by the human, and learn from the various ways and means by which it is defined across cultural venues’ (pp. 74–5). To hear the discourse on ‘women’s human rights’ or ‘lesbian and gay human rights’ performs the ‘human’ as contingent, in that it defines a variable and restricted population that may or may not include women, lesbians, and gays and requires that we recognize such groups as having their own sets of human rights. ‘Human’ has come to mean something very different when we think about the humanness of women from its meaning when it functioned as presumptively male (p. 76) – or heterosexual.

Butler’s observations remind us that the ‘human’ in ‘human rights’ presumes a *certain* human and that considering the rights of women, and of sexual minorities, entails a different conception of what it means to be human, what it means to live a liveable life. But when we say that the ‘human’ is defined in terms that are Western and often American, then clearly we must consider not only the problems raised by the assumed universality of the notion of human in the ‘gay rights are human rights’ movement, but also of the universality of ‘gayness’. Thus when Butler notes that thinking of gay rights requires rethinking the human of human rights, her reading – and her own body of work that is so central to queer theory<sup>14</sup> – summons recognition of a parallel need to rethink the second of the three universals: ‘gay’.

Some of these questions arise in Alan Sinfield’s chapter in *Sex Rights*. There, Sinfield discusses the complex place of gay rights rhetoric as a lever for lesbians and gay men, on the one hand, but as open to contestation as an ‘imperialist intrusion’, on the other. This latter aspect is attributable not only to differences between social ‘mores’, but also to the diversity of sex and gender identities, with many cultures more concerned about gender identity roles as determinant of sexual identity than about object choice. Given this diversity, Sinfield suggests speaking of civil rights rather than human rights, thereby focusing on the same rights as everyone else in a given society (pp. 151–4). He anchors his argument in the position that the

14. See, e.g., J. Butler, *Gender Trouble* (1990); J. Butler, ‘Imitation and Gender Insubordination’, in D. Fuss (ed.), *Inside/Out: Lesbian Theories, Gay Theories* (1991) 13.

debate between the assertion that homosexuality is ‘unnatural’ and the response from gays that their practices are natural and human to them is, in the end, merely a swapping of truth claims. In Sinfield’s view, maintaining that one’s preference is a right is merely a strategic way of reinforcing a stance. This is exemplified by the turn to rights in the United States by both proponents and opponents of choice in abortion, formulating their positions in terms of the right to choice and the right to life respectively. Sinfield’s argument illustrates how asserting rights is a strategic move that does not put an end to the dialogue but, rather, ignites it, clarifying the limits of resorting to rights in the context of sex and gender.

The context of gender itself raises similar issues. In ‘Women’s Human Rights in the Third World’, her chapter in *Sex Rights*, Rajeswari Sunder Rajan considers the difficulty entailed in ‘universal’ and ‘human’ as categories conceptualized to cover everyone everywhere (p. 119). Rajan explores the tensions between the ‘regional’ and the ‘universal’ and between ‘women’ and the ‘human’, observing that it is in the context of these tensions that the so-called taint of Westernization is most apparent (p. 120). However, setbacks to women’s rights emanate, Rajan notes, not only from cultural arguments seeking to justify denying women’s rights, but also from economic systems of deprivation that endanger the health and well-being of women in the Third World on a daily basis. Rajan astutely points to the fact that international human rights activism focuses on combating violence against women that is attributable to indigenous cultural practices, at the cost of ignoring systemic forms of deprivation that endanger their health and well-being on ‘a less spectacular everyday basis’ (p. 124). She attributes this disregard for the latter phenomenon, often caused by First World structural adjustment policies, to the fact that gender deprivation is displaced and marked as the disability of ‘culture’, rendering the deprivation of these women invisible (p. 124). Rajan thus proposes re-envisioning human rights in a ‘genuinely universal’ framework (p. 134).

Nicola Lacey explores related questions and solutions in ‘Feminist Legal Theory and the Rights of Women’, her contribution to *Gender and Human Rights*, where she considers the complex relationship between feminist analyses of law and contemporary feminist campaigns. Her article highlights the paradox of the feminist critique of modern law as an immanent critique of liberalism (p. 14), critical of rights and their individualistic and abstract nature (pp. 38–41), but, at the same time, turning to human rights as vehicles for securing justice, autonomy, and equality for women. After offering a thorough review of the various streams of feminist legal theory and the leading theories of rights, Lacey contemplates their interaction and the feminist critique of rights, leading her to embrace a project engaged in critique, utopianism, and reformist policy (p. 46) that seeks to reconstruct rights in the light of the feminist critiques (pp. 47–53). Lacey’s work attests to the inherent bond shared by all who choose to work within the legal – be it domestic or international – framework: the irresistible appeal of the rights discourse, with its compelling rhetoric and normative force, despite our realization of its inherent limitations and its reinforcement of the prevailing legal order.<sup>15</sup> The proposal she endorses, to integrate rights of equivalent

15. On the critique of rights, see Kennedy, *supra* note 13; Duncan Kennedy, *A Critique of Adjudication* (1997), 299–388.

worth, collective remedial rights in the form of affirmative action, group rights, rights to cultural membership, ‘rights of being’, and relational rights (pp. 47–53), holds both the promise of transforming rights and the risk of renewed co-option into the liberal framework. The question remains of whether a transformation of the rights discourse in the direction suggested by Lacey in line with feminist critique can successfully avoid the pitfalls of liberal rights theory pointed to by Lacey herself, raising the further question of whether rights can be rearticulated outside the traditional liberal framework without drawing us back into that framework.<sup>16</sup> Lacey in fact proposes considering the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>17</sup> as a treaty that, on the one hand, addresses directly and positively many of the concerns voiced by feminist critics of rights, but, on the other hand, also embodies, in several of its features, some of the difficulties identified by these same critics. This duality invites further critical inquiry into the interaction between gender critique<sup>18</sup> and law and rights.

### 3. THE LAW OF GENDER, THE GENDER OF LAW

The critical inquiry called for above is offered in other chapters of *Gender and Human Rights*. Looking at how the questions of gender and human rights play out in different legal systems, they examine such issues as the domestic application of international law, including the CEDAW (R. Rubio-Marín and M. I. Morgan, ‘Constitutional Domestication of International Gender Norms: Categorizations, Illustrations, and Reflections from the Nearside of the Bridge’), as well as the extent to which international criminal tribunals (specifically the International Criminal Tribunal for the former Yugoslavia) find liability for collective sexual violence (P. V. Sellers, ‘Individual(s) Liability for Collective Sexual Violence’). Moreover, citizenship is explored from a gendered perspective in chapters that explore European citizenship and the way gender is being constructed in the European human rights system (S. Baer, ‘Citizenship in Europe and the Construction of Gender by Law in the European Charter of Fundamental Rights’) and questions of migration and the trans/national subject (R. Salah, ‘Toward an Understanding of Transnationalism and Gender’). Gender is further pursued in articles in *Sex Rights*, considering issues of gang rape in the Parisian suburbs (R. George, ‘Share a Spliff, Share a Girl – Same Difference: The Unpleasant Reality of Gang Rape’) and the gendered perspective of apologies for violations of human rights (M. Warner, ‘Who’s Sorry Now? Personal Stories, Public Apologies’). While most of the contributions in these collections that engage with gender reflect on the ways in which human rights can serve the gender inquiry, two articles are the exception.

In his chapter in *Gender and Human Rights*, “‘The Appeals of the Orient’: Colonized Desire and the War of the Riff’, rather than using gender as an object on which he

16. For other interesting attempts to reconstruct rights from critical feminist and race perspectives, see J. Nedelsky, ‘Reconceiving Rights as Relationships’, (1993) 1 *Review of Constitutional Studies* 1; P. Williams, ‘Alchemical Notes: Reconstructing Ideas from Deconstructed Rights’, (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 401. For a critique of reconstructive projects, see Kennedy, *supra* note 15, at 359–61.

17. Convention on the Elimination of all Forms of Discrimination against Women, UN Doc. A/34/46 (1979).

18. See generally S. Benhabib and D. Cornell (eds.), *Feminism as Critique* (1987).

conducts his research, Nathaniel Berman offers a gendered reading of colonialism. In considering the stances taken by political and cultural figures in the 1925 War of the Riff between France and the Rif fighting European encroachment into their region in Morocco, Berman analyses the role of gender imagery and libidinal desires in these stances. To what extent did these stances involve a gendered image of the Orient and a sexualized configuration of its relationship to the Occident? Under Berman's reading, the various political stances taken by liberal leftists, radical leftists, and avant-gardists embody different kinds of desire, which play out a set of variations on gender and sexuality (p. 205). Berman argues that Orientalist desire is not monolithic and unchanging but rather that desire is irreducible and protean, in a way that produces variety, instability, and ambivalence (p. 230). His article reminds us that gender is not only an object on which international law operates, but is also, in the broad sense of gendered concepts of desire, productive of international politics and law.

As opposed to Berman's inquiry into the gendered nature of colonial relationships, Janet Halley's contribution to *Gender and Human Rights*, 'Take a Break from Feminism?', offers a perspective that – possibly contra to the *Sex Rights* project of addressing the convergence of sex and gender issues – may imply suspending gender analysis when exploring questions of sexuality. Halley proposes considering whether, from a queer-theory perspective, any engagement with erotic, sexual, and gender politics would be better off were some room left to imagine erotic, sexual, and gendered life under conditions that would possibly 'take a break from feminism' (pp. 59–60) – that is, challenge feminism as the inevitable origin and destiny of left politics on sexuality. While recognizing the risks entailed in such a break, Halley sees value in introducing this alternative perspective into the debate on gender and international law, given both the internal criticism of feminist work on international human rights as well as the fact that the globally authoritative status of US feminism invites consideration of critiques of its work. The need to take a break from feminism arises because of its commitment to a distinction between *m* (men/male/masculine) and *f* (women/female/feminine) and to an analysis based on the assumption of a subordination of *m* to *f*: 'Feminism is feminism because, as between *m* and *f*, it carries a brief for *f*' (p. 61). Thus despite the serious risks posed by her proposition, of the possible weakening of feminism and its power to resist male epistemic hegemony and sexual violence, Halley points to the importance of examining the costs of feminism. Pivotal to these costs, today, is what Halley calls 'governance feminism' – that is, feminism that rules. Issues such as sexual harassment, pornography, and sexual violence are feminist justice projects that moved into the state and corporate bureaucracy; but this feminist power achieves things on behalf of women at the expense of men and other social interests. Feminism must, therefore, take a break from itself so that it can see other interests and injuries (pp. 64–6). Taking a break from feminism would also enable reflection on the ways in which its concept of injury might be helping to reproduce the very subordination it is describing; could feminism be contributing to, rather than merely describing and resisting, the alienation of women from their own agency in its narratives of sexual violence (pp. 67–8)?<sup>19</sup> Halley illustrates this



argument through her reading of a family law case from Texas, but her own recent writings also highlight the relevance of her analysis to international humanitarian law.<sup>20</sup>

Halley's proposal suggests that gender and sex arguments, including those resorting to the rights discourse, do not only converge, but may actually conflict. Thus gendered arguments that assume a feminist position whose primary intuition is to treat sex as a site of female subordination, and thereby seek to expand the regulation of sex *by* the state, may be incommensurate with sex rights, which include rights to sexual liberty *from* the state. More broadly, Halley's proposition calls for a reconsideration of whether the various interests and projects we place under the titles of sex and gender rights do truly converge or, in fact, often conflict in ways that require certain choices.<sup>21</sup>

#### 4. FROM SEX TO MARRIAGE?

The question of the convergence or conflict of different rights projects in the sex/gender area arises in the context of the relationship between sex rights and marriage rights, between the title of the Amnesty book and its cover. The relationship between sex rights and marriage rights is addressed in great detail in Robert Wintemute's contribution to *Sex Rights*. Entitled 'From "Sex Rights" to "Love Rights": Partnership Rights as Human Rights', it presents the relationship between sex rights and marriage rights as one of convergence and progress.

In this comprehensive article, Wintemute describes a transition from the approach in the 1970s, when sexual activity between men was illegal in some European countries and stigmatized in many others, to the 2000s, with same-sex marriage available in three European countries (the Netherlands being the first to offer this<sup>22</sup>) and others recognizing some form of same-sex partnership, be it through registration or cohabitation. Under the subheading 'From "basic rights" to "sex rights" to "love rights"' (p. 187), Wintemute's thoughtful and thorough account of the development of human rights in this context identifies three stages in the process. The *first stage* was the recognition of what he calls 'basic rights' in the context of sexual orientation and gender identity discrimination, such as the right not to be killed or tortured, alongside freedom of speech rights. The *second stage* was the evolution of sex rights. Referring to the title of the book, Wintemute proposes that sex rights can be understood as including the right to sex as (i) sexual activity; (ii) changing sex or gender reassignment; (iii) biological sex; and/or (iv) social sex role – that is, gender. But in the context of the rights evolution he describes, he uses the term to refer to discrimination against lesbian, gay, bisexual, and transgendered (LGBT)

20. J. Halley, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism', (2006) 29 *Harvard Journal of Law and Gender* 335.

21. See more broadly J. Halley, *Split Decisions: How and Why to Take a Break from Feminism* (2006).

22. The others are Belgium and Spain. Outside Europe, Canada, South Africa, and, within the United States, Massachusetts have all legalized same-sex marriage. In Israel, same-sex couples who get married in a foreign country that conducts state-recognized marriages, can register in the Israeli population registry as married.

individuals because of their actual or presumed same-sex activity, their undergoing of gender reassignment, or their exclusion from the *third stage* of rights, ‘love rights’ – that is, the denial of rights, benefits, or recognition to same-sex partners. The battle for sex rights thus defined has largely met with success in the European context, Wintemute claims, citing a few decisions of the European Court of Human Rights (ECHR) against blanket criminalization of same-sex sexual activity and holding that discrimination by public authorities against LGBT individuals requires that strong justification be shown for the action.

The third stage in Wintemute’s account is the development of love rights, namely the legal recognition and equal treatment of the relationships between LGBT individuals and their partners (pp. 187–91). According to Wintemute,

The progression from the second stage of ‘sex rights’ to the third stage of ‘love rights’ requires a society to acknowledge that there is more to the lives of LGBT individuals than a search for sexual pleasure, or a need to change their physical appearance and dress. Rather they have the same human capacity as heterosexual and non-transsexual individuals to fall in love with another person, to establish a long-term emotional and physical relationship with them, and potentially to want to raise children with them. When they choose to do so, they will often want the same opportunities as heterosexual individuals to be treated as a ‘couple’, as ‘spouses’, as ‘parents’, as a ‘family’. (p. 191)

Wintemute discusses the growing recognition of love rights in recent ECHR judgments, including a decision determining the rights of transsexual individuals to marry according to their new sex<sup>23</sup> and another determining the rental rights of same-sex partners.<sup>24</sup> Both these decisions represented a departure from earlier case law, which had refused to make such determinations, and thus signified, along with a UN Human Rights Committee decision on the pension rights of same-sex couples,<sup>25</sup> the beginning of the triumph of love rights at the international level. Notably, so-called love rights are actually transformed in Wintemute’s account into partnership rights (p. 197); his analysis apparently makes no distinction between the right to love and the right to be recognized as a couple, and seemingly uses the two terms interchangeably. According to Wintemute, recognition of these rights can, in the context of same-sex couples, take the form of marriage rights, alternative registration systems, or recognition of cohabitating couples. The two last forms of recognition might include a package of rights equal or almost equal to marriage or, alternatively, a more restricted set of rights, different from what is extended to married couples (pp. 197–210). He argues that the claims made by same-sex couples are, within the human rights paradigm, mostly demands for equality – equal, not independent, rights and benefits to their heterosexual counterparts. Thus, he argues, these claims have great force, as the heterosexual majority will usually not be willing to forego a right or benefit merely in order to prevent its extension to same-sex couples. Civil

23. *Goodwin v. UK*, Decision of 11 July 2002, [2002] ECHR.

24. *Karner v. Austria*, Decision of 24 July 2003, [2003] ECHR.

25. *Young v. Austria*, UN Human Rights Committee, UN Doc. CCPR/C/78/D/941/2000 (2003). The Committee recently repeated this determination. See *X v. Columbia*, UN Human Rights Committee, UN Doc. CCPR/C/89/D/1361/2005 (2007). The Committee, however, rejected the argument that the denial of same-sex marriage violates the ICCPR. See *Joslin et al. v. New Zealand*, UN Human Rights Committee, UN Doc. A/57/40 (2002).

marriage will not be abolished to maintain the exclusion of same-sex couples, for example. But, at the same time, Wintemute notes that more 'trivial' benefits may become vulnerable, pointing to the BBC's general cancellation of a £75 'honeymoon' payment to employees, following a public outcry over the fact that this included not only married employees but also those who had conducted different-sex or same-sex commitment ceremonies (pp. 211–12).

In his discussion of the various arguments made against recognizing love/partnership rights, Wintemute outlines not only the traditional conservative claims but also what he calls left and feminist perspectives. The latter, he recounts, maintain that instead of seeking civil marriage, same-sex couples should secure all or part of the rights and obligations civil marriage extends, through an alternative registration system such as registered partnership or civil union. Wintemute counters that this 'separate but better' solution does not accommodate same-sex couples who wish to have the symbolic benefits of marriage and feel that their relationship is stigmatized as inferior if not accorded the status of marriage itself. Moreover, this solution fails to address both the matter of the portability of the institution within a federation or internationally and the exclusion from the alternative system of different-sex couples who are just as adamant about not wanting to marry (pp. 215–16). Wintemute also addresses arguments that marriage in general should be abolished or stripped of its legal consequences and that benefits should be individualized, which has been the case with healthcare in many countries. Under such proposals, in matters of resource allocation, such as survivor's pension or immigration, everyone would be able to designate one beneficiary. Thus sexual couples' relationships would cease to be privileged. Wintemute's response is that, while these are legitimate proposals that could possibly be implemented in certain situations, it is unlikely that civil marriage will disappear and, in his words, even if all of its material benefits and burdens could be secured through other means, the symbolic benefits would remain (pp. 216–17). From the perspective of this account, then, partnership rights should actually, in the name of full equality, mean marriage rights. At the end of his chapter Wintemute notes that what he calls love rights has in fact gained recognition almost exclusively in Western countries. But this does not mean, he argues, that this is a solely 'Western' issue. The LGBT equality movements in 'non-Western' countries, he contends, 'are at an earlier stage, often still struggling to achieve social acceptance of the right of LGBT individuals to be open about their sexual orientations or gender identity' (pp. 218–19).

Reading Wintemute's account against the background of the discrepancy between the title *Sex Rights* and the picture on the book's cover, his article can be understood as offering a possible bridge between the two: sex rights are a stage in the process towards recognition of love rights, which are, in fact, partnership rights and, ultimately, marriage rights. However, although this description may indeed describe the development of sexual minorities' rights in Western countries, I would question this 'progress narrative' and argue that the gap we may sense when looking at the cover of *Sex Rights* is a real one. Like Halley's insight on the possible conflict, and not mere convergence, between sex and gender rights projects, we should consider Wintemute's three stages of rights as possibly also in conflict and not only progression.

Indeed, there are two related axes in Wintemute's narrative that I query – first, the transformation from sex rights to what he calls love/partnership rights and, second, the identification of love rights with partnership/marriage rights.

Sex rights are about sexual liberty. They are about releasing us from the structures that place limits on our sexual activity, that brand certain forms of sex as legitimate and others as not, indeed, sometimes even criminalizing forms of sexual behaviour. In 'Thinking Sex',<sup>26</sup> Gayle Rubin, arguing for pluralistic sexual ethics, which includes a concept of benign sexual variation, pointed to the current existence of a hierarchy of sexual value that treats some sexuality as 'good', 'natural', and 'normal' and other as 'bad', 'unnatural', or 'abnormal'. 'Good' sex is heterosexual, marital, monogamous, reproductive, and coupled. 'Bad' sex may be homosexual, unmarried, promiscuous, or non-procreative. Indeed some of the sexual activities Rubin discussed as situated on the 'bad' end of the hierarchy, specifically same-sex sex, were criminalized in laws that have been held as violating human rights by national and international courts (e.g. the South African Constitutional Court,<sup>27</sup> the US Supreme Court,<sup>28</sup> and the ECHR<sup>29</sup>) as well as by the UN Human Rights Committee.<sup>30</sup> Thus the notion of sex rights – regardless of the question of the specific traditional human rights under which they are protected<sup>31</sup> – has expanded sexual liberty in this regard. But following Rubin's analysis, we should expect that expansion of sexual liberty to include also freedom from the bias in favour of marital sex and against non-marital sex.

With Rubin's analysis in mind, then, let us reconsider the claim of progression inherent in Wintemute's argument, from sex rights to partnership/marriage rights or, in other words, from the title *Sex Rights* to what is depicted on the book cover. Could marriage rights not actually in some way be in tension with sex rights? After all, marriage is not about sexual liberty but, in a certain respect, quite the opposite. It is about the regulation of sexuality in the framework of an institution that is purported to be the most legitimate, if not the only, place for sex, thereby signalling the inferiority of all sex that is not conducted between the married couple. Moreover, marriage, as an institution, conveys the message that it is the most sacred form of human relationship and the ultimate fulfilment of the individual's personal life. Thus the mere existence of marriage (at least as long as it is constructed around the couple that enters into it and thus commits to the obligations associated with it) sends a message of exclusion to all who do not or cannot participate in the institution. Consequently, although allowing same-sex couples entry into this institution expands marriage, it also reinforces the message that marriage is the ultimate form of human relationship, whether different-sex or same-sex. Given the symbolic and

26. G. Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality', in H. Abelow, M. A. Barale, and D. M. Halperin (eds.), *The Lesbian and Gay Studies Reader* (1993), 3. The article was originally published in C. S. Vance (ed.), *Pleasure and Danger: Exploring Female Sexuality* (1984), 267.

27. *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, [1998] SACHS CCT 11/98 (9 October 1998).

28. *Lawrence v. Texas*, 539 US 558 (Sup. Ct. 2003).

29. *Dudgeon v. Ireland*, Decision of 22 October 1981, [1982] ECHR (Ser. A.); *Norris v. Ireland*, Decision of 26 October 1988, [1989] ECHR (Ser. A.); *Modinos v. Cyprus*, Decision of 22 April 1993, [1993] ECHR (Ser. A.).

30. *Toonen v. Australia*, *supra* note 8.

31. Human rights included in the decisions cited above are the rights to privacy, equality, and liberty.

material benefits associated with marriage, this message is discriminatory towards all who do not participate in it, specifically those who opt to live in family units that are not based on couplehood: the single person, individuals with more than one lover, and other forms of human relationship. In Michael Warner's words,

As long as people marry, the state will continue to regulate the sexual lives of those who do not marry . . . In the modern era, marriage has become the central legitimating institution by which the state regulates and permeates people's most intimate lives; it is the zone of privacy outside of which sex is unprotected.<sup>32</sup>

Thus marriage can be seen as conflicting not only with sex rights, but, in fact, also with love rights: it privileges sex and love that are conducted within the framework of the institution of marriage.

Wintemute does address some of the queer and feminist critiques of marriage and rejects what he calls the 'separate but better' argument, according to which same-sex couples should seek to secure the rights of marriage through alternative systems. Pointing to the symbolic benefits of marriage, Wintemute argues that same-sex couples who would be awarded equal rights but not access to marriage might feel that their relationship is stigmatized as inferior if it is confined to a separate institution. But this then raises the question of whether the struggle for same-sex marriage does not in fact participate in sending precisely such a stigmatizing and inferior message to those who would not want to or would not be able to marry even if same-sex marriage were recognized. Again, this could include people who have no partner, either because they do not want one or could not succeed in finding one, people who have less or more than one partner, or anyone whose patterns of relationship do not fit the marriage model. Given the message of inferiority that the existence and status of marriage send to all kinds of relationships – and sex – outside its parameters, marriage must be understood as part of the heterosexual-patriarchal structure of society, which seeks to restrict sexual relationships to this structure. How, then, can a battle to expand marriage to same-sex couples be conceived as a continuation of the battle for sex rights, rather than its negation? As we see, the extension of the status of marriage to same-sex couples may actually reinforce the sex–marriage connection; expanding it to include the context of same-sex sex will create a discourse whereby LGBT individuals also face pressure to marry and forego forms of relationship outside marriage. The existence of same-sex marriage may thus subordinate same-sex sexual liberty – which has been growing and has certainly benefited from the development of sex rights – to the normalizing power of marriage.<sup>33</sup> The conflation of love rights and partnership rights and their collapse into marriage rights entails this same risk. This points to the danger that, rather than offering freedom of sex and love, the sex/gender international rights movement is reinforcing their subordination to normalizing institutions at the price of sex rights themselves.

32. M. Warner, *The Trouble with Normal: Sex, Politics and the Ethics of Queer Life* (1999), 96.

33. *Ibid.*, at 81–147; J. Halley, 'Recognition, Rights, Regulation, Normalization: Rhetorics of Justification in the Same-Sex Marriage Debate', in M. Andenaes and R. Wintemute (eds.), *The Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (2001), 97.

Of course, I in no way mean to deny that equal partnership and marriage rights can expand human liberty. In many contexts, such as immigration and hospital visitation rights, state recognition of same-sex partners, or of same-sex marriage in jurisdictions that do not usually recognize non-married couples, is necessary to guarantee LGBT individuals greater equality and liberty. Also, marriage and other systems of registration of same-sex couples might sometimes actually have less of a normalizing effect on individuals than the absence of such options, for they often grant rights upon mere registration, as opposed to co-habitation models, which require proof that the couple in question have lived together in line with a model based on the heteronormative concept of marriage. This would also make rights more accessible to those lacking the means for private legal representation and litigation, which they would otherwise require to secure certain rights. Nonetheless, in view of the normalizing aspect of the institution of marriage, it is important that we choose our rights battles – and the discourses we create through them – carefully and are heedful of their risks. Some advocates of marriage rights are motivated by the fact that marriage can be instrumental to securing certain material rights. In this context we must ask the strategic question of what is the best route for attaining these rights: a struggle for same-sex marriage or a struggle to detach material rights from the context of marriage? Other marriage rights advocates seek the undeniable symbolic value of equal recognition for same-sex love, which is cited by Wintemute. Here, it is necessary to ask what receives recognition and what does not. At whose expense is this recognition conferred? And, as Janet Halley notes, we must consider that when we ask the state for recognition, we are in fact recognizing the state's power to recognize (or not) our relationships.<sup>34</sup>

Wintemute notes that it is unlikely that civil marriage will be abolished and that, even if access to all of its material benefits is granted by other means, its net symbolic benefits will remain. But it is precisely this symbolic meaning that invites an examination of how partnership or marriage rights can undermine sex or love rights. Moreover, Wintemute's example of the cancellation of the BBC honeymoon payment attests to the potential of transformation that does exist: while expanding this payment to same-sex couples did accord their partnership equal recognition to that of different-sex married couples, it also reinforced the message that the institutionalized relationships of couples are privileged and deserve support and recognition, thus co-opting same-sex partnership and emphasizing the divide between those going on a honeymoon and those whose relationships do not fit the model of marriage-plus-honeymoon. Consequently, while the honeymoon payment to same-sex couples may have been an expansion of marriage rights, it had the simultaneous normalizing and hierarchy-creating effect that that undercuts sex rights.

This reading of the complex relationship between sex rights (narrowly defined) and marriage rights illustrates that there is no one unitary struggle on behalf of one identified group that falls under the broad categories of sex and gender rights. This is also manifested in Wintemute's description of partnership rights having been

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34. Halley, *supra* note 33, at 99.

achieved almost exclusively in so-called Western countries. In other countries, says Wintemute, the LGBT equality movements are at an earlier stage of development, often still struggling for social acceptance of the right of LGBT individuals to be open about their sexual orientation or gender identity, especially given that individual rights are, in some of these countries, a relatively new and foreign concept (p. 218). This narrative of the first stage, sex rights, seems to understand LGBT identities in these societies as existing identities that need to be liberated through sex rights. However, we should recall that not only rights but also LGBT identities themselves may sometimes be a foreign concept within these societies. As discussed, the notion of LGBT rights at a global level seems to assume universal sexual identities, when sexuality, in reality, takes many diverse forms. In certain societies, including some non-Western societies, same-sex sex exists or is normative outside the context of gay or lesbian identities,<sup>35</sup> and various forms of gender also exist beyond the Western models of gender and transsexuality.<sup>36</sup> Looking at the issue from this perspective, we can consider how an identity politics rights discourse centred on sexuality can be productive and constitutive of such identities, rather than built on pre-existing identities requiring liberation.<sup>37</sup> Queer theory would thus challenge the perspective of LGBT identities as awaiting liberation through sex rights, and would instead consider how identities are created through discursive practices, including liberatory ones. Articulating human rights from this critical perspective is a complicated business, which must take into account the risks of exporting and imposing identities – which supposedly must be liberated – for the global landscape. This emerges, then, as another context in which the limits of a converging globalized sex/gender human rights programme are manifested.

## 5. READING YOGYAKARTA

A recent development in the attempt to develop human rights in the context of sex and gender was the adoption in March 2007 of the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity.<sup>38</sup> Drafted by an international panel of experts in international

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35. See note 11 and accompanying text, *supra*. For a discussion of the ways in which the Western model of gay identity is 'exported' into legal and human rights work, see S. Katyal, 'Exporting Identity', (2002) 14 *Yale Journal of Law and Feminism* 97. For additional critiques of the turn to gay identity rights politics in international human rights, see K. Walker, 'Capitalism, Gay Identity, and International Human Rights Law', (2002) 9 *Australian Gay and Lesbian Law Journal* 58; W. Morgan, 'Queering International Human Rights Law', in D. Herman and C. Stychin (eds.), *Law and Sexuality* (2001), 208. See also B. Cossman, 'Gender Performance, Sexual Subjects and International Law', (2002) 15 *Canadian Journal of Law and Jurisprudence* 281. For an account of the need to address these questions while doing human rights work, see Human Rights Watch, *In a Time of Torture: The Assault on Justice in Egypt's Crackdown on Homosexual Conduct* (2004), 4–6. For a discussion see A. Gross, 'Queer Theory and International Human Rights Law: Does Each Person Have a Sexual Orientation?', (2007) 101 *ASIL Proceedings* (forthcoming).
  36. G. Herdt (ed.), *Third Sex, Third Gender: Beyond Sexual Dimorphism in Culture and History* (1996). On the diversity of 'queer subcultures' beyond the Western models of gender and sexuality and their relevance to the question of rights, see Sinfield's contribution to *Sex Rights*, p. 154.
  37. The classic text on the way in which modern sexual identities are created through, rather than pre-existing, discursive practices is M. Foucault, *The History of Sexuality*, Vol. 1: *An Introduction* (1990).
  38. The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, available at <http://yogyakartaprinciples.org> (hereinafter Yogyakarta Principles).

human rights law and on sexual orientation and gender identity, this comprehensive document deals with 28 human rights examined in the context of sexual orientation and gender identity. Many of these rights are actually general human rights that have been adapted to the context of sexual orientation and gender identity merely through a proviso that people should not be discriminated against with regard to the given right on the basis of sexual orientation or gender identity.<sup>39</sup> However, some of the principles and rights outlined in the Yogyakarta declaration engage with more specific and unique issues relating to gender identity and sexual orientation, such as recognition before the law and the right to family life, which I shall address in this section.

Principle 3, 'The Right to Recognition before the Law', declares that '[p]ersons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life.' It continues, determining that '[e]ach person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom'. Thus states are required to ensure that all persons are accorded legal capacity without discrimination on the basis of sexual orientation or gender identity. A similar declaration about sexual orientation and gender identity as integral to every person's dignity and humanity appears in the introduction to the Principles, which provides, in a footnote, broad definitions of sexual orientation and gender identity. The former is defined as referring to a 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'; gender identity is defined as referring to an individual'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 . . . and other expressions of gender, including dress, speech and mannerisms'.<sup>40</sup> While these are very broad definitions, they are still centred, respectively, on the concept of sexual orientation as based on the question of the similarity or difference in gender between oneself and one's object of desire, and on sexuality and gender as features of the self. This is, of course, to be expected in a document that seeks to establish human rights focused on sexual orientation and gender identity, especially in a world where LGBT individuals suffer from discrimination based on their sexual orientation or gender identity thus defined. However, it is necessary also to consider the extent to which such definitions remain captured within a certain model of gender and sexuality and whether sexual orientation and gender identity are, indeed, integral to every person's dignity and humanity. Sexual orientation defined as such is a feature of modern Western societies, but not necessarily a feature of all of humanity. The concept of sexual orientation, assigning people an identity based on the gender of their object-choice being identical or opposite to their own gender, is not typical of societies that do not subscribe to the modern Western concept

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The Yogyakarta Principles were issued by a group of 29 international human rights experts under the auspices of the International Commission of Jurists and International Service for Human Rights.

39. See, e.g., *ibid.*, Principle 8 on the right to a fair trial, Principle 14 on the right to an adequate standard of living, and other principles.

40. *Ibid.*, Introduction, at nn. 1, 2.



of sexuality, which divides people into hetero- and homosexuals. For example, in societies where men have sex with men regardless of any specific sexual identity, defining people as having a sexual orientation that is integral to their humanity constitutes an exportation of the Western model of sexual orientation identity and its categorization of this orientation as a distinct and autonomous feature of the self.<sup>41</sup> Thus the determination in Principle 3 warrants some contemplation as to whether we can think of a person without any specific sexual orientation and/or gender identity either because she or he lives in a society that lacks any notion of sexual orientation or gender identity in the Western sense or because she or he seeks to be free of the ideas of sexual orientation and gender identity. If we consider, following queer theory, that the binary hierarchical categories of gender and sexuality (i.e. men/women and heterosexual/homosexual) are themselves part of the problem, as this structure mandates that every person have a gender or sexual orientation, and consider that an emancipatory project may include ‘undoing gender’<sup>42</sup> and sexuality, then we can acknowledge that the Yogyakarta Principles limit themselves to the gender/sexuality framework, without opening the door to transcending this framework. From a queer-theory perspective, assuming our identities as women or gays is not merely a liberatory act, but also one in which we subordinate ourselves to the sex/gender system that demands that ‘in the modern world everyone can, should, will “have” a nationality, as he or she “has” a gender’<sup>43</sup> and a sexual orientation. This is concretely manifested in Principle 3’s requirement that states take all necessary measures to ensure that, where state-issued identity papers indicate a person’s gender/sex, this should reflect the person’s self-defined gender identity. But if we consider, following Judith Butler, that the division into the two genders is part of the institution of compulsory heterosexuality, which requires a binary polarized gender system since patriarchy and compulsory heterosexuality are only possible in a world built on such a hierarchized division,<sup>44</sup> we might shift the focus of our demands to the abolishment of state registration of gender altogether. This would be out of recognition for the fact that a binary gender system requires that we all have a gender, with only two possibilities in a hierarchy. If we consider gender and sexuality as arbitrary categories which we should be emancipated from, rather than within, our rights demands may take a different shape. An apt analogy here may be Marx’s determination that the development of civil rights gave people the right to property, but did not liberate them from property.<sup>45</sup> Similarly the Yogyakarta Principles represent an attempt at offering freedom of, but not freedom from, sexual orientation and gender identity.

41. See notes 35–7 and accompanying text, *supra*. On sexuality as a constitutive principle of the self, defined as a separate sexual domain within one’s psychological nature, and generating sexual identity, as a peculiar turn in conceptualizing human nature, that, along with other developments, marks the transition to modernity in northern and western Europe, see Halperin, *supra* note 11, at 24–5.

42. See J. Butler, *Undoing Gender* (2004).

43. B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (1983), 5.

44. Butler, *Gender Trouble*, *supra* note 14, at 1–34, 110–28.

45. K. Marx, ‘On the Jewish Question’, in R. C. Tucker (ed.), *The Marx-Engels Reader* (1972), 26, at 45.

Current queer/gender politics<sup>46</sup> suggest going beyond gay and transsexual identity politics, which demand recognition and affirmation of subordinated identities, and seek, at least alongside such affirmation, their deconstruction. Unlike transsexual politics, which call for recognition of a gender different from that assigned to a person at birth on the basis of perceived biological sex, especially after a physical modification to suit the newly assigned gender, genderqueer politics may demand recognition of the possibility of a lack of, or mixed, or border, gender identity. Unlike gay politics, queer politics may articulate an emancipatory project geared towards a transformation *from* the sexual orientation categories themselves, rather than equality and recognition *for* gays and lesbians, a project that is captured *within* the existing sex/gender system. These challenges of rearticulating such claims within the human rights system have been left largely unaddressed in the Yogyakarta Principles.

Principle 24 of the Yogyakarta declaration deals with the right to found a family, regardless of sexual orientation or gender identity. It states that family exists in diverse forms, including those not defined by descent or marriage, and calls for prohibition of discrimination of any family unit based on the sexual orientation or gender identity of any of its members. Alongside a requirement that national laws and policies recognize this diversity of family forms, Principle 24 also stipulates that

1. states that recognize same-sex marriage or registered partnerships make any entitlement available to different-sex married or registered partners equally available to same-sex married or registered partners; and
2. states ensure that any benefit available to different-sex unmarried partners be equally available to same-sex unmarried partners.

The result of these requirements is that states that do not recognize same-sex marriage or registered partnerships are not required to offer same-sex couples the rights accorded to married couples: they need only extend to same-sex couples the rights enjoyed by different-sex unmarried couples. Thus, notwithstanding its declaration on families existing in various forms, marriage maintains its privileged status in the Yogyakarta document. It does not advocate a concept of rights as something that should be fully detached from marriage or from ‘partnership’ or couple format; there is no engagement with the need to detach rights from relationships. And absent such detachment, privilege remains attached to the form of relationship that enjoys rights as well as symbolic recognition.<sup>47</sup>

Thus the Yogyakarta Principles, despite the attempt at inclusivity and the fact that there is no demand that states recognize same-sex marriage, in fact convey the same message conveyed by the cover of *Sex Rights*: marriage is privileged and same-sex marriage is conceived as the ultimate form of sex rights and equality – at least in

46. See, e.g., C. Howell, J. Nestle, and R. Wilchins (eds.), *Genderqueer: Voices from beyond the Sexual Binary* (2002).

47. See notes 27–34 and accompanying text, *supra*.

the context of human relationships and family. The queer potential in rethinking kinship detached from descent or marriage<sup>48</sup> is not realized in either context.<sup>49</sup>

## 6. CONCLUSION

The discussion on sex and gender rights is richer than ever. The recent books *Sex Rights* and *Gender and Human Rights* attest to this richness as well as to the variety and diversity of issues encompassed in the debate. A critical reading of the contributions in these two collections brings to light both the potential and limitations of the sex and gender rights discourse, similar to the rights discourse in general. As my reading of the Yogyakarta Principles illustrated, the risk entailed in the sex/gender rights discourse is that operating from within the liberal identity rights paradigm may leave us within the current sex/gender system, with its hierarchies and privileges, and co-opt into themselves any attempt at seriously challenging these systems.<sup>50</sup> Moreover, as the discussion has demonstrated, any attempt to conceive a purportedly single overarching sex/gender human rights project, encompassing all rights for all people with common sex/gender issues, involves more than one conflict, given the tensions existing among and within the different projects entailed. These include the tension between the feminist gender project and the queer sex liberatory project, as illustrated in Halley's work, but also tensions between liberal rights projects and queer projects, such as liberal identity politics rights versus identity diversity, transformation, and deconstruction, and marriage rights versus sexual liberty and the transformation of societal institutions project. Contrary to the temptation to think of all the issues being advocated under the title of sex and gender rights as harmonious and a continuation of one another, I suggest that we consider the conflicts arising in this context and the need to make choices.<sup>51</sup> The challenge of working within international human rights law but at the same time questioning the sex/gender system within which it operates lies in thinking beyond liberal identity rights politics and considering where queer perspectives on sex and gender are essential for transcending existing structures of hierarchy and privileging.

48. On the need to think beyond the heteronormative conceptions of kinship, see Butler, *supra* note 42, at 102–30. See also K. Weston, *Families We Choose: Lesbians, Gays, Kinship* (1991).

49. On the need to think of different forms of relationships beyond the heterosexual model, following Foucault's idea of the need for what he called a 'new relational right', see A. M. Gross, 'Challenges to Compulsory Heterosexuality: Recognition and Non-recognition of Same-Sex Couples in Israeli Law', in Andenaes and Wintemute, *supra* note 34, 391, at 411–14.

50. For the need to go beyond the liberal – and heteronormative – assumptions of international human rights law, see Morgan, *supra* note 35. As Morgan notes, pursuing legal strategies based on human rights means validating the theory of identity as given, with the possibilities of subject positions polarized into hetero/homo, the former being the normative category. *Ibid.*, at 217.

51. I am continuing here Janet Halley's argument for an alternative to the normative demand to harmonize and reconcile the different theories on sexuality and her suggestion that splits among theories are part of their value and that we will make better decisions about what we want if we lavish attention and appreciation on the capacity of our theory-making to reveal the world as a place where interests differ. Halley, *supra* note 21, at 3.